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European Insurance Law
A Single Insurance Market?

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Foreword

The following Working Paper contains my last year's master thesis submitted in order to obtain the Diploma in Comparative, European and International Legal Studies (LL.M.) at the European University Institute, Florence.

The idea to deal with a topic from the field of insurance law emerged at the University of Innsbruck, which hosts a project on the elaboration of European principles of insurance contract law. The thesis attempts to evaluate the current state of integration of the Single European Insurance market with particular regard to the integration of insurance contract law. Due to the dual character of insurance and the various regulatory and economic interests it is influenced by, the insurance market in Europe could so far not be liberalised completely. Instead we are confronted with a system of multi-level governance consisting of national, European and international law. Motivated by the EUI's interdisciplinary approach, the thesis comes to the conclusion that further integration cannot be reached by relying only on legislative measures but rather by combining various "alternative" methods of integration.

Warm thanks are due to Prof. Christian Joerges for his illuminating supervision throughout the year at the EUI, as well as Prof. Louis and Prof. De Witte for their second and third reading. I would also like to thank all my colleagues and friends at the EUI and the University of Innsbruck for their support and advice, among them especially Emma Jones, Mirjam Blaas, Christof Heel, Katherine McGarry and Bernhard Rudisch, as well as Brigitte Schwab and all others at the EUI publications office.

The law is stated as it stood on March 1st, 2001.

Kristin Nemeth

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Abbreviations

ABGB	Allgemeines bürgerliches Gesetzbuch, Civil Law Code
ABI	The Association of British Insurers
ADICONSUM	Associazione difesa consumatori e ambiente
AnwBl	Österreichisches Anwaltsblatt
Art	Article
Arts	Articles
BdV	Bund der Versicherten, German Association of Policyholders
BEUC	Bureau Européen des Unions des Consommateurs
BGBl	(Austrian and German) Bundesgesetzblatt, Federal law gazette
BlgNR	Beilagen zu den stenographischen Protokollen des Nationalrats, supplement to the protocols debated before the Austrian Parliament
BOE	Boletín Oficial del Estado, Spanish federal law gazette
CEA	Comité Européen des Assurances
Cf	see
CMLRev	Common Market Law Review
COM	Commission documents
d	deutsch(-e, -er, -es), German
DG	Directorate General
DP	French federal law gazette
e.g.	for instance
ECOSOC	Economic and Soial Committee
ed(s)	editor(s), edition
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
ELR	European Law Reports
esp	especially
et seq	and the following
etc	et cetera
EuR	Europa und Recht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
EvBl	Evidenzblatt der Rechtsmittelentscheidungen in ÖJZ

EWR	Europäischer Wirtschaftsraum, EEA
GDP	General Domestic Product
GP	Gesetzgebungsperiode, legislation period
HdV	Handbuch der Versicherung
HG	Handelsgericht, court for commercial matters
HGB	Handelsgesetzbuch, Commercial Code
HÖKV	Hauptverband österreichischer Kredit- und Versicherungsnehmer, Austrian association of credit users and policyholders
IAIS	International Association of Insurance Supervisors
IC	Insurance Commettee
i.e.	id est, that means
JBl	Juristische Blätter
JGS	Justizgesetzsammlung
JZ	Juristenzeitung
KartG	Kartellgesetz, Austrian cartel law
Kfz	Kraftfahrzeug, motor vehicle
KRES	Konsumentenrecht – Entscheidungssammlung, reports on judgements in consumer protection issues
KSchG	Konsumentenschutzgesetz, consumer protection code
MEP	Member of the European Parliament
Mon	Belgian federal law gazette
MPI	Max-Planck-Institut für ausländisches und internationales Privatrecht
NJW	Neue Juristische Wochenschrift
No	number
Nr	(German) Nummer
NVersZ	Neue Zeitschrift für Versicherung und Recht
ö	österreichisch (-e, -er, -es), Austrian
Ob	Zivilsenat beim OGH, chamber dealing with private law at the OGH
OECD	Organisation for Economic Cooperation and Development
OGH	Oberster Gerichtshof, Austrian Supreme Court
ÖBA	Österreichisches Bankarchiv
ÖJZ	Österreichische Juristen-Zeitung
OLG	Oberlandesgericht, Court of Appeals
p	page, -s

pil	private international law
RabelsZ	Rabels Zeitung für ausländisches und internationales Privatrecht
RdW	Österreichisches Recht der Wirtschaft
RGBl	Reichsgesetzblatt, old (German and Austrian) law gazette
Riv dir int priv proc	Rivista di diritto internazionale privato e processuale
SFS	Swedish federal law gazette
SR	Swiss federal law gazette
UK	United Kingdom
UN	United Nations
UNIDROIT	Institut international pour l'unification du droit privé, International Institute for the Unification of Private Law
VAG	Bundesgestz vom 18. Oktober 1978 über den Betrieb und die Beaufsichtigung der Vertragsversicherung (Versicherung-saufsichtsgesetz, law of insurance supervision)
VersE	Versicherungsrechtliche Entscheidungen, judgements concerning insurance law
VersR	Versicherungsrecht
VersVG	Bundesgesetz vom 2. Dezember 1958 über den Versicherungsvertrag (Versicherungsvertragsgesetz 1958, law on insurance contracts)
VR	Die Versicherungsrundschau
VVG	German Versicherungsvertragsgesetz
VVÖ	Verband der Versicherungsunternehmen Österreichs, Austrian Association of Insurers
VW	Versicherungswirtschaft
WBl	Wirtschaftsrechtliche Blätter
WRP	Wettbewerb in Recht und Praxis
ZERP	Zentrum für Europäische Rechtspolitik
ZEuP	Zeitschrift für Europäisches Privatrecht
ZfRV	Zeitschrift für Rechtsvergleichung
ZfV	Zeitschrift für Verwaltung
ZSR	Zeitschrift für Schweizerisches Recht
ZVersWes	Zeitschrift für Versicherungswesen
ZVersWiss	Zeitschrift für die gesamte Versicherungswissenschaft
ZVR	Zeitschrift für Verkehrsrecht

Introduction:
A Single Insurance Market?

The question mark in the title of this short introduction is an indicator of the problems and contents encountered in the writing of this LL.M thesis. The 1st July 1994, the date foreseen for the completion of the European insurance market,[1] is long passed and although subject to harmonisation measures since 1964, the question of whether this task has been fulfilled, cannot be answered in the affirmative without adding a 'but', a 'partly' or a 'there might still be hope'.

In this thesis I have approached the topic in the following way: To thoroughly understand the problems that Europe and the insurance industry are still facing, it was necessary first of all to sketch the characteristics of the product 'insurance' and its status over the centuries; it is indeed these special characteristics that have made the process of 'Europeanisation' so thoroughly complex. Chapter One then continues with a portrait of the development of the 'single insurance market'.

In taking this approach the thesis does not at all attempt to give a comprehensive description of the European secondary legislation concerning insurance law. However, what was planned as a brief survey of the Community's insurance directives took more time and space than expected. This was mainly due to two reasons. First of all the legislative style of most of the directives is somewhat 'unfortunate' mainly consisting of references to and amendments of other directives. The attempt to create a common market for the insurance industry can hardly be called an outstanding example of European integration and filtering information from more than twenty of those 'hybrid' acts of secondary legislation was not an easy task. Unfortunately, existing commentaries concerning the insurance directives were of limited use for; although they give an excellent overview of the novelties which led to the present level of integration in the European insurance market, they very seldom refer to the respective directive provisions. The critical reader of such descriptions is forced to go through the 'jungle' of provisions him/herself. Thus the present thesis attempts to go one step further. It attempts not only to present the landmarks of the development but also to provide the reader with a map of how to reach them. Even the Commission has in the meantime realised that it is indispensable to facilitate the rules and regulations concerning insurance.[2] This also, together with some other recent developments in preparatory acts, represents the novelty of Chapter One; the criticism which became concrete in EC documents has not yet been subject to detailed description in the literature.

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[1] With the deadline for bringing the implemented third generation directives (cited *infra* notes 162 and 180) into force; see Arts 57 para 1 and 51 para 1 thereof, respectively.

[2] COM (2000) 398 final, *infra* III.7; ECOSOC expresses its view on the need for consolidations in OJ 1998 No C 95/72.

Moreover, the description contained in Chapter One is a necessary prior condition for Chapter Two, the task of which it is to present the status quo and the difficulties faced. Both the industry‘s as well as the policyholders‘ perception of how far European integration has brought the insurance market are analysed.

In Chapter Three, finally, the methods of how future integration should or could take place are investigated. Regarding the harmonisation of insurance contract law the likelihood of reaching satisfactory results by applying non-conventional means of integration is stressed. Another alternative presented emphasises the importance of an ’informed policyholder’.

The thesis concludes with a summary of the results, pointing out that a solution might lay in a combination of the alternatives presented.

Chapter One:
The Development of a Single Insurance Market

'Integration through Law'

I. General Remarks and Early History

'The aim of insurance is to shift risk from one person (the insured) to another (the insurer).'[3] Insurance therefore deals with an ancient human instinct: the strive for security. In spite of that, its appearance as a common legal phenomenon belongs only to the recent history.[4] A few forerunners, however, can be found in antiquity as well as in 14th century Italy for marine insurance, but those are the rare exceptions. For a long time misfortune and misery were seen as extralegal phenomena, which people had to passively endure. Sometimes a charity system was set up to bring relief.[5]

Insurance as a form of provision for existence (*Daseinsvorsorge*) only became known in the industrial era of the 18th and 19th century. From that time on, insurance developed into a mass industry (*Massengeschäft*), which mutually influenced the establishment of big insurance companies as well as the development of a system of intermediary (*Vermittler*).[6]

In the beginnings the idea of insurance mainly covered the fields of fire and marine insurance. After insurance had developed into a mass industry, the foundations for creating more specific branches were laid. In particular, life insurance, which developed more and more from a means of family provision to a form of investment,[7] began to play an important role. In the outgoing 19th century, however, the insurance industry had reached its first summit of technical perfection and practical importance.[8]

The legal framework, on the other hand, was still lacking but due to the nature of the insurance contract the strong link to law could never be denied. The 'good' sold in an insurance contract, namely insurance coverage, is not tangible

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[3] J. Lowry and P. Rawlings, Insurance Law (1999) at p 3.

[4] F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 120 et seq); see for a historical overview: P. Koch, in: Handwörterbuch der Versicherung, p 223-232.

[5] F. Reichert-Facilides, in: FS Drobnig, p 129-134 (at p 120).

[6] V. Ehrenberg, Versicherungsrecht I, p 31; quoted according to F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 121); see for the development of insurance from the industrial era to today the results of the 12th International Economic History Congress in Madrid, in: C.E. Núñez (ed.), Insurance in Industrial Societies: Economic Role Agents and Market from 18th Century to Today (1998).

[7] See M. Clarke, Policies and Perceptions of Insurance (1997) at p 15.

[8] F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 121).

but in itself a legal construction,[9] or even a product of the law.[10] The carrying-out of an insurance operation seems to necessarily encompass the existence of some legal rules.

The first reply to this need for a certain regulation was the use of standard insurance conditions (and standard policy terms, respectively). Due to their stronger position in the market it was the big insurance companies which influenced the substance of these contractual terms rather than the insured. As a consequence, an alarming lack of balance between the interests of the contracting parties could be observed.[11]

The legislator first dealt with the public side of the insurance industry providing for a certain amount of state control and state supervision. It was only at the beginning of the 20th century that insurance contract law also started to be expressly set forth in statutes.[12] Before that it was subject to the general law of contract; in the Austrian Civil Law Code, the ABGB (Allgemeines bürgerliches Gesetzbuch),[13] for instance, it was regulated by Arts 1269 and 1288 et seq. Austria was also one of the first countries – only after Germany and Switzerland in 1908 –[14] to develop a special insurance contract code in 1917,[15] which can be characterised by the use of *mandatory*[16] *and half-mandatory*[17] provisions.[18] France and Italy followed with codifications in the 1930s and 1940s.[19] In the United Kingdom insurance law was determined by case law and also the 'Marine Insurance Act' of 1906 is mainly a reproduction of such case law.[20] In

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[9] F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 121); B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 130).

[10] M. Everson, Laws in Conflict – A Rationally Integrated Insurance Market, p VII; M. Dreher, Die Versicherung als Rechtsprodukt (1991).

[11] F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 121 et seq).

[12] With further references F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at p 120 et seq).

[13] JGS 1811 Nr 946 (as last amended by BGBl I 2000/135); these provisions are now replaced by the special rules of the latest 'reincarnation' of the Austrian Insurance Contract Law, the VersVG (Versicherungsvertragsgesetz) 1958 BGBl 1959/2 (as last amended by BGBl I 1999/150).

[14] Gesetz über den Versicherungsvertrag vom 30. Mai 1908, RGBl p 263 in Germany; Bundesgesetz über den Versicherungsvertrag vom 2. April 1908, SR 221.229.1 in Switzerland.

[15] Gesetz vom 23.12.1917 über den Versicherungsvertrag, RGBl No 501; replaced during the war by the German insurance contract code, and then, although not considerably varying from the German text, replaced by the VersVG 1958 (see note 13).

[16] Meaning the provisions which are not subject to party autonomy.

[17] Modifications of the provisions in the contract are allowed only if they favour the policyholder.

[18] See for examples M. Schauer, Das österreichische Versicherungsvertragsrecht (1995) at p 25 et seq.

[19] France: Loi du 13 juillet 1930 relative au contrat d'assurance, DP 1931.4.1; Italy regulated the insurance contract in Articles 1882-1931 of its Codice civile (Regio decreto 16 marzo 1942–XX, n. 262).

[20] M. Clarke, The Law of Insurance Contracts.

the 1980s and 1990s Spain,[21] Sweden,[22] Norway,[23] Belgium,[24] Finland[25] and Greece[26] set up their own insurance codes. In all these countries it is a principle that, when a specific rule does not exist, the general law of contract applies.[27]

Finally, also recent developments have to be mentioned: the reform of the Dutch 'Burgerlijk Weetboek', which also touches upon insurance contract law;[28] (still) the Commission's draft proposal for a Council directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts[29] and a proposal of the English Law Commission.[30]

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[21] Ley 50/1980 de Contrato de Seguro, 8 october 1980, BO del E, 17 october 1980.

[22] Konsumentförsäkringslag, 10 January 1981, SFS 1980 No 38.

[23] Lov om forsikringsavtaler, No 69 of 16 June 1989, Norsk Lovtidend No 12 of 5 July 1989.

[24] Loi sur le contrat d'assurance terrestre du 25 juin 1992, Mon of 20 August 1992.

[25] Act No 543 of 28 June 1994 concerning insurance agreements, Författningssamling 1450 (30 June 1994).

[26] Law No 2496, Insurance Contract Amendment of the Law concerning private insurance and other provisions, Official Gazette of the Republic of Greece, Volume one, issue No 87 of may 16, 1997.

[27] For England e.g. J. Lowry and P. Rawlings, Insurance Law (1999) at p 3.

[28] Book 7 Titles 17 and 18, which will enter into force in 2002.

[29] Submitted by the Commission to the Council on 10 July 1979; OJ No C 190/2; amended proposal, OJ 1980 No C 355/30.

[30] The Law Commission (Law Com No 104) Insurance Law – Non-disclosure and Breach of Warranty (1980); see F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at 120 et seq).

II. The Starting Point of Harmonisation

1. Fundamental Freedoms and Insurance Law

The realisation of the single market necessarily encompasses the insurance industry. This concerns especially two of the four fundamental freedoms which are foreseen in the Treaty establishing the European Community, namely freedom of establishment and freedom to provide services,[31] and was mentioned for the first time in the Commission's two General Programmes on these two freedoms of 1961.[32]

Art 43 (ex Art 52) of the EC Treaty reads:

> Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of any Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Art 49 (ex Art 59) of the EC Treaty reads:

> Within the framework of the provisions set out below, restrictions to provide services within the Community shall be prohibited in respect of nationals of Member States who are

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[31] The free movement of capital, which comes into play with cross border investments of the big insurance companies, will not be dealt with in the context of this thesis. However, it should be pointed out that the Italian Government in the early decision Case C 205/84 (see *infra* note 125) noted that the abolition of the restrictions of the freedom to provide services could only work hand in hand with the abolition of the restrictions of the free movement of capital (para 19 of the decision). For the importance to provide free movement of capital and its interdependence with life assurance in particular see T.H. Ellis, European Integration and Insurance (1979) at p 17 et seq.

[32] General Programme for the abolition of restrictions on freedom of establishment, OJ 1962, No 2/36; General Programme for the abolition of restrictions on freedom to provide services, OJ 1962 No 2/32.

> established in a State of the Community other than that of the person for whom the services are intended ...

That this was not an easy aim to be achieved was due to the special sensitivity of insurance law in general. More so than in any other field of law were the respective national insurance laws clear expressions of the nation states' different regulatory interests. According to the Commission's plans both freedom of establishment and freedom to provide services should have been achieved by the end of 1969.[33] In reality, the development took longer than expected. The following sections try to explain why.

2. The States of the Law in Europe before Harmonisation

The different regulatory interests of the Member States were especially evident in the field of public insurance law. Albeit in different forms, insurance law was subject to some state control in every Member State, even before harmonisation started. The extent to which this control was exercised and the subject of control, however, varied considerably.

Only three of the six original Member States, namely France, Italy and Luxembourg, foresaw supervision of all branches of the insurance industry. Germany did not supervise transport insurance and insurance for the loss on the exchange. In Belgium only life insurance, insurance against industrial accidents and compulsory motor vehicle liability insurance were supervised. And finally, in the Netherlands only life insurance was subject to state control. The new Member States which joined the EC in 1973, Denmark, the United Kingdom and Ireland, again supervised nearly all branches.[34]

The differences in how state supervision was exercised were even bigger. The principle of 'freedom with publicity' in the United Kingdom, for instance, for a long time only foresaw the duty to publish the annual balance sheets and business reports. Later on this was accompanied by a certain financial and therefore only formal control.[35]

The substantial control was left to the sphere of the enterprises.[36] Also the Netherlands followed a very liberal system of supervision.[37]

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[33] See the General Programmes, which foresaw different deadlines for re-insurance, non-life and life insurance (cited *supra* note 32).

[34] H. Müller, Versicherungsbinnenmarkt, p 7.

[35] Starting with the Life Insurance Act 1774, which prohibited certain forms of insurance; later the Life Insurance Company Act (1870), the Company Act (1967) and the Insurance Company Act (1982) followed; see T. Hoeren, Selbstregulierung im Banken- und Versicherungsrecht, p 30 et seq.

[36] See T. Hoeren, Selbstregulierung im Banken- und Versicherungsrecht, p 31 et seq.

[37] B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at 133).

In Germany, France, Italy and Luxembourg, on the other hand, a comprehensive system of supervision was exercised. This included legal and financial control as well as technical control.[38] Among these countries with a strong tradition of government domination Austria – albeit at that time far from being a member of the European Union – has to be mentioned as the 'major pioneer of substantive regulation in Europe'.[39] Austria's response to the need to guarantee the insurers' ability to fulfil their obligations as well as the need to protect the policyholder manifested itself in a statute as early as 1880, in the Insurance Regulation of that year.[40] Therefore Austria was the first European country to set forth a system of substantive regulation in a statute.[41]

It was characteristic for the countries which provided for a comprehensive control of the insurance industry that every insurance company had to ask for public authorisation before it was entitled to do business. Conducting business in the United Kingdom, on the other hand, only required registration.[42]

It will be shown in the following that the necessary harmonisation of *insurance supervision law* could be achieved over the years. Concerning *insurance contract law*, on the other hand, this statement cannot be upheld, as European harmonisation measures barely touched upon this field of law. Of course, despite the national differences, the European insurance contract laws do show a certain degree of homogeneity in structure – a factor inherent in the nature of this field of law.[43] A brief example from the chapter 'Aspects of contractual commitment of the parties' serves to illustrate such common features and differences: As far as life insurance contracts are concerned, there exists a tendency across Europe to provide life-long coverage. In the field of non-life insurance, on the other hand, the existence of different concepts is noticeable: Whereas in continental Europe long-term contracts are quite common, the duration of contract in common law legal regimes normally does not exceed a year.[44]

Another common feature, which can be pointed out, concerns issues of company law and their interference with insurance law. In most European countries only

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[38] H. Müller, Versicherungsbinnenmarkt, p 7 et seq.

[39] W. Pfennigstorf, Public Law of Insurance, p 11.

[40] Insurance Regulation 1880, later replaced by the Regulations of 1896 and 1921 and the German Insurance Supervision Law in 1939. The actual Austrian regulation, the Insurance Supervision Law 1978 (VAG), BGBl 1978/569 (as last amended by BGBl I 2000/117) constituted no severe change from the old regime despite the amendments that were necessary after Austria entered the European Union in 1995.

[41] W. Pfennigstorf, Public Law of Insurance, p 31.

[42] H. Müller, Versicherungsbinnenmarkt, p 7 et seq; see for a comparative description of the state of the law of selected legal systems W. Pennigstorf, Public Law of Insurance, p 10 et seq.

[43] F. Reichert-Facilides, in: FS Drobnig, p 119-134 (at 125) and the description of the 'product of law' before.

[44] See F. Reichert-Facilides, in: FS Egon Lorenz, p 423-431 (424 et seq); F. Reichert-Facilides, Law of Insurance Contracts (forthcoming).

companies of certain legal forms were admitted to carry out insurance business.[45] This principle should provide for the insurance companies' solvability and stability and was later 'europeanised' by the first generation of insurance directives.[46]

3. Interests

It has already been mentioned that the differences which could be found in the national insurance laws were mainly due to the different regulatory interests of the Member States.[47] The result was a variety of legal forms of state supervision in a broad sense[48] ranging from a very liberal approach to the form of comprehensive substantive regulation.

Countries which favoured the latter model seemed to mainly pursue two aims: general economic policy and consumer protection in the form of policyholder, insured or third party protection.[49] In these countries the legislator stepped in on a regulatory basis instead of letting the industry regulate itself by means of *party autonomy* and the *laws of the market*.

And indeed, the national economy can benefit from a 'healthy' insurance industry. Adam Smith expressed this as early as 1776 with the following words:[50]

> 'The trade of insurance gives great security to the fortunes of private people, and by dividing among a great many that loss which would ruin an individual, makes it fall light and easy upon the whole society ...'

Next to this general observation, a well functioning insurance industry also explicitly raises state income, first of all via indirect taxation of insurance contracts.[51] Secondly, state income can be increased indirectly by the imposition

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[45] In Austria according to Article 3 VAG (see note 40) *Aktiengesellschaften* (limited liability companies) or *Versicherungsvereine auf Gegenseitigkeit* (mutual insurance undertakings).

[46] Art 8 para 1 First Life-Insurance Directive and First Non-Life-Insurance Directive, respectively as amended by Art 5 Third Life-Insurance and Art 6 Third Non-Life-Insurance Directive, respectively, see H. Müller, Versicherungsbinnenmarkt, p 71.

[47] See *supra* II.2.

[48] As not only public supervision law itself but also 'control mechanisms' in contract law are concerned.

[49] See for an in depth analysis of the different regulatory interests of Germany and the United Kingdom, M. Everson, Laws in Conflict, esp p 29 et seq.

[50] A. Smith (Book V, Chapter 1, 1776), quoted according to K. Borch, Economics of Insurance (1990) at p 2.

[51] M. Everson, in: Regulating Europe, p 202-228 (at p 212); for a European comparison see Ch. Zwonicek, VW 1998, p 26-27.

of investment requirements on insurance funds.[52] A few figures shall illustrate this hypothesis: In 1996 the investments of insurance undertakings in the European Union came to an amount of 37% of the GDP of the Member States.[53] To compare this with the Austrian market, the insurance undertakings' share of all investments in the same year came to 14% of the Austrian GDP.[54] The insurance industry therefore seems to be the largest investor of a national economy. But it is not only the state itself for which the investments made from these funds are of great importance; also other national industries and financial markets rely heavily upon them.[55]

Apart from that, the insurance industry has enough financial potential to provide the state with significant loans.[56] In Austria – with the year 1996 again serving as an example – approximately 10% of the state's loans were granted by the insurance industry.[57]

All in all it can be noted that insurance constitutes a very important[58] and moreover the largest growing sector of the industry.[59]

The second regulatory interest mentioned above, the protection of the *weaker party*, the policyholder, against the *superior* insurer was reflected in two respects in the national insurance laws. Firstly, again in supervision law, as provisions concerning the ex ante control and authorisation of tariffs and standard insurance conditions were mainly directed against the unilateral imposition of unfair terms and prices upon the policyholders. Also solvency provisions, which form part of the national insurance supervision laws, contributed to the policyholders' general interest, as they ensured the functioning of a system of social support in addition to the often insufficient public system.[60] Most of all this is nowadays recognised with respect to pensions.[61]

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[52] M. Everson, in: Regulating Europe, p 202-228 (at p 203).

[53] According to a report of the European Commission (DG XV) from 15 October 1997: Liberalisation of Insurance in the Single Market – An Update (see http://www.europa.eu.int/-comm/internal_market/finances/insur/87.htm): The same report talks about the EU's single market in insurance being the third largest insurance market in the world, accounting for 25.4% of the world-wide market, after the US (30.8%) and Japan (30%), the presence of 4 800 insurance undertakings on the EU insurance market, employing nearly one million people (according to the CEA), global premiums issued valued 7.1% of the GDP of the EU Member States (which came to ECU 455 thousand million); all for the year 1996.

[54] Source: http://www.vvo.at/nav/frmset_zahlen.htm, which is part of the web-page of the Austrian Association of Insurers VVÖ.

[55] M. Everson, in: Regulating Europe, p 202-228 (at p 203).

[56] J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 14).

[57] See note 54.

[58] See the figures in e.g. K. Borch, Economics of Insurance (1990) at p 6 et seq.

[59] J. Kuscher, Kooperation in der europäischen Versicherungswirtschaft, p 4.

[60] See M. Everson, in: Regulating Europe, p 203-228 (at p 203), although some economists argues against that, e.g. J. Stiglitz, Rethinking the Economic Role of the State (1992) quoted according to R. Feldman, C. Escribano and L. Pellisé, The Role of Government in

In addition to that, the states' interests to protect the party other than the insurer, manifested themselves in the form of mandatory and half mandatory provisions in the insurance contract codes.[62]

4. Breaking up the old system

The different systems the states had imposed upon the insurance industry increasingly started to come under pressure. Surprisingly enough, it was not the economic theorists to mainly influence this development.[63] Besides some attacks from their side the major impetus for change was the European integration process.

Both regulatory interests mentioned above suffered from a severe change as the European Union started to move towards an integrated market. It is clear from the description above that especially the very strict systems of supervision proved to be a barrier to the unification of the European insurance market as they prevented undertakings from establishing themselves in other Member States and/or providing services cross borderly.

It will be shown in the following that the Commission increasingly accelerated the pressure towards the removal of such barriers.

But also from the consumer's perspective[64] the concept of the existing 'protective' insurance laws with their strictly national requirements was no longer compatible with the European idea. Over the years the Community developed a new consumer concept. The consumer underwent a metamorphosis from the so-called *homo oeconomicus passivus* to the *homo oeconomicus activus*.

It is expressed clearly that nowadays the consumer is not simply considered the weaker party to a contract who needs special protection. According to the

Competitive Insurance Markets with Adverse Selection (1997) at p 2, which draw the theory further.

[61] See Austrian Federal Ministry of Justice, Report on the situation of the consumer 1999, at p 23.

[62] As example for a mandatory provision see e.g. Art 51 para 4 of the Austrian VersVG (cited *supra* note 13) which provides that an insurance contract is void if the policyholder was fraudulent; for a half mandatory provision see e.g. Art 178 thereof which states that some rights of the policyholder in a life insurance contract can not be altered inasfar as they make his/her position worse than what it would be according to positive law.

[63] See with further references M. Everson, in: Regulating Europe, p 202-228 (especially at p 215 et seq); according to K. Borch, Economics of Insurance, p 2 et seq, the insight into the essentials of insurance that Adam Smith had come up with (see *supra* note 50) that was not developed very much further in the following century despite other rapid movements in legal theory.

[64] The later analysis will show that the technical term 'consumer' used in EC legislation and European Court of Justice case law is to be discussed controversially in regard to insurance, see IV.3.d.

jurisdiction of the European Court of Justice s/he is somebody who is perfectly capable of choosing from the range of ‘goods’ offered in a European market as long as the information s/he gets is appropriate.[65] The legislator’s aim is now not only to protect him but rather to guarantee a state of the law which provides the basis for him to take autonomous decisions.[66] It is meanwhile recognised that a well functioning common market, a functioning economy and a functioning competition besides depending on the *supplier side* also rely to a great deal on a strong *demand side*, and therefore on the consumer as an active economic player.[67] The wording of the preamble of the Third Non-Life Insurance Directive underlines this new consumer idea by stating that

> ‘... it is in his [the policyholder’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; ...’.[68]

5. Deregulation – Reregulation

Having these concepts in mind the European Commission, which recognised the need to take legal steps in order to move towards a European insurance market, was – of course – also aware of the existing differences in regard to the legal situation in the various Member States.[69]

Dealing with such a sensitive field of law – from both a socio-economic as well as a political point of view – which was also characterised by enormous growth,[70] the Commission soon noticed that it was not sufficient to rely only on means of negative integration to create a European insurance market. The two main reasons for regulation, i.e. market failure and concurrent aims, were

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[65] E.g. Case C 207/83, Commission v United Kingdom and Northern Ireland [1985] ELR, 1201; Case C 16/83, Criminal Proceedings against Karl Prantl [1984] ELR, 1299; Case C 3/91, Exportur SA v LOR SA and Confiserie du Tech SA [1992] ECR I-5529; M. Dauses, EuZW 1995, p 425-431 (at p 429); A.-H. Meyer, WRP 1993, p 215-224 (at p 221 et seq); differentiating more F. Rüffler, WBl 1998, p 381-385 (at p 383); for the concept of information particularly in regard to financial services see P. Cartwright, Consumer Protection in Financial Services, p 10 et seq.

[66] H. Heiss, ZEuP 1996, p 625-647 (at p 629); N. Reich, Privatrecht und Verbraucherschutz in der Europäischen Union, at p 9; N. Reich, ZEuP 1994, p 381-407 (at p 391).

[67] Stated very early by G. Rambow, EuR 1981, p 240-252 (at p 242), from whom the quotations are taken; further developed by H. Heiss, ZEuP 1996, p 625-647 (at p 628).

[68] Cited infra note 180; suffice it to say (for present purposes at least) that this concept, based on consumer information, has in the meantime come under pressure. There are serious doubts that information works for the insurance sector.

[69] See e.g. the preamble of the first Council Directive of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (73/239/EEC), OJ 1973, L 228/3, No 1.

[70] See J. Lowry and P. Rawlings, Insurance Law, preface.

present in the insurance industry and therefore simply abolishing the restrictions to freedom of establishment and freedom to provide services the insurance companies faced in the different Member States had to be accompanied by the establishment of a certain common legal basis. Regarding the topic at issue it was thought essential to first of all harmonise the relevant parts of insurance supervision law so as not to distort competition or dilute consumer protection.[71]

This was rendered even more necessary as both of the regulatory interests mentioned above belong to the issues which are able to justify certain restrictions of the freedoms in the general interest,[72] as long as they pass the test of being proportionate.[73] The preamble of the Third Non-Life Insurance Directive puts this into the following words:

> '... whereas it is for the Member State in which the risk is situated to ensure that there is nothing to prevent the marketing within its territory of all the insurance products offered for sale in the Community as long as they do not conflict with the legal provisions protecting the general good in force in the Member State in which the risk is situated, and insofar as the general good is not safeguarded by the rules of the home Member State, provided that such provisions must be applied without discrimination to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued; ...'.[74]

Yet, in establishing a common European wide standard of, in regard to the topic at issue, supervision and policyholder protection, respectively, the chance to justify such national deviations should be minimised. In those fields of law, which were subject to prior harmonisation measures, the existence of a purely natural general interest which would justify a restriction is normally considered impossible.[75]

Therefore the keyword of such a development – *deregulation* – has to be reinterpreted. Especially in the context of the insurance industry it cannot be

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[71] See the Comment to Art 1 of the proposal for a first Council directive on the co-ordination of the laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance.

[72] For the consumer protection issue this can be found in the insurance cases; see e.g. Case C 205/84 *Commission v. Germany* [1987] ECR 3755 (e.g. para 30); cf, for example, Case C 176/84, *Commission v Hellenic Republic* [1987] ECR 1193 (para 22) to give an example outside insurance law.

[73] A.-H. Meyer, WRP 1993, p 215-224 (at p 220) who quotes as an example Case C 261/81, *Walter Rau Lebensmittelwerke v De Smedt PVBA* [1982] ECR 3961 (para 12).

[74] Cited *infra* note 180.

[75] See – although taken from another context it is valid in this context – H. Heiss, in: Czernich/Heiss Art 5 EVÜ para 83; W.-H. Roth, RabelsZ 55 (1991) p 623-673 (at p 655 et seq); W.-H. Roth, ZEuP 1994, p 5-33 (at p 32 et seq) pointing out the following article: St. Grundmann, IPRax 1992, p 1-5 (at p 4).

equated with the reduction of norms anymore.[76] The term *deregulation* has to be substituted by the term *reregulation*, meaning the replacement of old, sometimes rigid norms, which are not fit for cross border transfers of goods and – in our case – services, with new, more flexible norms, which integrate themselves neatly into the system of free trade within Europe.[77]

6. State of the Art in the Field of Harmonisation

So far, more than twenty directives have been enacted in order to realise this goal.[78] These – together with other sources of law, which inevitably come into play[79] – unfortunately do not build a very structured body of law. The many extensions of the respective directives' scopes were often combined with more or less important amendments, and it is often hard to duplicate the development. Even more disappointing is that the EC legislator has not succeeded in publishing consolidated versions yet.[80]

Anyhow, as far as insurance *supervision law* is concerned, the necessary harmonisation has been achieved to a large extent. For those parts, which have been left untouched by the harmonisation measures, the principle of mutual recognition is the determining factor.[81]

The Member States' *insurance contract laws*, on the other hand, still vary considerably. The early plan to enact a directive in order to harmonise the substantive provisions relating to insurance contract law failed.[82] Also the Commission's plan to achieve the single insurance market by harmonising the

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[76] R. Schaer, in: Versicherungsrecht in Europa, p 31-58 (at p 34) criticises *deregulation* by equating it with the loss of *guiding values*.

[77] See for this topic in a broader context J. Basedow, in: Staatswissenschaften und Staatspraxis, p 151-169.

[78] Starting 1964 with the reinsurance directive; the three generation directives between 1973-1992; directives in the field of motor vehicle insurance and so on. The issues will be dealt with in depth in the following sections.

[79] See *infra* IV.

[80] Despite the Commission's Decision of 1 April 1987 to instruct its staff that all legislative measures should be codified after no more than ten amendments, stressing that this was a minimum requirement and that departments should endeavour to codify the texts for which they were responsible at even shorter intervals, so as to ensure that the Community rules were clear and readily understandable and although there were plans to do so (Com (2000) 398 final, Explanatory Memorandum).

[81] See e.g. recital 5 of the preamble of the Third Non-Life Insurance Directive (cited *infra* note 180); B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 134); according to the Commission communication to the Council (COM (2000) 155 final), the principle of mutual recognition is a 'pragmatic and powerful tool for economic integration'.

[82] Commission's draft proposal for a Council directive on the coordination of laws, regulation and administrative provisions relating to insurance contracts, OJ 1979 No C 190/2; amended by OJ 1980 No C 355/30; the Commission officially withdrew the proposal in 1993, as stated by J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (p 17).

relevant provisions of *private international law* could only establish a single market in the field of large risks.[83] For mass risks and the life insurance sector, on the other hand, a common market still does not exist.[84]

The following section will describe this European development giving an overview of what has been achieved with regard to a single insurance market. The contents of the individual directives will thereby only be dealt with in detail as they are of importance for the establishment of the single market. Main emphasis will lay on a functional approach of the issue. Besides that, the thesis will focus on some important changes the europeanisation has brought about for the Austrian system.

[83] For a definition see *infra* note 145.

[84] B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 134).

III. A Chronology of the Development

1. Reinsurance

Due to what has been described above as the existing differences in the Member States' laws when harmonisation started, it is not surprising that the first step towards a single European insurance market took place in the field of reinsurance.

To briefly discuss the characteristics of a reinsurance contract it should be stated that such a contract is generally concluded between two insurance undertakings. The party seeking insurance coverage does so to cover the losses it endures when providing direct insurance.[85]

The differences in the Member States' regulatory interests in this field of insurance law were not as striking. Reinsurance law had never been that heavily regulated as both parties to the reinsurance contract were professionals and therefore not in need of special protection.[86] Secondly, the reinsurance market had always had an international character.[87]

Under these circumstances the Reinsurance Directive,[88] which applied to professional reinsurers as well as insurers which exercised both direct and reinsurance,[89] could be enacted without further problems. It already provided for a complete liberalisation of the reinsurance market in 1964 requiring those Member States which imposed restrictions on the right of establishment and the freedom to provide services in the reinsurance field to abolish them.[90]

Every EC based reinsurer is now entitled to set up any form of establishment and/or provide services in every other Member State as long as it complies with the rules of this host state.[91] Further harmonisation was renounced.[92]

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[85] For a definition see M. Schauer, Das österreichische Versicherungsvertragsrecht, at p 59 et seq (concerning Austrian law, where reinsurance is regulated by Art 779 HGB).

[86] See United Nations, International Tradability of Insurance, p 7 et seq.

[87] See W. Werner, International Reinsurance Trade between the US and Western Europe 1949-1989, in C.E: Nuñez, p 193-206 (at p 193) with further references, who points out that the large reinsurers are mostly situated in Western Europe. Reinsurance trade between Europe and the US is large, firstly because the US are the largest insurance market in the world with enormous demand for reinsurance and secondly because the US developed their own reinsurance industry much later; see also B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 135).

[88] Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession, OJ 1964 No 56/878.

[89] Art 2 of Directive 64/225/EEC.

[90] Art 3 of Directive 64/225/EEC.

[91] R. Merkin and A. Rodger, EC Insurance Law, p 4.

[92] H. Müller, Versicherungsbinnenmarkt, p 12.

2. The 'First Generation' Insurance Directives

a) General Remarks

The move towards an integrated market for direct insurance (to distinguish from reinsurance) mainly took place in three steps, 1973/1979, 1988/1990 and 1992, when the Council – each time separately for the field of life and non-life insurance – enacted six directives[93] with the aim of achieving the necessary harmonisation in this field. Other directives followed, partly extending the scopes of the directives, partly concerning other fields of insurance such as, for example, motor vehicle liability insurance and legal expenses insurance and, partly caring for other prior conditions – like common accounting provisions – to enable the development of a single insurance market.

The first generation of directives essentially introduced the freedom of establishment.[94]

b) The First Non-Life Insurance Directive

The first important step, taken in 1973 when the Council enacted the First Non-Life Insurance Directive,[95] introduced a distinction that was different from the traditional Austrian system. The Austrian VersVG[96] used the technical terms *Schadens*- and *Summenversicherung*[97] and therefore distinguished between contracts which provided for coverage where a particular loss occurred (indemnity insurance) and contracts which guaranteed the payment of a certain amount of money at a certain time in the future unconnected with any damage actually suffered (insurance of capital sums).[98]

The EC system, however, used different terms: life insurance as opposed to other than life insurance. This is easily explained taking into consideration that in most Member States life insurance was regulated differently from all other forms of insurance, especially because of its characteristic saving function.[99]

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[93] Actually seven, see *infra* b.

[94] B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 135).

[95] Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ 1973 No L 228/3.

[96] Cited *supra* note 13.

[97] The latter is also called *Personenversicherung*.

[98] B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at 134). Using the Austrian terminology insurance against sickness and accidents would also therefore fit into the latter category; such a distinction seems common also in Central and Eastern Europe; see OECD, Policy Issues in Insurance, at p 299.

[99] B. Rudisch, in: Wieviel Europa verträgt Österreich?, p 129-143 (at p 134).

The First Non-Life Directive is considered the most important insurance directive, as all the following directives are based upon it.[100] Its primary objective was to establish a common regulatory structure for *non-life insurers*; these numbered fifteen classes outside of life insurance, the most important exception being motor insurance, which was compulsory in most of the Member States.[101] In providing a basically harmonised insurance supervision law the exercise of freedom of establishment for the insurance undertakings should be facilitated. Complying with the rules of the host state, which – after the respective harmonisation – were to a great extent identical with the rules of the state of origin, was enough for an EC based non-life insurer to establish its headquarters, a branch or an agency in another Member State.

It is remarkable for the time that next to this harmonisation directive another, separate directive was necessary to explicitly abolish the remaining national restrictions to freedom of establishment. Besides the reinsurance directive enacted in 1964, this so-called *liberalisation directive*[102] was the last of the insurance directives to do so.[103] After the European Court of Justice's judgements *Reyners*[104] and *Van Binsbergen*[105] it was clear that both freedom of establishment as well as freedom to provide services were directly applicable in the Member States.

To quote the wording of one of the decisions:

> The provisions of Article 59,[106] the application of which was to be prepared by directives issued during the transitional period, therefore became unconditional on the expiry of that period.[107]

Provisions which explicitly provided for the abolition of restrictions to these freedoms therefore rendered unnecessary as the directly applicable freedoms

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[100] H. Müller, Versicherungsbinnenmarkt, p 13.

[101] See R. Merkin and A. Rodger, EC Insurance Law, p 5; motor insurance was subject to separate regulation (see *infra* III.6.b.).

[102] Council Directive 73/240/EEC of 24 July 1973 abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance, OJ 1973 No L 228/20.

[103] H. Müller, Versicherungsbinnenmarkt, p 13.

[104] Case C 2/74, *Reyners v. Belgium* [1974] ECR 631, where a Dutch national sought admission to the Belgian Bar and was refused only because of his nationality; for a summary of the case concerning freedom of establishment see P. Craig and G. de Búrca, EU Law, p 735.

[105] Case C 33/74, *Van Binsbergen v. Bestuur van de Bedrijsvereniging Metaalnijverheid* [1974] ECR 1299 concerning a provision in Dutch law, which required a legal adviser to be established in the Netherlands if he wanted to represent a party there; see P. Craig and G. de Búrca, EU Law, p 765.

[106] After the Treaty of Amsterdam renumbering now Art 49.

[107] See Case 33/74 (cited *supra* note 105) para 24.

enjoyed supremacy over all contrary national provisions.[108] As a consequence the Commission withdrew all the draft liberalisation directives which had not yet been enacted by the Council.[109]

The most important provisions of the First Non-Life directive which cannot be left unmentioned were the following:

The taking up of an insurance business – no matter if in the form of a primary establishment, a branch or an agency – required prior authorisation.[110] The authorisation was given separately for each class of insurance business indicated in the directive.[111] Admission could not, however, be made dependent on what was required 'in the light of the economic requirements of the market' (*Bedarfsprüfung*).[112] The authorities of each Member State had to ask every insurer for the submission of a *scheme of operations*, in which it had to state its business plan, financial resources, general and special policy terms and anticipated level of premium income.[113] If the insurer did not comply with the regulatory regime or authorisation requirements, the authorisation could be withdrawn.[114] A great part of the directive consisted of provisions concerning assets and technical reserves; the most important one being the introduction of a *solvency margin*, which had to be met by every insurance undertaking.[115] In addition to that, and also serving as a means to guarantee the individual insurance undertaking's solvability, sufficient technical reserves had to be maintained in every Member State in which the insurance undertaking was authorised.[116] Insurers, which had their head office outside the Community (so-called *third country insurers*) were also free to establish themselves within the territory of the Member States. In such cases, however, stricter authorisation requirements could be maintained.[117]

Despite being a big step towards an integrated insurance market, the directive left a lot in the hands of the national legislators, especially in regard to prior authorisation of policy terms and premium levels, which could be upheld for both domestic and other EC insurers.[118]

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[108] Ground breaking Case C 26/62, NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie de Belastingen [1963] ECR 1.

[109] See H. Müller, Versicherungsbinnenmarkt, p 14 et seq.

[110] Art 6 of Directive 73/239/EEC.

[111] See Arts 6 and 7 of Directive 73/239/EEC.

[112] Art 8 (4) of Directive 73/239/EEC.

[113] Art 9 of Directive 73/239/EEC.

[114] Art 12 and 22 of Directive 73/239/EEC.

[115] Art 16 of Directive 73/239/EEC.

[116] Art 15 of Directive 73/239/EEC.

[117] Art 23 of Directive 73/239/EEC.

[118] R. Merger and A. Rodger, EC Insurance Law, p 6.

c) The First Life Insurance Directive

The corresponding directive harmonising the regulatory provisions regarding the law of life insurance only followed in 1979 and mainly echoed the principles set out in the First Non-Life Insurance Directive.[119]

The First Life Insurance Directive defined nine classes of life insurance business, such as assurance on survival to a stipulated age or birth assurance, for example.[120] By imposing a prohibition of new *composite insurers*, i.e. insurers which carry out both life and non-life insurance business, the EC legislator responded to the persisting demands of some of the Member States.[121] The policy behind this prohibition was to limit the danger that the generally more profitable life insurance business was used to balance the losses of the normally not so profitable non-life insurance business.[122] Existing *composite insurers*, however, could continue trading but had to adhere to a strict separation of business keeping separate accounts for non-life and life funds.[123]

3. The Co-Insurance Directive and the Insurance Cases

In the years 1983 and 1984 four cases concerning insurance law were pending before the European Court of Justice. Four countries, namely Denmark, France, Germany and Ireland had failed to implement the co-insurance directive.[124] These four cases (known as the *insurance cases*)[125] were, however, only half a step further towards the implementation of a single market for the insurance industry as they came into conflict with the Commission's ambitious plans to move directly into guaranteeing freedom to provide services.[126]

After the First Generation Directives and the realisation of freedom of establishment the Commission moved towards guaranteeing freedom to provide services for the insurance industry, i.e. ensuring the possibility to directly 'sell' insurance contracts from one Member State to residents of another without the

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[119] Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance, OJ 1979 No L 63/1; see e.g. for the authorisation requirement Arts 6 et seq, the scheme of operations Arts 8 et seq, provisions concerning assets and technical reserves Art 19 et seq and so on.

[120] See Art 1 and Annex of Directive 79/267/EEC.

[121] Art 8 of Directive 79/267/EEC.

[122] R. Merger and A. Rodger, EC Insurance Law, p 7.

[123] Arts 13 et seq of Directive 79/267/EEC.

[124] Council Directive 78/473/EEC of 30 May 1978 on the coordination of laws, regulations and administrative provisions relating to Community co-insurance, OJ 1978 No L 151/25.

[125] Cases C 252/83 *Commission v. Denmark* [1986] ECR 3713; C 220/83 *Commission v. France* [1986] ECR 3663; C 205/84 *Commission v. Germany* [1986] ECR 3755; C 206/84 *Commission v. Ireland* [1986] ECR 3817.

[126] See R. Merger and A. Rodger, EC Insurance Law, p 7 et seq.

existence of an establishment within the meaning of Art 43 (ex Art 52) of the EC Treaty in that state and without the requirement to be formally authorised there. The first cautious step towards freedom to provide services was taken in 1978, when the aforementioned co-insurance directive was enacted.[127]

The provisions of this directive apply to arrangements of at least two insurance undertakings of two different Member States which together provide insurance coverage for *major risks*[128] which are situated within the European Community under one single contract with an overall premium. One of these undertakings must have the role of the so-called *leading insurer* with delegated responsibility to administrate the contract and to settle problems with the assured.[129] The directive was supposed to facilitate the participation of EC insurers in such arrangements. To achieve this task it abolished e.g. the requirement that all co-insurers had to be authorised in the state where the *leading insurer* was situated. Beyond that, it was left to the respective Member State in which the individual co-insurer had its head office to regulate the necessity, form and amount of technical reserves of the individual undertaking, which also contributed to an easier entry in the European co-insurance market.[130]

Among the domestic rules the Commission challenged before the European Court of Justice in the insurance cases were national provisions which required the risk covered in a co-insurance contract to exceed a certain sum. The Court, however, dismissed this application both partly for substantial[131] and partly for formal reasons.[132] The necessity to limit the scope of co-insurance was even set forth in the Second Non-Life Directive in 1988 with the result that from that time on only large risks could be subject to co-insurance contracts.[133]

What made the decisions famous, though, was the European Court of Justice's interpretation of Community law in the light of the following national provisions: The first one obliged the *leading insurer*, which was rightfully established in another Member State, authorised by the supervisory authority of that state and subject to the supervision of that authority, to have a permanent

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[127] See the preamble of Directive 78/473/EEC: '... this Directive thus constitutes a first step towards the coordination of all operations which may be carried out by virtue of the freedom to provide services; ...'.

[128] See the preamble of Directive 78/473/EEC: '... such coordination covers only those co-insurance operations which are economically the most important, i.e. those which by reason of their nature or their size are liable to be covered by international co-insurance; ...' and Art 1 (1) thereof.

[129] See Art 2 of Directive 78/473/EEC.

[130] Arts 3 and 4 of Directive 78/473/EEC.

[131] See Case C 220/83 (cited *supra* note 125) para 27 et seq.

[132] See Case C 205/84 (cited *supra* note 125) para 69 et seq.

[133] See the preamble and Art 26 of 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, OJ 1988 No L 172/1.

establishment within the territory of the state in which the service was provided. The second provision under discussion did not go that far but still obliged the *leading insurer* to obtain a separate authorisation from the host state.[134]

Although it is in fact true that the co-insurance directive's provisions did not allow for an unambiguous interpretation of whether the abolition of the restrictions in question was only applicable to co-insurance undertakings and not to the *leading insurer*, the European Court of Justice took a strong position towards the liberalisation of the relevant market.[135]

In its ruling the Court first of all made clear that freedom to provide services, just like the other fundamental freedoms, was directly applicable in the Member States.[136] Furthermore, the Court stated that the *requirement of a permanent establishment* was not only a restriction of freedom to provide services but moreover the 'very negation of that freedom' and therefore confirmed every national rule imposing such a requirement incompatible with the EC Treaty.[137]

In respect to the *authorisation requirement* the Court's ruling was more ambivalent. The judges agreed upon the fact that, in general, also this requirement constituted a restriction of freedom to provide services.

> '... However, as one of the fundamental principles of the Treaty also freedom to provide services could be restricted ... by provisions which are justified by the *general good*[138] and which [were] applied to all persons or undertakings operating within the territory of the State in which the service [was] provided[139] in so far as that interest [was] not safeguarded by the provisions to which the provider of a service [was] subject in the Member State of his establishment ... '[140]

The Court took this further by defining certain means of policyholder protection as capable of justifying restrictions in the general interest. Even though the Court admitted that it depended on the individual characteristics of the different classes of insurance if policyholder protection came to an imperative reason relating to the public interest and the general good, respectively, it answered the

[134] See Case C 205/84 (quoted *supra* note 125) para 28.

[135] See H. Müller, Versicherungsbinnenmarkt, p 17 et seq; also the Commission noticed that, see Case C 205/84 (quoted *supra* note 125) para 59.

[136] See e.g. Case C 206/84 (quoted *supra* note 125) para 16 with reference to Case C 33/74 (cited *supra* note 105).

[137] See e.g. Case C 205/84 (quoted *supra* note 125) para 52.

[138] Put in italics by the author.

[139] For the decision at stake this is the Member State of the policyholder where also the risk is situated (para 23).

[140] Case C 205/84 (quoted *supra* note 125) para 27 stating the further requirements for such a restriction in the light of the principle of proportionality.

national governments' applications that the authorisation requirement was justified in the *general interest* in the affirmative.[141]

As a consequence of these judgements the Commission was faced with the problem of not being able to move directly towards the establishment of freedom to provide services in the insurance industry. More than that it had to explicitly deal with the Court's view of the possible existence of a general interest justification in further legislation.[142]

4. The 'Second Generation' Directives

The Commission being forced to implement the principle of the *general good* adopted different methods for the life and the non-life insurance sector, respectively, when it enacted the second generation directives in 1988/1990 in order to prepare the ground for the insurance industry to exercise freedom to provide services.[143]

a) The Second Non-Life Insurance Directive

Again, the first field to be regulated was non-life insurance.[144] Spinning further the ruling of the European Court of Justice, a distinction was drawn between *large risks* and *mass risks*.

The former mainly included big commercial and transport risks,[145] where

> '... policyholders who, by virtue of their status, their size or the nature of the risk to be insured, [did] not require special protection in the state in which the risk [was] situated ...'.

For these types of insurance complete freedom was foreseen so that the policyholders could

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[141] See Case C 205/84 (quoted *supra* note 125) para 49 et seq.

[142] See R. Merkin and A. Rodger, EC Insurance Law, p 9.

[143] See R. Merkin and A. Rodger, EC Insurance Law, p 9.

[144] 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, OJ 1988 No L 172/1.

[145] Risks in relation to railway rolling stock, aircraft, ships, goods in transit, credit and suretyship insurance if exercised commercially, fire and other natural forces insurance, general liability, miscellaneous financial loss, if the policyholder fulfilled certain conditions; see for details Art 5 (d) and Annex of Directive 73/239/EEC, respectively (the former was inserted by Titel II of Directive 88/357/EEC).

> '... avail themselves of the widest possible insurance market; ...'.[146]

As a consequence the authorisation of an insurance undertaking in its home state was also a license to cover such types of risks in all other Member States. It was enough to *inform* the host state's supervisory authority of the activity.[147] For large risks the necessity of a *prior approval of tariffs and policy terms* was also eliminated.

Mass risks, on the other hand, still required special protection as the policyholders in these cases normally did not have the abilities mentioned above to judge the obligations they undertook in an insurance contract in their entire complexity.[148] If an insurance undertaking wanted to cover mass risks in another Member State, that state could still ask for formal authorisation as well as impose its provisions as to technical reserves. The ex ante control of tariffs and policy terms, which was foreseen in a few Member States, was not abolished in this field, either.

Also the field of compulsory insurance, to which the directive extended its scope, was subject to some exceptions. As a consequence special domestic provisions could still be applied there.[149]

Apart from that, Directive 88/357/EEC carried on with the harmonisation of supervision law and introduced a complicated system of co-ordinated supervision.[150] According to what the European Court of Justice had ruled in the insurance cases the directive explicitly drew a line between freedom of establishment and freedom to provide services providing that

> '... any permanent presence of an undertaking in the territory of a Member State [should] be treated in the same way as an agency or branch, even if that presence [did] not take the form of a branch or agency, but [consisted] merely of an office managed by the undertaking's own staff or by a person who [was] independent but [had] permanent authority to act for the undertaking as an agency would ...'.[151]

Such a permanent presence therefore fell within the scope of freedom of establishment.[152]

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[146] See the preamble of Directive 88/357/EEC.

[147] See e.g. Art 9 and 13 et seq of Directive 88/357/EEC.

[148] See the preamble of Directive 88/357/EEC.

[149] Art 8 of Directive 88/357/EEC.

[150] See e.g. Art 10 of Directive 88/357/EEC.

[151] Art 3 of Directive 88/357/EEC.

[152] See for a clarification of that demarcation line now the Commission Interpretative Communication on freedom to provide services and the general good, COM (1999) 5046, p 6 et seq.

One of the most important provisions of the second non-life insurance directive, however, was Art 7 thereof, which contained rules about the *law applicable to insurance contracts*. The provision stemmed from the Commission's plan to harmonise the relevant private international law in order to substitute the harmonisation of insurance contract law which had not made any progress since 1980.[153] According to the 'old' private international law the determining factor would have always been the law of the state where the insurance undertaking (the *provider of the characteristic service*) had its seat.[154] Albeit favouring the supplier and therefore enhancing the passive freedom to provide services this was seen as contrary to important policyholder interests; therefore another approach was to follow.[155]

Also Art 7 reflected the distinction made between large and mass risks, which was described above, introducing the freedom to choose the law applicable to the contract for the former and setting out a complicated system of choice of law- and otherwise applicable rules for the latter.[156] According to Art 7 para 2 the forum state as well as the state where the risk was situated and the state imposing to take out compulsory insurance could continue applying their *mandatory provisions* notwithstanding the otherwise applicable law.[157]

b) The Second Life Insurance Directive

The corresponding life insurance directive was enacted two years later and – again – echoed the principles of its elder 'sister'.[158]

The distinction between large and mass risks, however, did not work for the life insurance sector. Therefore the directives used a system which distinguished between policyholders who took the initiative in entering into a commitment with an insurer of another Member State and those who did not.[159] Those cases in which a policyholder was considered to have taken the initiative was accurately laid down in the directive. Moreover, the directive foresaw that in such cases a statement had to be signed in which the policyholder took notice

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[153] See *supra* note 29.

[154] I.e. head-office but also branch relevant for the respective contract; see e.g. the 'old' Art 36 of the old Austrian IPRG (Private International Law Statute); this provision was cancelled according to the Rome Convention.

[155] M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at p 86).

[156] For the distinction of *convergence* and *divergence cases* (i.e. are the policy holder's residence and seat, respectively, identical with the place where the risk is situated?) see the excellent analysis in M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at 91 et seq); the private international law issue will be picked up again, see *infra* section IV.1.c.

[157] Space does not allow to further discuss the meaning of *mandatory*.

[158] Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ 1990 No L 330/50.

[159] See the preamble of Directive 90/619/EEC and esp Art 13 thereof.

that the commitment would be subject to a legal and therefore supervisory regime other than that of his/her habitual residence, namely the one of the Member State where the insurance undertaking which was to cover the commitment had its establishment.[160]

The law applicable to life insurance contracts was regulated by Art 4 of the Directive. In general, the law of the policyholder's residence and seat, respectively, was to be applied. A choice of law was only possible in two cases: (a) if the applicable law allowed it and (b) in cases, in which the policy holder was not citizen of the Member State where the risk was situated. Regarding the latter the parties could choose between the law of the policyholder's residence and the law where the risk was situated. Again, the application of so-called *mandatory provisions* of the forum state as well as the state where the policyholder had his/her habitual residence was foreseen.[161]

Besides that, it is worth stating that the only provisions relating to substantive insurance contract law in the second generation of insurance directives could be found in the second life insurance directive. In so far as contracts were concluded under freedom to provide services a cooling off period of 14-30 days in which the policyholder could withdraw from the contract was foreseen (Art 15). Furthermore, Art 22 contained a duty of disclosure obliging the insurance undertaking to provide the policyholder with certain information, such as the address of the establishment granting the cover as well as the address of the head office.

In every other respect, insurance contract law was not touched upon.

5. The 'Third Generation' Directives

According to the Commission's ambitious plans the single insurance market should have been perfected by the Third Generation of insurance directives.

a) The Third Non-Life Insurance Directive

The Third Non-Life Insurance Directive[162] finally introduced the *principle of single licensing* for EC based insurers for the – by then – nineteen[163] classes of non-life insurance business. Every insurance undertaking which was established and authorised in one Member State could use this license in the whole territory

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[160] See in detail Art 13 and part B of the Annex of Directive 90/619/EEC.

[161] Art 4 para 4 sentence 1 of Directive 90/619/EEC.

[162] Council Directive 92/49/EEC of 18 June 1992 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 (Third Non-Life Insurance Directive), OJ 1992 No L 228/1.

[163] Figures after the extending of the scope of Directive 79/239/EEC; see *infra* III.6.

of the European Community under both freedom of establishment and freedom to provide services without having to fulfil further requirements and no matter if it wanted to exercise cross border activities in the first place or not.[164]

According to the preamble of the Directive the necessary prior conditions for the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and to apply the principle of supervision by the home Member State, were finally met by this last directive and the supplementary and expanding directives, which had been enacted in addition to the 'pure' insurance directives[165].[166]

In particular, the prior conditions just mentioned regarded the final harmonisation of the national provisions in relation to supervision and technical reserves. The necessary control is now mainly to be exercised by the supervisory authority of the state of origin. The host state's authority, on the other hand, has very limited means of control which particularly do not include the question whether an insurance undertaking has indeed met the conditions under which it was granted the licence in the first place by the home Member State.[167] In case of infringement of authorisation requirements a rather complicated system of co-operation was foreseen.[168]

Moreover, the directive also introduced a new requirement for controlling shareholders and members of management in regard to their integrity and professional skills.[169] The detailed provisions concerning tax law[170] as well as the prohibition of existing monopolies formerly allowed in some Member States should also be mentioned.[171]

Regarding insurance contract law, on the other hand, once again no progress had been made except for some provisions concerning the insurers' duty of disclosure.[172] The Commission, which had come to the conclusion that '... the harmonisation of insurance contract law [was] not a prior condition for the achievement of the internal market in insurance; ...'[173] pursued instead the

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[164] According to recital 6 of the preamble and Art 5 of Directive 92/49/EEC amending Art 7 of Directive 73/239/EEC.

[165] See *infra* 6.

[166] Recital 5 of the preamble of Directive 92/49/EEC.

[167] So the Commission's view in COM (1999) 5046, p 14.

[168] Arts 9 et seq of Directive 92/49/EEC; see in more detail IV.3.a.

[169] The directive calls them 'persons of good repute with appropriate professional qualifications or experience'; see e.g. Art 6 of Directive 92/49/EEC amending Art 8 para 1 (e) of Directive 73/239/EEC as well as Art 8 of Directive 92/49/EEC.

[170] Art 46 of Directive 92/49/EEC.

[171] Art 3 of Directive 92/49/EEC.

[172] Art 31 of Directive 92/49/EEC.

[173] Recital 19 of the Preamble of Directive 92/49/EEC; see also L. Brittan, VW 1990, p 754-761 (at p 759).

harmonisation of the relevant private international law.[174] This was considered satisfactory in terms of policyholder protection, where such protection was necessary, because Art 7 of Directive 88/357/EEC as amended by Art 27 of Directive 92/49/EEC provided for the applicability of the law where the policyholder had his/her habitual residence and therefore for the application of the law that s/he was used to, thus saving him transaction costs of information.[175] In addition to the existing separate treatment of compulsory insurance a special provision was introduced for insurance which served as a partial or complete alternative to health cover provided by the statutory social security system.[176]

Besides that, the major achievement of the Third Non-Life Insurance Directive was the *abolition of the ex ante control of tariffs and policy terms also for the field of mass risks*.[177] Insurance undertakings offering compulsory insurance, on the other hand, could still be required to submit their standard policy terms.[178] The same was valid for private health insurance which – at least partially – substituted the health insurance provided by the public social security system.[179]

b) The Third Life Insurance Directive

This time the corresponding directive regulating the field of life insurance was enacted almost simultaneously, only five month after the Third Non-Life Insurance Directive.[180]

Just like in the parallel non-life insurance directive the most important novelties in the field of life insurance were the introduction of the principle of *single licensing* and the *abolition of the ex ante control of tariffs and policy terms*. Consequently, also a life insurance undertaking had to seek authorisation only in its home Member State to be able to then use this license for the whole territory of the European Community.[181] Also financial control was in the hands of only that instance. For other forms of control the home state's authority had to co-operate with that of the Member State where the service was provided.[182]

Whether or not the prior approval of tariffs and policy terms should be completely abolished, had been subject to serious discussion during the drafting

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[174] Art 27 of Directive 92/49/EEC.

[175] See H. Müller, Versicherungsbinnenmarkt, p 28.

[176] Art 54 of Directive 92/49/EEC.

[177] See the new Art 8 para 3 as amended by Directive 92/49/EEC as well as Art 29 of Directive 92/49/EEC.

[178] Art 30 para 2 of Directive 92/49/EEC.

[179] Art 54 of Directive 92/49/EEC.

[180] Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (Third Life Assurance Directive), OJ 1992 No L 360/1.

[181] See Art 7 of Directive 92/96/EEC.

[182] See Arts 15 et seq of Directive 92/96/EEC.

process.[183] In fact what was left of the demands of those Member States oriented more towards substantive regulation was finally no more than the possibility of requiring the systematic communication of the technical bases used, in particular, for calculating scales of premiums and technical provisions. This, however, did not constitute a prior condition for an undertaking to carry on business.[184]

To compensate for the lack of control resulting from the abolition of every other prior approval, the insurer was obliged to follow certain *duties of disclosure* having to provide the policyholder with information both before the contract was concluded as well as throughout the duration of the contractual relationship.[185] It is worth pointing out that these duties – of course – form part of the respective insurance contract law. The only other provision concerning substantive law was Art 30, which extended to all life insurance contracts the policyholder's right to cancel the contract after a certain time, as opposed to the Second Life Insurance Directive, which foresaw such a right only for contracts concluded under the freedom to provide services.[186]

Besides that, it is worth noting that the prohibition of *composite insurers* was further mollified. Existing ones could now trade under both freedom of establishment and freedom to provide services in all Member States. In the same vein it was now possible for life insurance undertakings to also offer coverage for health in general and accidents.[187]

Moreover, it was agreed that even these more liberal provisions should be revised in 1999.[188]

6. Other Relevant EC Secondary Legislation

a) General Remarks

The following section gives an overview of other EC secondary legislation which consequently influenced the insurance sector. However, one important issue, i.e. insurance intermediaries will not be taken into consideration as it will be dealt with in a separate section.[189]

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[183] See H. Müller, Versicherungsbinnenmarkt, p 34.

[184] Art 8 and 29 of Directive 92/96/EEC.

[185] Art 31 and Annex II of Directive 92/96/EEC.

[186] See Art 30 para 1 of Directive 92/96/EEC amending Art 15 para 1 of Directive 90/619/EEC: in some cases where the policyholder did not need special protection Member States were allowed some exceptions (see Art 30 para 2 of Directive 92/96/EEC).

[187] Art 13 of Directive 92/96/EEC.

[188] H. Müller, Versicherungsbinnenmarkt, p 36.

[189] Chapter Three III.3.

b) Further Harmonisation in the Field of Non-Life Insurance

The quite restrictive scope of the First Non-Life Insurance Directive was extended over the years. In 1984 *tourist assistance* was incorporated;[190] in 1987 *credit and suretyship insurance* followed.[191]

Legal expenses insurance was even subject to a separate directive as it could not be harmonised in the course of the First Non-Life Directive, either. Freedom of establishment for this class could only be guaranteed in 1987 when the Member States agreed upon a system (or, in reality, three equivalent systems the Member States could choose from) with the objective to 'preclude as far as possible any conflict of interest arising in particular out of the fact that the insurer is covering another person or is covering a person in respect of both legal expenses and any other class of ... [insurance]'.[192]

These new classes were subsequently amended according to the Second and Third Non-Life Insurance Directives, and therefore nineteen classes of non-life insurance were seized by EC harmonisation measures.

c) Motor Vehicle Liability Insurance

Because of its special character and especially its social importance motor vehicle liability insurance was excluded from the scope of the Second Non-Life Insurance Directive as far as it concerned freedom to provide services. The applicability of the Second Non-Life Directive's provisions to motor vehicle liability insurance was only realised in 1990 with Directive 90/618/EEC.[193]

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[190] Council Directive 84/641/EEC of 10 December 1984 amending, as regards tourist assistance, the First Directive (73/239/EEC) on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ 1984 No L 339/21; for the history why this class was included see H. Müller, Versicherungsbinnenmarkt, p 19.

[191] Council Directive 87/343/EEC of 22 June 1987 amending, particularly as regards credit insurance and suretyship insurance, First Directive 73/239/EEC on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ 1987 No L 185/72, which did not extend the scope of the First Non-Life Directive to the field of public export insurance, but forced Germany to give up its provision prohibiting the simultaneous undertaking in its territory of credit and surety insurance and other classes of insurance imposing on insurers of the former the duty to increase their funds (Art 1 No 5 of Directive 87/343/EEC); see H. Müller, Versicherungsbinnenmarkt, p 20.

[192] Art 1 and 3 of the Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance, OJ 1987 No L 185/77.

[193] Council Directive 90/618/EEC of 8 November 1990 amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance, OJ 1990 No L 330/44.

Although in the field of motor vehicle liability insurance the main emphasis lies, or at least should lie, on the injured, and therefore the distinction between large and mass risks does not seem appropriate, it was nevertheless a distinction adopted by the directive.[194] Thus, for large risks the provisions concerning supervision were to follow the principle of the state of origin, whereas for mass risks the principle of the state where the service was provided was adhered to.[195] National provisions requiring an *a priori* approval of tariffs and policy terms were to be abolished for large risks in general, not only within the scope of freedom to provide services. The provisions of Directive 88/357/EEC relating to compulsory insurance were made applicable.[196]

Besides that, Directive 90/618/EEC introduced the principle of reciprocity in relation to Non Member States and extended that principle to all forms of non-life insurance meaning that an insurance undertaking from a third country could establish itself and provide its services, respectively, only if this right was granted to undertakings of the respective Member State as well.[197]

Directive 90/618/EEC was dealt with in detail as it was also of concern to all the other classes of non-life insurance. The other directives relating to motor vehicle liability insurance, on the other hand, shall only briefly be mentioned, although integrating the field of compulsory motor vehicle liability insurance can be identified as one of the tasks the Commission paid most attention to.[198] For the topic at hand, however, it is sufficient to say that the development began with the Strasbourg Convention of 1959, and thus with an international convention rather than a form of supranational law, which established minimum requirements for the national insurance systems.[199] Of great importance was also the establishment of the so called *green card system* based on a recommendation of the UN traffic committee[200] and further developed in the so called *London Convention*, which was supposed to serve as a model for bilateral conventions between the respective 'bureaus' of two states which wanted to join the system.[201]

By enacting several harmonisation directives the European Community achieved further integration in that field, in particular by abolishing the need to check the green cards when crossing a Community border.[202] The most recent

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[194] See the preamble of Directive 90/618/EEC; H. Müller, Versicherungsbinnenmarkt, p 26.

[195] See Art 2 of Directive 90/618/EEC which modified Art 5 (d) of Directive 73/239/EEC.

[196] H. Müller, Versicherungsbinnenmarkt, at p 26.

[197] Art 3 of Directive 90/618/EEC amending Title III of Directive 73/239/EEC.

[198] According to H. Müller, Versicherungsbinnenmarkt, p 51 et seq.

[199] European Convention on Compulsory Insurance against Civil Liability in respect of Motor Vehicles, Strasbourg, 20 April 1959, see http://www.coe.fr/eng/legaltxt/29e.htm.

[200] Recommendation 5 of 1949, set in forth by UN Decision 1952.

[201] By the Council of Bureaux (foundation in 1949).

[202] Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, OJ 1972 No L 103/1; Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of

development took place with the 4th Motor Vehicle Insurance Directive in July 2000, which provided for a direct right of action of the injured.[203] However, it would still be too much to claim that there exists a European wide standard of comparable and competitive protection of both the policyholder and the injured.[204]

d) Accounting Provisions

Although the European Community soon recognised the need to develop common accounting provisions for EC based companies in order to ensure direct comparability for investors and creditors and adopted several directives on company accounts, the most important ones being the Fourth Directive of 1978 and the Seventh Directive of 1983,[205] the insurance industry was at first excluded – consequence of the fact that for this sector more specialised provisions were required. In 1991, however, the Insurance Accounting Directive was finally adopted.[206] In accordance with what was required it was based on the other accounting directives but foresaw specific provisions, such as, for example, increased duties of disclosure regarding the investment forms.[207]

e) Winding Up

The European Community has only recently succeeded in adopting a directive on reorganisation and winding up of insurance undertakings.[208]

The Directive was first proposed in 1987[209] but has proved extremely lengthy to negotiate, due to the complexity of the insolvency regimes of 15 Member States.

the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1984 No L 8/17; Third Council Directive 90/232 of 14 May 1990 on the approximation of the laws of the Member states relating to insurance against civil liability in respect of the use of motor vehicles, OJ 1990 No L 129/33 and all the amending directives.

[203] Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and amending Council Directives 73/239/EEC and 88/357/EEC, OJ No L 181/65.

[204] See H. Müller, Versicherungsbinnenmarkt, p 56.

[205] Council Directive 78/660/EEC of 25 July 1978 on the annual accounts of certain types of companies, OJ 1978 No L 222/11, and Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, OJ 1983 No L 193/1. In Austria these directives were implemented into the HGB (Commercial Code), German RGBl 1897, 219, last amendment BGBl I 1999/187.

[206] Council Directive 91/674 of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings, OJ 1991 No L 374/7.

[207] According to R. Merkin and A. Rodger, EC Insurance Law, p 16.

[208] The directive is not yet officially published; the text can be found in the Council's Common Position (EC) 49/2000, OJ 2000 C 344/23.

The European Parliament agreed on the second reading of the proposal not to amend the common position reached in Council on 10 October 2000[210] (!) and voted on 15 February 2001 in favour of its immediate adoption. With this approval, the Directive has now been adopted, without the need for a second reading by the Council.

The directive adheres to the home country control principle. Where an insurance undertaking with branches in other Member States fails, the winding up process will be subject to a single bankruptcy proceeding initiated in the Member State where it has its registered office, the home state, and governed by a single bankruptcy law, namely that of the home state. According to Internal Market Commissioner Frits Bolkestein this Directive provides for a clearly established procedure, which also strengthens consumer confidence by being equally valid for all policyholders for the distribution of assets.[211]

f) The Insurance Committee

The third generation directives take account of the fact that some of their provisions may need to be modified from time to time in order to keep up with new developments in the insurance market thereby containing a limited list of areas in which the directives may be adapted rapidly by independent Commission 'measures' without requiring a Council and Parliament act.[212] To support the Commission with this function Directive 91/675/EEC set up the *Insurance Committee* (*IC*),[213] which is composed of representatives of the Member States supervisory authorities and chaired by the representative of the Commission and assumed its functions on 1 January 1992.[214]

The IC's organisation and procedure was regulated according to the Council's comitology decision of 1987.[215] Therefore the IC was to adopt its own rules of procedure.[216] Whenever the Commission wants to take a measure within its implementing powers it has to submit a draft to the IC which consequently can deliver an opinion on it. If this opinion coincides with the draft or if no opinion is delivered, the measure can be taken, if not, the Council has to be further

[209] Proposal for a Council Directive on the Coordination of the laws, regulations and administrative provisions relating to the compulsory winding up of direct insurance undertakings, COM (1986) 768 final, and amended proposal, COM (1989) 394 final.

[210] Quoted *supra* note 208.

[211] Information taken from the web-page of DG XV: http://www.europa.eu.int/comm/internal_market/en/finances/insur/01-216.htm.

[212] See Art 51 of Directive 92/49/EEC and Art 47 of Directive 92/96/EEC, mainly regarding technical amendments and the authorisation procedure for non-EC insurers.

[213] Council Directive 91/675/EEC of 19 December 1991 setting up an insurance committee, OJ 1991 No L 374/32.

[214] See Arts 1 and 5 of Directive 91/675/EEC.

[215] Council Decision 87/373/EEC of 13 July 1987 laying down the procedure for the exercise of implementing powers conferred on the Commission, OJ 1987 No L 197/33.

[216] Art 1 para 2 of Directive 91/675/EEC.

involved.[217] So far only one example of co-operation is known concerning the need to further harmonise the *solvency margin*.[218] Thus the IC's influence still seems moderate at the moment.[219]

Beside its comitology function the IC may examine 'any question relating to the application of Community provisions concerning the insurance sector', which provides for a wide ambit of co-operation between the Commission and the national supervisory authorities not only restricted to the insurance directives. However, the IC must not consider specific problems raised by individual insurance undertakings.[220]

The IC's advisory function also extends to being consulted on any new proposals for legislation the Commission intends to submit to the Council in the field of insurance.[221]

7. A 'Fourth Generation' Insurance Directives? Further Developments

> 'A single insurance market, promoting economic efficiency and market integration, requires a common framework, to allow insurers to operate throughout the EU and to establish and provide services freely. The legal framework must also protect customers, particularly individuals, where the safe delivery of promised benefits can be vital. This is achieved by a common prudential framework, founded on three generations of life and non-life directives, harmonising essential rules. This framework needs to be updated, revised, completed and where possible simplified, to respond to market developments and product sophistication.'[222]

The non-existence of a single insurance market has been criticised frequently in the literature.[223] Indeed, as becomes clear from the quotation above, the European Community is also aware of the complexity of the topic at issue as well as of the obstacles which still remain.

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[217] Art 2 of Directive 91/675/EEC.

[218] COM (97) 398 final.

[219] The ECOSOC expressed its hope to strengthen the Committee's position in the future; see OJ 1998 No 95/72 point 4.3.8.

[220] Art 3 of Directive 91/675/EEC.

[221] Cf European Commission, Institutional Arrangements for the Regulation and Supervision of the Financial Sector, available for download from the webpage of DG XV.

[222] Taken from the official web-site of the European Union, DG XV (Internal Market); see (http://www.europa.eu.int/comm/internal_market/en/finances/insur/index.htm).

[223] See e.g. J. Basedow, in: Versicherungsrecht in Europa, p 13-30.

Only on 28 June 2000, however, did the problem manifest itself in a proposal for legislation.[224] In the interests of clarity the previous plans to enact 'official codifications' of the existing legislation was given up in favour of a 'recast version'.[225] This time the field of life assurance was tackled first.

Albeit a great improvement, it appears that no significant changes have been made so as to integrate mass risks. The Commission has not moved away from the reasoning that restricting the possibility of choosing the law applicable to the contract and imposing mandatory requirements in the general good substitute the need to provide for a harmonisation of the respective insurance contract laws.[226]

Instead, a solution was sought in publicising an *interpretative communication* concerning freedom to provide services and the general good in the insurance industry – as the problem was being viewed as the Member States' different interpretations of the matters at issue.[227] Of course, this document, which was delivered after a wide ranging consultation process involving all interested parties,[228] has no legally binding effect. It can neither anticipate what interpretation the European Court of Justice may place on the matter, nor does it impose any new obligations on the Member States. It simply tries to clarify some 'grey areas' like the ambit of freedom of establishment as opposed to freedom to provide services, the use of advertising which cannot be made subject to an authorisation procedure or the concept of the *general good* which lacks a precise definition in the insurance directives. Doing this the communication relies on case law as well as on traditional grammatical interpretation of the existing legislation. In applying abstract definitions and principles mostly coming from the ECJ's jurisdiction the Commission contributes to a better understanding of the existing legal hotchpotch. It remains to be seen, however, if a real improvement has been achieved.

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[224] Proposal for a directive of the European Parliament and of the Council concerning life assurance (recast version), COM (2000) 398 final.

[225] See *supra* note 80.

[226] Recital 42 of the preamble and Art 31 of COM (200) 398 final.

[227] Commission Interpretative Communication, Freedom to Provide Services and the General Good, COM (1999) 5046 from 2 February 2000; with a section concerning *pil* and the *general good* in particular at p 37 et seq.

[228] The Member States within the framework of the Insurance Committee, private operators, the European Parliament, Economic and Social Committee, professional association of insurers and intermediaries, consumer organisations, law firms etc.

IV. Results of the development: 'A System of Multilevel Governance?'

1. General Remarks

From the description in Section III one might rush to the conclusion that creating the basis for an insurance single market falls entirely within the Community's competence to enact secondary legislation in the form of directives.

This impression is deceptive, though. On the contrary, taking a closer look, the insurance sector is reminiscent of what is called a system of *multilevel governance*. Next to what has been harmonised through the directives described above, there exists a hotchpotch of legal and other 'rules', both European and merely national, which touches upon the insurance industry and leaves everybody who tries to classify it somewhat puzzled.

2. European Primary Law

The applicability of European Primary Law to the insurance industry was made clear as early as 1961 with the Commission's General Programmes on freedom of establishment and freedom to provide services.[229] Within this context also the prohibition of discriminatory practices because of nationality has to be mentioned as being relevant to the insurance industry.

Linking these principles with national law, the jurisdiction of the European Court of Justice, with its competence to exclusively and bindingly interpret Community law, comes into play.[230] Indeed, and as has already been shown, the relevance of the Court's ruling in relation to insurance law,[231] i.e. when it introduced the principle of the *general good*, was one of the determining factors in the future legislative development in the area.[232]

Exkurs: Case C 212/97

At this point a recent development in the European Court of Justice's jurisdiction concerning freedom of establishment should be mentioned.

In a Danish case concerning the registration of a secondary establishment the Court ruled that it was incompatible with freedom of establishment to refuse to register the branch of a rightfully established firm under UK company law only

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[229] See *supra* note 32.

[230] Art 220 (ex Art 164) of the Treaty establishing the European Community.

[231] See the section about the insurance cases *supra* III.3.

[232] See *supra* section III.4.

because it wanted to conduct all its business via the branch and because it had no genuine activities whatsoever in the state of registration.[233]

Without going deeper into an analysis of *Centros* and its implications mainly for international company law,[234] one feature of the decision should be singled out, namely what the Court stated in para 27 thereof:

> '..., the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.'

In this context it is noteworthy to refer to Directive 95/26/EC,[235] known as the BCCI Directive, which was adopted as a consequence of the bankruptcy of the Bank of Credit and Commerce International.[236] The directive demands that Member States impose certain requirements of establishment on companies trading in particular industry sectors, among these, companies which undertake insurance business.

Art 3 para 1 inserted the following into Art 8 of Directive 73/239/EEC[237] and Art 8 of Directive 79/267/EEC,[238] respectively:

> 1a. Member States shall require that the head offices of insurance undertakings be situated in the same Member State as their registered offices.

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[233] Case C 212/97, Centros Ltd v Erhervervs- og Selskabsstyrelsen [1999] ECR I-1459.

[234] See for that e.g. W.-H. Roth, Case Note on C-212/97, 37 CML Rev. (2000), p 147-155 (at p 155) with further references to the by now very comprehensive literature.

[235] European Parliament and Council Directive 95/26/European Community of 29 June 1995 amending Directives 77/780/EEC and 89/64/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC in the field of non-life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view reinforcing prudential supervision, OJ 1995 No L 168/7.

[236] A. Fenyves and St. Korinek, ZfV 1999, p 158-187 (at p 164); in Austria this provision was implemented by the *VAG-Novelle 1996* (law that amended the Austrian VAG according to European law), BGBl 1996/447, which amended Art 3 para 1 thereof; see for the amendments in detail P. Baran, VR 1996, p 57-61 (at p 58).

[237] Cited *supra* note 95.

[238] Cited *supra* note 119.

In the *Centros* context this provision seems puzzling; one might even be tempted to regard it as 'superseded' by the Court's decision in the 1999 case, as Directive 95/26/EC undoubtedly stems from the 'pre *Centros* era'.[239] To draw such a conclusion would be somewhat hasty, however. First of all, there are considerable differences in the facts at issue, as *Centros* concerns a private limited company which could never take up an insurance business anyway.[240] Yet, this would not be the first time that general conclusions are drawn from a case deciding a very specific situation.[241]

The following argument therefore seems more convincing in order to explain the relevance of the BCCI Directive. In *Centros* itself the Court admits that

> '... a Member State may adopt measures in order to prevent attempts by certain of its nationals to evade domestic legislation by having recourse to the possibilities offered by the Treaty'.[242]

It furthermore states that

> '... in the present case, the provisions of national law, application of which the parties concerned have sought to avoid, are rules governing the formation of companies and not rules concerning the carrying on of certain trades, professions or businesses'.[243]

In this light the BCCI Directive still finds its justification, as it applies to the trading of a particular business, for the issue under discussion: the insurance business. Suffice it to say for the present that *Centros* allows the speculation that the Court could here have kick-started another development in this respect, i.e. towards a greater liberalisation of company law also in respect to the special provisions applying to the insurance business.

3. Harmonised and Not So Harmonised Features

What has also already been discussed is that the unfolding of the basic freedoms was conditional on the unification of at least parts of the relevant national laws concerning the insurance industry, as the principle of mutual recognition only works as long as the differences in the national legal orders are not that striking.[244] It was the insurance directives' task to create the basis for that.

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[239] And indeed, the value of the Court's decisions is sometimes overestimated in comparison to other European legal sources, see P. Craig and G. de Búrca, EU Law, p 79.

[240] See Art 8 of Directive 73/239/EEC and Art 3 of the Austrian VAG.

[241] Just look at the discussion and national case law that followed *Centros*.

[242] Case C 212/97 (cited *supra* note 233) para 18; similar para 24.

[243] Case C 212/97 (cited *supra* note 233) para 26.

[244] See in another context but with a valid result K. Nemeth, Kollisionsrechtlicher Verbraucherschutz, p 4 with reference – among others – to J. Basedow, RabelsZ 59 (1995) p

For the relevant insurance supervision law this project can be called sufficiently completed; a common European standard of how assets and technical reserves have to be calculated has been developed and a compatible authorisation procedure introduced.

For the two other subjects that were supposed to be regulated by directives, on the other hand, a similar degree of success cannot be reported. The harmonisation of the relevant conflicts rules was only partly successful. Moreover, the harmonisation of insurance contract law has – despite some small exceptions – not taken place at all.

a) A System of Co-ordinated Supervision

Before addressing the harmonised supervision law in more detail it should be observed that this field of law, which is here described as one of the layers in a system of *multilevel governance*, in itself constitutes a mix of various forms of legal rules. Attila Fenyves and Stefan Korinek make this point when they describe the peculiarities of the Austrian Insurance Supervision Law, the VAG, as combining different legal forms under one statute. And indeed, the VAG contains norms of pure administrative law, administrative law with consequences for private law, commercial law, insolvency provisions as well as criminal law.[245]

However that may be, the harmonised insurance supervision law can be summarised with the catch-phrase *single license*. It is up to the home state's supervisory authority to check if the requirements set out in the insurance directives have been fulfilled before the individual insurance undertaking is permitted to enter the market. It is also up to this authority to survey the current business of such an undertaking. Concerning financial control this competence is exclusive. The host state's supervisory authority, on the other hand, can only survey the criteria for admission to the market as far as it pursues national provisions which are justified in the general good.

In both cases the national authority would have to take sovereign acts on the territory of another Member State which is not possible according to international law. Also the Insurance Directives adhere to these principles and foresee a system of co-operation instead, e.g. for securing the assets in the case of solvency, for a transfer of the portfolio and a withdrawal of admission. Besides that the main subject of co-operation is mutual information, co-ordination of supervisory practices and the handling of complaints.[246] In that context also a working group on Insurance Contract Law was reported to exist; apparently the supervisory authorities are aware of the necessity to harmonise

1-55 (at p 4) and 'Completing the Internal Market', Commission's White Paper to the European Council, Milan 28/29 June 1985, COM (85) 310 final.

[245] A. Fenyves and St. Korinek, VR 1999, p 158-187 (at p 164 et seq).

[246] See for a detailed description H. Müller, in: J. Basedow, E. Schwark and H.-P. Schwintowski, Informationspflichten ..., p 55-66 (at p 57 et seq).

substantive law, too.[247] To facilitate co-operation it has been agreed that only one authority per Member State can act in the international exchange.[248] Co-operation takes place according to a ‘manual’, which lays down certain procedures. Major achievements are reached in international conferences which take place regularly; one of them was institutionalised in the form of the Insurance Committee.[249] Also other international fora are consulted, such as the Pan European Conference, which includes East European States, the OECD Insurance Committee, which was the driving motor for certain developments also on EC level, and the IAIS (International Association of Insurance Supervisors) with head quarters in Chicago.[250]

In practice, there seem to be problems as far as the exercise of this co-ordinated supervision is concerned. At a Conference in Basel, Switzerland, in September 1998, on ‘Insurance Law in Europe – Core Perspectives at the End of the 20th Century’ representatives from the Austrian, German, Liechtenstein as well as the Swiss insurance supervisory authorities expressed their concerns, albeit not questioning the rationale behind the system. They agreed upon the fact that their facilities in regard to both budget and personnel were by no means sufficient to cope with the workload by which such co-operation is accompanied.[251] Also academic experts recognise this as a problem and especially criticise the lack of a real European Supervisory Authority.[252]

b) The Private International Law Approach

Art 1 paras 3 and 4 of the Rome Convention on the Law Applicable to Contractual Obligations[253] explicitly excludes from its scope direct insurance contracts which cover risks that are situated within the European Union.[254] The Convention, however, is applicable to those direct insurance contracts which cover risks outside the EC as well as reinsurance contracts.

Direct insurance contracts with participation of an EC insurer which cover risks within the EC are instead governed by the special directive provisions mostly of

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[247] E. Weber-Wolf, in: Versicherungsrecht in Europa, Discussion, at p 62.

[248] H. Müller, in: J. Basedow, E. Schwark and H.-P. Schwintowski, Informationspflichten ..., p 55-66 (at p 59 et seq): This is particularly important as there exist special boards for certain insurance sectors e.g. in the UK. Besides that, there exists co-operation with the EFTA states and Switzerland and other relevant authorities.

[249] See *supra* III.6.e.

[250] See note 248.

[251] The results of that conference have been published: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, Supplement 34 to ZSR 2000, Basel 2000, p 215-240 (e.g. at p 227).

[252] H. Müller, in: J. Basedow, E. Schwark and H.-P. Schwintowski, Informationspflichten ..., p 55-66 (at p 65 et seq).

[253] OJ 1980 L 266/1 of 9 October 1980 as amended (cf the consolidated version in OJ 1998 C 27/34).

[254] See K. Nemeth, in: EVÜ, Art 1 para 58 et seq.

the second generation and partly modified by the third generation directives. Within their scope these provisions foresee an exclusive determination of the applicable law, notwithstanding the freedom they leave national legislators to allow – in certain cases – a greater freedom of the choice of law.[255]

Furthermore there are cases which fall outside the scope of both the Rome Convention and the insurance directives, e.g. regarding insurance contracts which cover risks within the EC but involve a third country insurer or the possibility of a choice of law after having concluded the contract.[256] These cases are ruled by the respective private international law provisions of national law.

All in all three different legal sources have to be considered for the topic at issue: an international convention, EC secondary legislation and national law.

Obviously this was a source for various problems up to now. The directive provisions, in particular, gave rise to interpretative problems. It was, for example, criticised that there is no explicit definition of *mandatory rules*.[257] Commonly they are understood as rules which can be applied notwithstanding the otherwise applicable law, which, naturally, is only unequivocal if the national legislator explicitly states such characteristics or if the legal framework clearly allows for such an interpretation. For the rest there exist widespread opinions; to present them, however, would go beyond the scope of the present thesis.[258] Secondly, the *general interest rule* was a source of interpretative conflicts, which – again – cannot be dealt with in depth.[259] In the authors view, however, the two principles have to be seen as mutually influencing each other, as all mandatory requirements have to be justified in the general interest to be compatible with the principles of EC law.[260]

For all that, it was not easy for the national legislators to implement these principles. Together with the other very complex, and not objectively distinguishable criteria stemming from the directives, the resulting 'international insurance law' was less than satisfactory.[261]

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[255] M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at p 99).

[256] See e.g. M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at p 97).

[257] E.g. in Art 7 para 2 of Directive 88/357/EEC.

[258] See with references M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at p 96); *Mandatory rules* are – of course – always a restriction of freedom to provide services, see e.g. A.K. Schnyder, Versicherungsverträge, in: Ch. Reithmann and D Martiny, para 1132.

[259] See e.g. N. Wördemann, International zwingende Normen im internationalen Privatrecht des europäischen Versicherungsvertragsrechts, at p 300 et seq; for the meaning and importance of Art 28 of Directive 92/49/EEC in particular see W.H. Roth, in: Aspekte des internationalen Versicherungsvertragsrechts im EWR, p 1-41.

[260] The same result in another context W.-H. Roth, RabelsZ 51 (1999), 623-673.

[261] For harsh critique see M. Wandt, in: Versicherungsrecht in Europa, p 85-103 (at p 85); also J. Basedow, NJW 1991, p 785-795 (at p 794).

Nonetheless, the Austrian implementation is considered to be among the more reasonable ones,[262] although still it could not smoothen the complexity and uncertainty inherent to the directive provisions. It remains to be seen whether the recently published Commission Interpretation, which includes a chapter on the *general good* in the context of private international law, will bring more clarity.[263]

The main point of criticism, however, is that the private international law approach succeeded only in establishing the legal framework for an insurance single market in the field of large risks by allowing a free choice of law only in that respect. Otherwise the law of the state where the policyholder has his/her habitual residence is the determining factor and largely responsible for the still existing partitioning of the insurance market along national borders.

c) Insurance Contract Law

It has also already been mentioned in the previous sections that substantive contract law has hardly been touched by the insurance directives. The few relevant provisions were only briefly mentioned when describing the respective directives. They mainly concern the insurer's *duties of disclosure*.

The only other provision influencing substantial insurance law stems from Directive 90/619/EEC; namely Art 15 para 1 as amended by Art 30 of Directive 92/96/EEC, which states that the policyholder of a life insurance contract must have the right to cancel the contract without having to give particular reasons within a period of between 14-30 days after having been informed that the contract was concluded (*cooling off period*).[264]

Duties of Disclosure, which probably stem from the UK example – in particular after the enforcement of the Financial Services Act 1986 –,[265] on the other hand, can be found both in the field of life insurance as well as in the field of non-life insurance. In conformity with the 'philosophy' of the EC legislation in consumer protection they provide for appropriate information of the policyholder, although it is frequently criticised that a distinction is drawn between life and non-life insurance.[266]

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[262] In form of the *Bundesgesetz über internationales Versicherungsvertragsrecht für den Europäischen Wirtschaftsraum* (Federal Law on International Insurance Contracts for the European Economic Area), BGBl 1993/89 as last amended by BGBl 1994/508; see B. Rudisch, ZEuP 1995, p 45-59 (at p 58); J. Basedow, in: Aspekte des internationalen Versicherungsvertragsrecht im EWR, p 89-100.

[263] Cited *supra* note 227.

[264] This provision was implemented by Art 165a of the Austrian VersVG; see for the changes A. Fenyves, F. Kronsteiner and M. Schauer, VersVG-Novellen, p 227.

[265] H. Müller, Verbraucherschutz im Versicherungswesen durch Information der Versicherten, p 24.

[266] Criticised by P. Präve, VW 1999, p 1511-1517 (at p 1512), where he outlines that the 'mistake' is repeated in regard to the planned directive concerning the distance marketing of consumer financial services.

In regard to non-life insurance contracts the relevant information to be given concerns only the pre-contractual relationship and merely consists of the duty to state where the insurer's head office or branch is situated, the applicable law and details about possible complaints.[267] Moreover, the duty only exists towards natural persons.[268]

The *duties of disclosure* foreseen in the Third Life-Insurance Directive, on the other hand, are more sophisticated. Next to the information just mentioned for non-life insurance contracts, other details about the insurance undertakings and the commitment have to be provided, like e.g. a definition of each benefit, the term of the contract, means of terminating it, means of payment, calculation and distribution of bonuses, information about the underlying assets and so on, some of them also to be given during the term of the contract.[269]

Although Directive 92/96/EEC does not explicitly do so, it is argued in conformity with the foregoing that the applicability of the insurer's obligation is also restricted towards natural persons.[270] This concept was adhered to by the German legislator when implementing the directive provisions for life and non-life insurance together in Art 10a German VAG.[271] The Austrian legislator, however, does not agree with this opinion and states in Art 9a of the Austrian VAG that *except in life insurance* certain duties exist only towards natural persons.[272]

The definition of a natural person in the insurance directives does not coincide with the definition of the consumer in the relevant EC consumer protection directives, however, as the latter normally focus on a '... *natural person* who ... is acting for purposes which are outside his/her trade, business or profession'[273].[274]

All in all, the duties of disclosure foreseen in the insurance directives are problematic in three ways. First of all they are not comprehensive, particularly as far as non-life insurance is concerned. Secondly, the Third Life Insurance Directive is interpreted differently by the Member States as to whether only natural persons or all policyholders have to be informed. And thirdly, and for the topic at issue probably of most concern, the information given can be hard to

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[267] Art 31 para 1 and 43 para 2 of Directive 92/49/EEC; in Austria implemented by Art 9 VAG and Art 5b VersVG, the provisions go further than required by the directive.

[268] Art 31 para 2 of Directive 92/49/EEC.

[269] Annex II of Directive 92/96/EEC; for a detailed description see also St. Osing, Informationspflichten des Versicherers und Abschluß des Versicherungsvertrages, p 38 et seq; for Austria see Art 5b VersVG and Arts 9a and 18b VAG, again they go further.

[270] St. Osing, Informationspflichten des Versicherers und Abschluß des Versicherungsvertrages, p 36 et seq.

[271] See R. Schmid, in: Prölss, Versicherungsaufsichtsgesetz, Art 10a VAG, para 10.

[272] Cited *supra* note 40.

[273] E.g. Art 2 (b) of Council Directive 93/13/EC of April 1993 on unfair terms in consumer contracts.

[274] See the next section.

'digest', as insurance products and consequently the information about them are technically very complex. Duties of disclosure therefore do not 'equalise' the fact that future policyholders need to have a great deal of confidence in the insurance undertaking before concluding a contract.[275]

d) EC Consumer Directives with Relevance for the Insurance Sector

In the last few years a considerable development has taken place in the field of EC consumer protection. According to what has been said before about the changing role of the consumer in the single market as an active economic player, the directives enacted tried to establish a state of law in which the consumer can move confidently and enjoy the free choice of products offered on the European market, mostly by trying to remedy existing information deficits;[276] It has just been pointed out that this concept was also adhered to in the insurance directives.

A great many of the EC consumer directives, however, are not applicable to the insurance industry. This is particularly crucial in so far as they harmonise contract law aside from what has been achieved in the insurance directives themselves.

This is the case regarding doorstep selling, for example. Art 1 para 2 (d) Directive 85/577/EEC[277] explicitly excludes insurance contracts from its scope, and the planned directive with special provisions in relation to doorstep insurance contracts could never be enacted.[278] Together with a complete lack of a right to withdraw from non-life insurance contracts all together,[279] this forms a great deficit in protection.[280]

Insurance Contracts are also not covered by the Distance Selling Directive.[281] The Commission Interpretative Communication on Freedom to Provide Services and the General Good notes that the insurance sector has – by now – been left completely untouched especially by the development that is currently taking

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[275] See for the requirement of confidence J. Kuscher, Kooperation in der europäischen Versicherungswirtschaft, p 6.

[276] See *supra* II.4. and P. Cartwright, Consumer Protection in Financial Services, p 10.

[277] Council Directive 85/77/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJ 1985 No L 372/31.

[278] See H. Müller, Versicherungsbinnenmarkt, p 104.

[279] See *supra* IV.1.c.(3).

[280] P. Cartwright, Consumer Protection in Financial Services, p 38 et seq; Commission Communication Priorities for Consumer Policy 1996-1998, COM (95) 519 final; see the Austrian implementation, though, in section IV.1.d.

[281] Directive 97/7/EC of the European Parliament and of the Council on the protection of consumers in respect of distance contracts, OJ 1997 No L 144/19; see Art 3 para 1 and Annex II thereof.

place in the field of electronic commerce.[282] According to what is reported from the Austrian and German market this is not entirely true as different insurance undertakings there seem to have started offering their services via Internet.[283] A special legal framework, however, is still lacking. The proposed directive concerning the distance marketing of consumer financial services shall tackle this task providing, for example, for special rights of cancellation and detailed duties of disclosure.[284]

There was also disagreement as to whether the Unfair Terms Directive[285] was applicable to the terms of an insurance contract.[286] It is now recognised that they are included, although – as a result of Art 4 para 2 – the price of insurance and the description of insurance coverage as such is only to be checked against the required standard of fairness if the terms are not transparent.[287] Besides that 'contractual terms which reflect mandatory statutory or regulatory provisions and the provisions or principles of international conventions to which the Member States or the Community are party ...' are also not subject to revision under the directive.[288]

As a result of the Unfair Terms Directive, there exists – at least for cases which involve a consumer[289] – a European wide standard of ex post control of policy conditions. Of course, as has been pointed out, the Unfair Terms Directive provides only for sporadic, and not systematic and comprehensive, control. Thus it could not equalise the still existing need to mark out the limits to terms in relation to fairness and transparency in substantive insurance law.[290]

Before going to the next section another problem should be addressed in more detail, i.e. the fact that all the consumer directives in force only provide for a minimum standard of protection.[291] The Member States may maintain and/or adopt measures that are more favourable for the consumer with the result that – if they make use of this provision – the legal situations still differ and every

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282 Cited *supra* note 227, p 2 with reference to the Commission's Financial Services Action Plan of 11 May 1999 (COM (1999) 232).

283 For Austria reported by a special e-commerce initiative, http://www.e-comm.at/; for Germany see ZVerWes 2000, p 271 et seq.

284 COM (1998) 468 final, amended proposal COM (1999) 385 final.

285 Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ 1993 No L 95/29.

286 H. Heiss, ZEuP 1996, p 625-647 (at p 637); N. Reich, ZEuP 1994, p 381-407 (at p 396); O. Remien, ZEuP 1994, p 34-66 (at p 42); W.-H. Roth, ZEuP 1994, p 5-33 (at p 32 et seq).

287 Th. Langheid, NVersZ 2000, p 68-68 (at p 64 et seq); J. Basedow, VersR 1999, p 1045-1055 (at p 1048); for a detailed description also W. Römer, NVersZ 1999, p 97-104 (esp p 99 et seq).

288 See Art 1 para 2 thereof; for a closer analysis see P. Präve, VW 2000, p 450-457 (at p 451).

289 See for the definition *supra* c.

290 H.E. Brandner, in: J. Basedow, E. Schwark and H.-P. Schwintowski, Informations-pflichten ..., p 66-73 (at p 73).

291 Art 8 of Directive 85/577/EEC and Art 8 of Directive 93/13/EC; not so the amended proposal for a directive concerning the distance marketing of consumer financial services.

supplier is still confronted with – in the worst case – fifteen different laws. Nonetheless, minimum harmonisation makes sense if it is explained from the demand side. Consumers are indeed protected enough as they can at least rely on a certain standard of protection. The legal uncertainty that remains concerns only the question of how much higher the standard is, and is as such tolerable.[292]

Nonetheless, there are doubts, as to whether a minimum harmonisation model works in practice. Albeit true that it gives the Member States the necessary flexibility to implement the directives' provisions into their sometimes very sophisticated consumer protection regimes, it should be mentioned that the model has disadvantages. The philosophy that consumer protection rules should be clear, simple and therefore widely understandable is certainly not adhered to if the Member States are given such freedom of implementation. Even the ECJ's jurisdiction to interpret the directives' provisions does not have the expected effect of bringing the laws of the Member States together.[293] The Unfair Terms Directive may serve as an example. Although the directive provisions had to be implemented by the 31 December 1994, the first interpretative judgement was pronounced only in June 2000, i.e. five and a half years later.[294]

The foregoing might serve as an explanation why the latest legislative proposal, the amended proposal for a European Parliament and Council Directive concerning the distance marketing of consumer financial services and amending Directives 97/7/EC and 98/27/EC,[295] has given up that concept and does not allow stricter national regulation.[296] Another explanation might be more suitable, though. The reasons for minimum harmonisation presented before, namely to favour the demand side, are not convincing in regard to financial services. The products there are too complex and also very much dependent on the respective national law which is applicable; as long as national deviations are possible, the comparability of the products offered in different Member States is not guaranteed.[297]

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[292] H. Heiss ZEuP 1996, p 625-647 (at p 642).

[293] St. Weatherill, EC Consumer law and Policy, p 86 et seq, in the context of the Unfair Terms Directive.

[294] Combined Cases C-240-244/98, judgement of 27 June 2000.

[295] COM (1999) 385 final amending COM (1998) 468 final.

[296] Recital 9: 'Whereas, given the high level of consumer protection guaranteed by this Directive, with a view to ensuring the free movement of financial services, Member States may not adopt provisions other than those laid down in this Directive in the fields harmonised by this Directive'; critical P. Präve, VW 1999, p 1410-1414 (at p 1410) for whom this means a higher evaluation of supplier than of consumer interests; he uses Art 4 para 1 sentence 2 as a further example to underpin that view.

[297] See for a closer analysis Chapter Two II.5.

4. National Law

National law comes into play in two respects. Firstly, there simply exist fields of law which – up to now – have not been subject to harmonisation measures at all – the outstanding example for a non-harmonised feature being insurance contract law. As has already been shown, the insurance directives touch upon this issue only in a pointillist's style.

Secondly, some directive provisions only define minimum standards and allow national law to go further, i.e. keep and/or introduce stricter rules.[298]

Hence some national legislators took the fragmentary directive provisions as regulatory examples both for legislative style and substance and took the scope of the directives further than they needed to. The aforementioned Austrian implementation of the duties of disclosure illustrates that: Art 9a VAG obliges the provider of non-life insurance services to give more detailed information than what is required in the corresponding European directive. Moreover, Art 5b of the Austrian VersVG not only repeats the disclosure duties but also concedes to the policyholder a right to cancel the contract within two weeks if the necessary information is not provided before the conclusion of the contract.[299] As this right also exists in regard to non-life insurance contracts, the scope of policyholder protection experienced a real extension.[300]

That national differences are largely responsible for integration problems has already been pointed out.

5. Legal Rules Concerning Unfair Terms

Although this topic was touched upon when talking about EC secondary legislation, the body of legal rules concerning unfair terms needs to be discussed in a separate section.

As a result of the abolition of the compulsory prior approval of policy terms the issue at stake became increasingly important. This position can also be upheld against the increased duties of disclosure and against the fact that policy terms are normally made by the national associations of insurers and applied in a uniform way.[301]

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[298] See e.g. recital 9 of the preamble of Directive 92/96; the advantages and disadvantages of such an approach have already been discussed in the previous section.

[299] See A. Fenyves, in: A. Fenyves, F. Kronsteiner and M. Schauer, VersVG-Novellen, Art 5b, para 4.

[300] Recently, however, the Austrian Supreme Court (Oberster Gerichtshof, OGH) interpreted this provision very restrictively (Case 7 Ob 175/99g, judgement of 14 July 1999), see. E. Grassl-Palten, RdW 2000, p 72-75.

[301] See e.g. H.E. Brandner, in: J. Basedow, E. Schwark and H.-P. Schwintowski, Informationspflichten ..., p 67-73 (at 69).

Not only was the ex ante control abolished in favour of an ex post control, also the actor of control changed. What was in the hands of the public supervisory authority became subject to the review of national courts in – mostly – civil procedures.

In the case of Austria it has to be added that there is a 'left over competence' of the supervisory authority in two respects: If the insurer uses standard conditions in which so much cover is guaranteed that the undertaking's solvability is put in jeopardy, the authority can prohibit the use of these terms and provide for a cancellation of insurance contracts prior to their expiry date.[302] Besides that, the authority can step in and intervene in the running of contracts if they are subject to policy terms or tariffs which are a threat to the insured and the insured himself cannot cancel the contract immediately.[303] As both of these means are rights of ex post control they are in conformity with the insurance directives.[304]

The Unfair Terms Directive, finally, only applies if a consumer is involved. In Austria it was implemented in Art 6 of the Consumer Protection Code (KSchG).[305] Other policies are to be checked according to the general rules, which are – in Austria – Art 864a, Art 879 and Art 915 of the Austrian Civil Code (ABGB).[306] The first provision mentioned is irrelevant for present purposes in that it concerns the question whether a term becomes part of a contract. Art 915 sentence two is a general provision applying to all contracts and stipulates that the responsibility for an unclear term rests with the party who makes use of it and therefore – despite being a provision for the interpretation of a contract – comes close to the directive's transparency provision (Art 5 Directive 93/13/EEC)[307].[308] Needless to say, general law is also applicable to consumer contracts if there are no special rules.

Consequently, in Austria the standard of protection for policyholders in general is similar in substance. However, the fact that it is scattered over various laws and stems from both European and merely national sources is problematic for the application and interpretation of the rules.

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302 See Art 104 para 1 VAG (cited *supra* note 40).

303 See Art 106 para 3 VAG (cited *supra* note 40): by means of a 'Verordnung' which is a generally binding 'statute' issued by an administrative body – in this case the supervisory authority.

304 See A. Fenyves and St. Korinek, ZfV 1999, p 158-187 (at p 182 et seq); cf also Art 81 of the German VAG; a parallel can be drawn to the US *insurance commissioners* with the exclusive right to interfere in case they discover *unfair and discriminatory practices* (found in R. Schaer, in: Versicherungsrecht in Europa, p 31-58 (at p 40)).

305 BGBl 1979/140 as last amended by BGBl I 1999/185.

306 Allgemeines bürgerliches Gesetzbuch JGS 1811 No 946 as last amended by BGBl I 2000/135.

307 Art 5 Directive 93/13/EEC and Art 6 para 3 KSchG, respectively. Art 5 Directive 93/13/EEC calls this 'plain, intelligible language' and applies when all terms are in writing, Art 6 KSchG applies when a standardised contract is concerned.

308 An example from Austrian jurisdiction: Austrian Supreme Court (OGH), Case 7 Ob 1/95 judgement of 14 June 1995, ÖJZ 1995/175 (EvBl); HG Wien case 1 R 815/96s judgement of 30 September 1997, KRES 3/99.

As a last point it should be mentioned that when talking about the fairness of standard policy conditions the criteria mentioned in Commission Regulation 3932/92 which provides for a block exemption of standard policy conditions from the application of EC competition law, seem suitable for a substantial control thereof.[309] Unfortunately they only form part of the Commission's admission procedure and are of no use for judicial control.

6. Below National Law

What has probably become clear when reading the previous sections, i.e. that the terms of an insurance contract are normally not individually negotiated (with an exception, perhaps, of the price of the policy), but are instead concluded according to certain standardised contracts, shall here be discussed in more detail. Thereby it is to be noted that the use of standardised contracts is particularly widespread as far as mass risks (as opposed to large risks) are concerned, for any deviation would cost too much money in relation to the premium income.[310]

Standard insurance conditions and standard policy terms are normally drafted by the respective national association of insurance undertakings which then recommends their use to their fellow insurers. In Austria these standard terms are issued by the VVÖ, the Association of Austrian Insurers, from whose web-page forty-three different standardised contracts can be downloaded.[311]

As a result there is a wide use of standardised contracts (i.e. the terms recommended are not adopted one to one, but an orientation help for every single undertaking[312])[313] which, on the one hand, improves the comparability and transparency of different insurance offers, as it helps the policyholder to recognise a 'normal' contract and to identify possibly unfair terms in the policies offered to him. On the other hand, of course, the use of standard policy terms stands for a reduction of competition.[314]

In Austria as long as formal authorisation was required the standard policy terms were interpreted as 'laws' whereas now the interpretation of contracts is the

[309] For a closer examination of this block exemption see *infra* IV.7.

[310] U. Fahr, Entwicklung von Versicherungsprodukten unter neuen verbraucherrechtlichen Vorzeichen, unpublished speech, Karlsruhe 2000.

[311] Http://www.vvo.at/nav/frmset_muster.htm; in Germany the model insurance conditions are issued by the Gesamtverband der Deutschen Versicherungswirtschaft e.V., see P. Präve, ZVersWes 2000, p 549-555 (at p 552 et seq).

[312] According to the e-mail service of the Austrian VVÖ; see the partly deviating view of the ECOSOC (Opinion on the Commission report on the application of Art 81 para 3 in the field of insurance (cited *infra* note 337), OJ 2000 No C 51/105, point 3.2.2.

[313] They are even published in the respective insurance law textbooks, e.g. in W. Doralt, Kodex Versicherungsrecht.

[314] P. Präve, ZVersWes 2000, p 849-855 (at p 552).

determining factor.[315] The standard lies with a 'normal policyholder with average diligence and intelligence'; the insurer is thereby responsible for unclear terms.[316] At this point it is interesting to remark in a side note that in reality these recommended terms do not deviate much from the terms that were previously approved by the authorities, apparently so as to maintain the continuity of the contracts in the policyholders' interest.[317]

The main complaint brought forward against standardised insurance contracts is their complexity and lack of transparency; exploiting the progresses made by linguists in exploring the understandability of texts in respect of their linguistic style and contents has even been suggested.[318] Apparently, also the industry side would welcome such a development. The German national association of insurers, for example, [319] has drafted sample elements of standard insurance conditions in an attempt to simplify the language, although not very successfully according to academic review.[320] Another example of the simplification of insurance standard terms derives from the United States, where the state of Massachusetts made the so-called *Flesch*-test the basis for valid insurance policies mainly looking at the length of words and sentences.[321]

Something that should be repeated when talking about lack of transparency is that the nature of the product insurance coverage is in itself problematic. Especially life insurance contracts are by definition particularly complex due to the fact that their characteristic features stem mostly from actuarial theory. The insurance undertakings' duty to keep their policies understandable must therefore not be over-stretched. Also in terms of the length of a contract it must be noted that short and pregnant terms are, of course, clearer but should not be at the expense of completeness.[322]

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[315] W. Völkl, AnwBl 1995, p 166-180 (at p 166).

[316] OGH Case 7 Ob 40/94 judgement 28 June 1995, VersE 1633.

[317] According to the e-mail service of the Austrian VVÖ; K. Hohlfeld, VW 1998, p 680-682 (at p 680).

[318] H.-P. Schwintowski, NVersZ 1998, p 97-102.

[319] The 'Gesamtverband der Deutschen Versicherungswirtschaft e.V.'; see their web-page http://www.gdv.de/; also P. Präve, ZVersWes 2000, p 549-555 (at p 549) mentions efforts on the part of the insurance industry.

[320] See the report in ZVersWes 2000, 173 et seq; critically J. Basedow, VersR 1999, p 1045-1055 (at p 1052).

[321] Text in J. Basedow, VersR 1999, p 1045-1055 (at p 1054 et seq).

[322] P. Präve, ZVersWes 2000, p 549-555 (at p); with advise for the insurers U. Fahr, Entwicklung von Versicherungsprodukten unter neuen verbraucherrechtlichen Vorzeichen, unpublished speech, Karlsruhe 2000; see also A. Bittl, ZVersWes 2000, p 174-183: 'Communication is not everything but without communication everything is nothing', last sentence of his analysis of the transparency requirement in modern insurance industry.

7. Competition Law

As the standard insurance conditions, which were subject of discussion in the previous section, stem from an agreement of an *association of undertakings*, it is undeniable that EC competition law also comes into play.

Art 81 of the Treaty establishing the European Community prohibits certain types of behaviour that have anti-competitive purposes or effects (para 1) and makes arrangements involving such behaviour automatically void (para 2).[323] However, certain of these 'arrangements' can be granted exemption under Art 81 para 3, if they are proportionate and contribute 'to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit'.

Competition policy has always been one of the most important subjects of the EC in order to enhance efficiency, i.e. maximising consumer welfare and achieving optimal allocation of resources. It has been subject to continuous reviews, this particularly being the case at the moment in relation to vertical restraints which can be left aside, though, in regard to the topic at issue.[324] But also Art 81 para 3 could itself soon experience a reform from a system of exemptions to a *directly applicable exception system*.[325] The proposed change, a subject of much controversy in the literature, shall not be presented further, though.[326] It suffices to state that the Commission plans to further enforce the competition rules rigorously and also to review the treatment of horizontal agreements.[327]

As far as the insurance industry is concerned 'cartels' have a long history. It took longer there than in any other industry sector to even accept that the Treaty's competition rules applied. The resistance lay, understandably, mainly within those countries which favoured a protective insurance law, partly from the industry which preferred to be sheltered from possibly stronger rivals, partly from the governments which were fond of such models for political reasons.[328]

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[323] For EC Competition Law in general see P. Craig and G. de Búrca, EU Law, p 891-1025; for the field of insurance in particular see R. Greaves, EC Competition Law: Banking and Insurance Services (1992); A. Fitzsimmons, Insurance Competition Law (1994).

[324] See Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices (Text with EEA relevance), OJ L 336/21; and the 'Guidelines' thereto (http://europa.eu.int/-comm/competition/antitrust/legislation/vertical_restraints/guidelines_en.pdf).

[325] White paper on the Modernisation of the Rules implementing Art 85 and 96 of the EC Treaty, OJ 1999 No C 132/1.

[326] See e.g. with further references A. Deringer, EuZW 2000, p 5-11.

[327] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, COM (2000) 155 final, p 9.

[328] See the description of the different regulatory interests in section II.3; A. Fitzsimmons, Insurance Competition Law, p 2; J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 17).

Finally, in 1987 in the *German Fire Insurance Case*, the ECJ ruled – once again –on the issue clearly stating that the insurance industry was not exempted from the EC competition rules.[329] Despite that, pressure from the industry was strong and resulted in a Council Regulation which empowered the Commission to free the insurers from an exhaustive application of competition policy in regard to certain categories of concerted behaviour.[330]

The corresponding Commission regulation was enacted in 1992 providing for a block exemption for agreements, decisions by associations of undertakings[331] and concerted practices in the insurance sector in the following cases: (a) the establishment of common risk-premium tariffs based on collectively ascertained statistics or on the number of claims; (b) the establishment of standard policy conditions; (c) the common coverage of certain types of risks; and (d) the establishment of common rules on the testing and acceptance of security devices.[332] As no further notification of the agreements was required Regulation 3932/92 also laid down detailed conditions which had to be fulfilled before the exemption could apply.[333]

As far as the compilation of statistics was concerned 'collusive' behaviour was thought to have positive effects, for example, in regard to the calculation of risks; however, the exemption only applied as far as such tasks were effectively fulfilled.[334] The aforementioned standard policy conditions were exempted as far as they served to improve the comparability of products. Moreover, the Commission expressed its hope that those standard terms would contribute to the concept of guaranteeing a high technical standard of insurance products within the European Market.[335] A real standardisation of the respective products should be avoided, though. This was one of the reasons why standard terms could only be drafted as 'recommendations' without having any binding effect.[336] Besides that the regulation laid down an extensive list of 'forbidden' clauses, which – as part of a catalogue of standard policy conditions – were

[329] Case C 45/85, Verband der Sachversicherer e.V. v Commission of the European Communities [1987] ECR 405; before that Case C 90/76, Srl Ufficio Henry van Ameyde v Erl Ufficio Centrale Italiano di Assistenza Assicurativa automobilisti in circolazione internazionale [1977] ECR, 1091 para 18 and 22.

[330] M. Everson, in: Regulating Europe, p 202-228 (at p 216 et seq); see Council Regulation No 1534/91 of 31 May 1991, OJ 1991 No L 143/1 and especially Art 1 para 1 (a-f) thereof; even before that the insurance undertakings and associations of insurance undertakings, respectively, had notified numerous agreements for exemption under Art 81 (at that time Art 85) para 3 EC; see ECOSOC opinion, OJ 2000 No C 51/105 point 2.3.

[331] Whereby decision is meant in a very broad sense, also covering recommendations (A. Fitzsimmons, Insurance Competition Law, p 17).

[332] Art 1 of Regulation No 3932/92 of 21 December 1992, OJ 1992 No L 398/7.

[333] E.g. for standard policy conditions in Title III.

[334] Recital 6 of the Preamble of Regulation 3932/92.

[335] See Recitals 7 and 15 et seq of Regulation 3932/92 with references to the corresponding Council and Commission documents (OJ 1985 C 136/1, OJ 1989 C 267/3, OJ 1990 C 10/1).

[336] Recital 7 of the Preamble of Regulation 3932/92; A. Fitzsimmons, Insurance Competition Law, p 61.

automatically not covered by the exemption.[337] It has already been discussed that these 'tasks' are in fact not appropriately met by the standard policy terms in use. However, no complaints from Commission side have been reported.

Next to Arts 81 et seq EC national cartel law stays applicable. To briefly discuss the relevant Austrian provisions, it should be stated that as long as standard insurance conditions were to be formally authorised they were exempted from approval under the Austrian *Kartellgesetz*.[338] Now the 'recommendations' of associations of insurers fall within Arts 31-33 of the aforementioned statute and have to be notified with the *Kartellgericht*.[339] If a 'cartel' falls within the scope of an EC block exemption, however, national prohibitions are not valid anyway.[340]

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[337] Arts 7 et seq of Regulation 3932/92; for a closer examination A. Fitzsimmons, Insurance Competition law, at p 75 ff. The Commission intends to review this system, see Report to the European Parliament and to the Council on the operation of Commission Regulation (EEC) No 3932/92 concerning the application of Article 81 (ex-Article 85), paragraph 3, of the Treaty to certain categories of agreements, decisions and concerted practices in the field of insurance, COM (1999) 192 final.

[338] KartG 1988, BGBl 1988/600 as last amended by BGBl I 1999/126 (Art 5 para 2).

[339] The Vienna Court of Appeals; see for Austrian cartel law in general H. Fitz and H. Gamerith, Wettbewerbsrecht; see also Art 12 KartG.

[340] H.-G. Koppensteiner, Österreichisches und europäisches Wettbewerbsrecht, p 350 (§ 17 para 50); for the relation of EC competition law and Arts 31-33 KartG see Vienna Court of Appeals (OLG Wien) Case 25 Kt 276/96, WBl 1996, p 461-462.

Chapter Two: The European Insurance Market in Reality

I. The Problem at Stake

Looking quickly at Chapter One one can distinguish four 'actors' which determine the European Insurance Market: the industry, the policyholders, the national governments and *last but not least* the European legislator.

The latter two form a pair, the penultimate one being the determining factor for what the very last one can achieve. Obviously European legislation has been in a deadlock for a while. The following analysis will therefore look at the industry's and policyholders' viewpoints asking the questions of what is possible for them according to the present state of law.

The literature agrees on the fact that the insurance directives and what has been enacted around them largely failed in establishing a common market in the mass and life insurance sector. Therefore these fields will mostly be addressed.

It should be kept in mind, however, that the life insurance sector is a special case as far as its function as a form of alternative saving is concerned, which – for obvious reasons – cannot be equated with life assurance in the classical sense. To simplify matters in the following – especially from a linguistic point of view – the results will in general be presented for mass insurance contracts; some peculiarities for life assurance will also briefly be addressed.

II. The Industry's Viewpoint

1. General Remarks

The following section will deal with the insurance industry's viewpoint of how much integration is possible according to the present state of law and how profitable it is at the moment to do cross border business.

To thereby look at the possible interest of insurers in increasing their cross border activities in the mass market it would be interesting to know to what percentage the total premium income is made up of premiums from mass insurance contracts. Unfortunately such statistics were not available.[341] For the following analysis, however, it can be assumed that the percentage is high enough so that enhancing the direct sale into other Member States would mean an increase in total business volume.[342]

2. Freedom of Establishment v Passive Freedom to Provide Services

Various EC documents report that according to the present state of law the insurance undertakings still prefer to go and open branches in other Member States rather than offer their products cross-borderly via freedom to provide services.[343] Apparently this statement is not entirely true for smaller Member States; in countries such as Belgium, Ireland and Luxembourg[344] freedom to provide services is of greater importance. In the German market, on the other hand, which is next to the UK and France one of the largest insurance markets in Europe, the premiums raised under freedom to provide services in the non-life insurance sector only come to 0.13% of the total premium income.[345]

3. Types of Contract

At this point I dare assume that the percentage of premium income via freedom to provide services mentioned above is made of large risks rather than mass

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[341] According to Dr. G. Kozak of the VVÖ information service; the information required from the British ABI has not arrived by the time of submission of the present thesis; the percentage of premiums for life assurance, on the other hand, is accounted for separately.

[342] Cf F. Wagner, VW 1998, p 811-819 (at p 812).

[343] According to Eurostat Press Release No 6198 of 10 August 1998.

[344] Unfortunately no figures in premium income were available for the Austrian market, but according to the VVÖ 10 of the 87 members are foreign insurers offering via freedom to provide services (source: http://www.vvo.at/nav/frmset_engl.htm).

[345] J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 17).

risks. Indeed, most known international contracts are only suitable for covering large risks.

So-called *umbrella contracts*, for example, are 'insurance programmes' for covering large risks, which are situated in and therefore governed by different jurisdictions. Normally there exists one framework contract with the desired standard; to cover the respective risks in the different states special policies are issued, in each case governed by the regional legal regime, which are then lifted up to the umbrella conditions by e.g. lowering the premium or granting special conditions. Despite all that the applicable law is different for every single policy.[346] Systems like the one presented were in use even before the European integration process started. No significant changes have been reported; i.e. the change of the legal framework could not contribute much in practise.[347]

4. Products Sold

On the other hand, a change of the products offered by national insurers in their home country can be observed.[348] Moreover, increasing internationalisation and globalisation, respectively, produced a change from classical insurance to alternative forms of risk transfer, partly for tax reasons,[349] partly for financing considerations.[350]

The new products, however, need to be of a suitable standard so as to be accepted in a foreign market with different socio-economic characteristics.[351] Therefore they need to be more policyholder-oriented than ever before; product information plays an increasingly important role. Other stimulation to buy could come from offering additional and better services such as e.g. additional personal advice throughout the whole term.[352] That's why new products can only be introduced very carefully and only if they are able to satisfy possible

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[346] M. Mächler-Erne, in: Versicherungsrecht in Europa, p 153-167 (162 et seq); in the same article she presents two other popular constructions, i.e. *master*- and *excess contract*s (at p 163 et seq), the former based on a system of agency, the latter a substitute for co-insurance concluding a separate contract ('layer') to increase the amount insured for.

[347] M. Mächler-Erne, in Versicherungsrecht in Europa, p 153-167 (at p 165 et seq).

[348] See T. Köhne, ZVersWiss 1998, p 143-191; cf also a recent report of the Austrian Federal Ministry of Justice on the consumer situation 1999 at p 24: apparently consumers also show more flexibility.

[349] The remaining differences between the national tax laws, which – of course – also form a major obstacle to the single insurance market, shall not be dealt with further.

[350] Cf F. Wagner, ZVersWiss 1997, p 511-552 for covering loss from natural disasters; R. Eisen, ZVersWiss 1997, p 553-567 for new products and product combinations.

[351] Which is extremely difficult in the motor vehicle insurance sector, as reported by Mirjam Blaas on a symposium on tariffs in the motor vehicle insurance in Europe, Louvain, Belgium, 15 June 2000.

[352] T. Köhne, ZVersWiss 1998, p 143-191 (at p 145, 185 et seq) applying several 'illuminating' models developed by economists.

differences in cultural and social understanding. An example is the offer of insurance coverage for 'dread disease' within a life insurance package, a product which sold very well in the UK, and proved to be successful also in the Austrian as opposed to the German market.[353] Similarly the introduction of so-called non-smoker-tariffs in the life and health insurance sector, again following the Anglo-Saxon model, became popular especially in Germany.[354]

5. Selling insurance directly into another Member State: An Evaluation

It is already relatively difficult to introduce new products in the home market, entering another market is associated with even bigger effort. In the case of mass and life insurance contracts in particular it is not only the aforementioned need to make the products 'euro-fit' that has to be met. The social and cultural differences are moreover responsible for possible deviations in risk evaluation and assessment of damage; to cope with such deviations the foreign insurer normally lacks experience.[355] Finally, due to the state of private international law the insurer is in general faced with the application of a different legal system, i.e. an unknown insurance contract law. In the special case of insurance this is particularly relevant as insurance contract law directly *modifies the (legal) product*, i.e. insurance coverage, and does not only constitute mere *selling arrangements* within the meaning of *Keck*.[356]

Despite the existing theoretical prerequisites in form of the *single licence* every insurance undertaking will therefore reflect and calculate well before entering another market. To give the dilemma a name it can be called a problem of *transaction costs* consisting of three variables: (a) the confrontation with a different insurance contract law (which is frequently furthermore accompanied by a jurisdiction in the policyholder's state of residence), (b) the confrontation with a deviating understanding of risk and damage and (c) the costs of informing potential policyholders who come from a different social as well as cultural system in order to create the amount of confidence needed to enter into a contractual relationship such as insurance. The confidence is thereby to be built up in regard to both the product and the future contracting partner. In the same

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[353] Material obtained during a visit of the 'Bayerische Rück', one of the biggest German reinsurance companies with headquarters in Munich; for 'dread disease insurance' as an independent product see P. Präve, ZVersWiss 1998, p 355-367.

[354] Cf K. Hohlfeld, VW 1998, p 680-682 (at p 680) also mentioning new calculation methods.

[355] Cf J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 18).

[356] J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 18) referring to Cases C 267 and 268/91, *Criminal Proceedings against Keck and Mithouard* [1993] ECR I-6069 para 16 et seq.

vein it is argued by Michelle Everson that the insurance undertakings mainly face a problem of advertising.[357]

The outlined reasons can – at least partly – explain the insurance undertakings' preference of exercising freedom of establishment; indeed direct sale could not work without building up a certain infrastructure (i.e. employing lawyers from the respective Member State, forming risk pools, policyholder specific information and so on). The costs of informing future policyholders of life assurance contracts might thereby be smaller as far as insurance is taken out as a means of saving, which is less 'personal'.[358] But still, it is advantageous for the insurers to join the respective national association of insurance undertakings, which provides the expertise the foreign insurers do not automatically have at their disposal.[359] It has already been pointed out that such co-operation also has disadvantages.[360]

6. The European Market – Increased Competition

Competition has increased on the European market, however,[361] with the result that many insurance undertakings fear that they are economically not strong enough to survive, particularly in regard to the transaction costs described under point 5. As a consequence they merge.[362] This explains the odd statistics indicating that the number of undertakings decreases while the premium income increases every year.[363] The insurance industry – having always been an 'oligopolistic' market –[364] becomes even more concentrated.[365]

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[357] Michelle Everson is currently undertaking a project on that issue; title: 'The Establishment of Effective Regulatory Structures for an Integrated European and Globalised Insurance Market. Socially Embedded Market Polities and Private Governance Regimes.'

[358] This might explain K. Hohlfeld's observation that increased competition in the German insurance market is at most noticeable in the field of life assurance, VW 1998, p 680-682 (at p 681); cf also the report of the Austrian Federal Ministry of Justice on the consumer situation 1999, at p 23.

[359] Cf F. Wagner, VW 1998, p 732-740 (at p 736) that also joint ventures can be a solution where a foreign insurer lacks experience.

[360] See *supra* Chapter One IV.7.

[361] See e.g. the report about the consumer situation 1999 which was recently published by the Austrian Federal Ministry of Justice, at p 23.

[362] H. Kern, VW 1999, p 218-220 created the catch word 'merger-mania'. The phenomenon, however, is neither restricted to Europe nor the insurance industry, but also common in Asia and the USA, see. A. Surminski, ZVersWes 2000, p 67-74 (at p 67).

[363] Eurostat News Release No 2 of 11 January 1999 as well as No 101 of 8 October 1999; J. Kuscher, Kooperation in der europäischen Versicherungswirtschaft, p 3 and 25 et seq with an analysis of the reasons and procedures.

[364] In Austria e.g., where 66 insurance companies are established, 82.99% of 1998's total premium income was earned by the 20 largest undertakings (source: http://www.vvo.at/nav/-frmset_engl.htm).

Another unwanted reaction to increased competition is the segmenting of client groups with the result that only so-called ‘good risks’, are insured, while for the rest either no cover is obtainable or policyholders are forced to pay higher premiums. Self dynamic developments such as *red-* and *shore-lining* known from the United States, i.e. the distinction between more or less damage prone areas, are to be increasingly expected.[366]

7. Conclusion

In drawing a conclusion from all these arguments it needs to be said that the still existing partitioning of the market can only be met with further attempts to create a suitable framework for more integration, whether by means of private international law, public or private ‘measures’.[367] The term ‘measures’ is thereby used deliberately as the later analysis will particularly focus on alternative integration methods.

Before that it should be pointed out, however, that notwithstanding the above analysis, the author is left with the impression that from the industry side the main concern lies with the remaining exclusion of all other commercial business when trading in insurance.[368] This allows the conclusion that according to the present state of law the industry’s hope focuses on that ‘chance’ rather than on cross border services. Pressure from the industry side to remove that prohibition therefore determines the scenery.[369]

[365] Eurostat News Release No 101 of 8 October 1999. The results, however, have to be qualified as even the report states exceptions to the general trend. It can be upheld, however, that the results are definitely valid for the Member States with a particularly potential (in terms of size) insurance industry.

[366] R. Schaer, in: Versicherungsrecht in Europa, p 31-58 (at p 39 et seq).

[367] See M. Mächler-Erne, in: Versicherungsrecht in Europa, p 167-153 (at p 167).

[368] See Art 8 para 1 (b) as amended by Art 6 of Directive 92/49/EEC for the non-life insurance sector as well as Art 8 para 1 (b) of Directive 92/96/EEC for the life insurance sector; this does not mean, however, that insurance undertakings cannot hold shares of other commercial companies as part of their assets, see Case C 241/97, *Criminal proceedings against Försäkringsaktiebolaget Skandia (Publ).*

[369] The author obtained this impression in September 1998 when attending a Conference in Basel, Switzerland; see the publication of the conference results: R. Schaer, in: Versicherungsrecht in Europa, p 31-59 (at p 37).

III. The Policyholders' Perspective

1. General remarks

Practically all the reasons for the insurance industry's problems with the lack of integration just outlined also have consequences for the other side, the policyholders, who are the focal point in the following analysis. This is especially unfortunate as insurance nowadays plays an increasingly important role as an essential instrument for redistributing and spreading risks across society in the modern economy.[370]

2. Definition of the Relevant Policyholder

It is first of all necessary to define which policyholders are relevant for the topic at issue.[371] To begin with it can be said that they coincide with the group of policyholders the insurance directives as well as the European Court of Justice consider to be in need of special protection.[372]

As has already been pointed out this does not concern natural or legal persons taking out insurance for large risks.[373] It would be a false conclusion, however, to automatically assume that the 'classical' consumer as within the meaning of most EC directives shall be addressed.[374] For also a baker, despite acting within his/her profession, might need special protection when taking out household insurance for his/her bakery shop.

The distinction drawn between large risks and mass risks in the non-life insurance sector pays tribute to that fact; only policyholders seeking insurance coverage for the latter are considered to be in need of protection. If our baker took out life assurance, on the other hand, s/he would always be regarded in need of protection, also within the meaning of the insurance directives, as s/he would be a natural person who does not act within his/her trade, business or profession. Frequently, however, such contracts are concluded by a firm or company within the framework of an employee retirement arrangement or

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[370] ECOSOC report on 'Consumers in the Insurance Market', OJ 1998 No C 95/72, point 1.3.; the report focuses on those insurance sectors which are relevant for the consumer and leaves others (such as reinsurance) out.

[371] All the statistics and reports available, on the other hand, refrain from defining the relevant 'consumer group' and classifying it, respectively.

[372] ... as well as the Brussels Convention and the following, see again *supra* Chapter One IV.3.d.

[373] ...and co-insurance, respectively, see Chapter One III.3.

[374] See for a definition *supra* Chapter One IV.3.d; cf also N. Reich, in: Systembildung und Systemlücken, p 481-509 (at p 501 et seq).

benefit plan, which would lead to a restriction of the scope of protection in case the EC definition of 'consumers' was applied.

In summary it can be said that the EC legislator foresees special protection for policyholders of mass and life insurance contracts. These are at the same time the cases where a lack of integration is reported.

3. Protection v Active Freedom to Provide Services

a) Private International Law

The insurance directives tried to guarantee a high level of protection of the 'weaker' party in the above sense while guaranteeing a wide and optimal choice of the products offered European wide.[375] The private international law approach chosen to tackle this aim by applying, in general, the law of the state where the policyholder has his/her habitual residence (solely allowing a greater freedom of the choice of law if the respective national law does so) however, failed, and according to empirical experience rather resulted in a non-entering of new markets.

'Not only one potential policyholder was rebuffed when asking a foreign insurer for a contract offer.' Therefore even the active policyholder who is willing to go across the border and try new products, is prevented from doing so, as the insurer is often not willing to confront the application of another legal regime.[376]

Another point of criticism against the private international law approach is that it causes problems for the so-called 'euro-mobile' policyholder, who is prone to change residence within Europe from time to time. According to the insurance directives' private international law rules his change of address also results in a change of the applicable law. Enormous transaction costs arise. Also for the purposes of continuity of contracts it is easy to imagine that s/he would prefer to have the contract ruled by only one legal regime throughout the term.[377]

Both arguments lead to the presumption that applying the law of the policyholder's residence does not lead to appropriate results. Therefore the wish to apply the law of the state where the insurance undertaking has its seat was expressed more than once in the literature. For policyholders' interests, however, this should be accompanied by more harmonisation in the field of insurance contract law.[378]

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[375] In H. Müllers's view the application of the law of the Member State where the consumer has his/her habitual residence is not enough protection, see H. Müller, Versicherungsbinnenmarkt, p 51.

[376] 'Schon macher, der bei einem ausländischen Versicherer um ein Angebot gebeten hat, hat sich einen Korb geholt,' J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 18).

[377] J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 20).

b) Substantive Law

As has already been presented the insurance directives contain some provisions regarding substantive law.[379] These, of course, are only small steps on the way to a European insurance contract law.

The standard of harmonisation guaranteed by the EC consumer directives, on the other hand, is, as has also already been described, only applied with serious restrictions; i.e. so far only the Unfair Terms Directive applies,[380] and then only as far as the policyholder is identical with the European consumer.[381]

c) Results

Without further harmonisation, the existing problems resulting from the application of fifteen different insurance contract laws, can be called one of the major obstacles to the single insurance market from the policyholders' viewpoint. This is confirmed, for example, by the opinion of the Economic and Social Committee on 'Consumers in the Insurance Market', which moreover expresses its concern that there has not taken place either a harmonisation of policy standard conditions or of insurers' practices instead.[382] This state of the law does not contribute to greater transparency of the products offered, especially as far as they are specified by the contract law and standard conditions applied. Needless to say that policyholder confidence is not fostered, either.

4. Other Remaining Obstacles

a) Non-Transparency

The concluding sentences of the last section address two of the main problems policyholders still face in case where they decide to enter a new market, the first one to describe being the lack of transparency.

It should be stated at the very beginning that transparency is a complex issue regarding transparency of products, contract conditions as well as transparency of legal rules.[383]

[378] M. Mächler-Erne and H. Heiss, discussion, in: Versicherungsrecht in Europa, p 170 et seq.

[379] See *supra* Chapter One section IV.3.c.

[380] The directive concerning the distance marketing of consumer financial services has not been enacted yet, see *supra* note 284.

[381] See *supra* Chapter One section IV.3.d.

[382] OJ 1998 No C 95/72, esp No 1.7. thereof.

[383] ... which is, of course, also a topic within national borders.

The three facets thereby mutually influence each other. The non-transparency of products, for example, is, on the one hand, caused by the fact that insurance undertakings from different Member States may offer their products under the same name but with different characteristics.[384] On the other hand, as has already been shown, the 'product to be compared' is made up of legal components, defined by the respective insurance contract law and the contract conditions used.[385]

A major complaint brought forward concerns the latter, as the standard insurance conditions used by the insurance companies in the different Member States still vary considerably and so transparency of the information provided does not exist. This is made even worse by the fact that the pre-contractual information provided is often insufficient.[386] Also from the Austrian insurance market it is reported that policy terms, which are normally hard to read anyway, are often not described well when the contract is concluded. This complaint is also brought forward if/although insurance intermediaries are involved.[387]

b) Lack of Confidence

The lack of transparency mutually influences the next obstacle to a full expansion of the European single insurance market as it hinders the development of greater 'policyholder confidence'.

The current Commissioner of DG XV (Internal Market), Frits Bolkestein, recently expressed the following view:

> 'There cannot be a cross-border market for insurance services until consumers are confident they are adequately protected.'[388]

A great deal of confidence is required from the policyholder in general if s/he enters into a contractual relationship with an insurance undertaking.[389] Even

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[384] ECOSOC report, OJ 1998 No C 95/72 point 2.3.2.4.

[385] Again, motor vehicle insurance is an outstanding example, see *supra* note 351.

[386] See opinion of the Economic and Social Committee on 'Consumers in the insurance market', OJ 1998 No C 95/72 especially points 1.7. and 3.7.1.2 et seq; cf also SEK (96) 2378 of 16 December 1996; COM (96) 520 final; COM (97) 184 final; OJ No C 206/ of 7 July 1997; OJ No C 287/ of 22 September 1997; COM (94) 51 final; COM (96) 51 final; CSE (97) 1 final of 4 June 1994 (strategic aim 3, action 1: reduction of the obstacles to the single market in for services).

[387] Report of the Austrian Federal Ministry of Justice on the consumer situation 1999, at p 27.

[388] In the context of the adoption of a common position in regard to the Commission proposal of a directive on the reorganisation and compulsory winding up of insurance institutions see *supra* note **Error! Bookmark not defined.**. He continues with the statement that the legislative acts which have taken place in that respect 'helps to provide that assurance' (what else would the responsible Commissioner say!).

more confidence is required when product and supplier are unknown. As it seems now, this confidence could not be created yet for cross border contracts although it is becoming increasingly easier to enter a foreign market, in particular, due to the new communication methods; a further facilitation can be expected by the introduction of the Euro.[390] A recent survey undertaken by DG XXIV (Health and Consumer Protection) signalled improvements since 1997 in general consumer confidence. Consumer confidence in financial services ('or their providers'), on the other hand, is still 'limited' and only 'growing'.[391] It can be assumed that this is similar in regard to mass and life insurance contracts in general.

Therefore the main problem seems to be an information deficit which becomes apparent in a lack of confidence to accept and rely on insurance services offered by foreign insurers and ruled by another legal regime, respectively. The insurance directives have started to set up a system of information by introducing duties of disclosure. Such a system, which seems to have worked for other areas (e.g. the harmonised parts of consumer protection law), however, does not seem to be able to achieve the appropriate result in the case of insurance. The question of how difficult it is to handle the information given has already been discussed.[392]

c) Use of Unfair Terms

The previously mentioned opinion of the Economic and Social Committee on consumers in the insurance market also reports that there is still wide use of unfair clauses in insurance contracts.[393] Between 1976 and 1996 240 cases were decided against insurance companies which had caused damage by using fraudulent practices in their contracts. A study of the Consumer Law Centre at Montpellier University, which was presented in July 1995, revealed that a lot of the clauses used in motor vehicle and household insurance were not compatible with Directive 93/13/EEC.[394]

On the other hand it must also be noted that there are other cases which definitely favour the consumer more than they would be obliged to according to the present state of Community law.[395] The legal uncertainty, however, remains.

[389] J. Kuscher, Kooperation in der europäischen Versicherungswirtschaft, p 6; P. Präve, ZVersWes 2000, p 549-555 (at p 549): especially as far as life or health assurance is concerned.

[390] J. Basedow, in: Versicherungsrecht in Europa, p 13-30 (at p 23).

[391] Eurobarometre 52: Consumers and Financial Services, Brussels 26 July 2000, A/5/JR D (2000).

[392] Cf Chapter One IV.3.c; see also M. Martinek, in: Systembildung und Systemlücken, p 511-557 (at p 518 et seq) about the 'regulatatory sense' of information.

[393] Social and Economic Committee, OJ 1998 No C 95/72 1.9. (apparently due to the pressure of reinsurance companies).

[394] Quoted according to the ECOSOC report, OJ 1998 No C 95/72 1.9.2. and 3.7.3.

[395] Social and Economic Committee, OJ 1998 No C 95/72 1.9.1.

5. The Price of the Policy

The EC's plan to enhance efficiency in the insurance market and therefore guarantee a wider choice of products (i.e. insurance coverage) for lower prices was only partly successful. There exist enormous differences across Europe between the premiums charged for similar services.[396] This is mostly connected with a failure to precisely inform the client about the exact level of the premium as well as stating how they relate to the risk insured for. In fact neither is the client normally informed about the possibility of adjusting the amount covered. Moreover, not infrequently the insurer is granted the right to unilaterally increase the premium without giving reasons (such as e.g. inflation rate in long term contracts).[397]

From the Austrian insurance market it is reported that, as far as insurance coverage has become cheaper, this is due to allowing discounts rather than lower premiums. Especially in the field of non-life insurance, where the total premium registered a downward movement, this phenomenon was noticeable.[398]

Hans Dieter Meyer, chairman of the German *BdV* (*Bund der Versicherten*, Association of Policyholders), however, represents the view that the premiums currently asked for are way too high anyway.[399] To his great concern the benefits earned therefrom are used to build up the insurers' capital contributing to even bigger economic and therefore also political power.

6. Concluding Remarks

Summarising the obstacles the policyholders still face it can be said that the following problems determine the scenery: (a) Insurance undertakings are sometimes not willing to sell to foreign policyholders; (b) the applicable law changes for the 'euro-mobile' policyholder; (c) there exists only little comparability of the products offered; (d) there is a lack of proper information; (e) there is wide use of non-transparent and unfair policy conditions; (f) the prices are still too high and.

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[396] Again motor vehicle insurance is the 'object lesson', see *supra* note 351.

[397] According to a BEUC study cited (point 3.7.4.2.).

[398] Report of the Austrian Federal Ministry of Justice on the consumer situation 1999, at p 23; see also E. Weber-Wolf, in: Versicherungsrecht in Europa, at p 222 et seq; to my surprise the report of the Austrian Federal Ministry of Justice on the consumer situation 1999, though looking at the consumers' and not the industry's angle, calls the increased competition in the insurance market 'unhealthy' in regard to the development of cheaper products.

[399] The webpage of this German BdV is worth a visit (http://www.bundderversicherten.de/).

Chapter Three: How Could More Integration Be Achieved?

I. General Observations

Chapter Two reveals a call for action. The following analysis will focus on two possible ways to achieve further integration.

First of all the possibility of further harmonising insurance contract law has to be examined as the lack of a common legal basis there was held to be the main obstacle for the single insurance market.[400] The following analysis will focus on different means to achieve such harmonisation (II).

Secondly, it has been shown that the concept of information normally used to ensure ‘consumer’ protection did not work in regard to insurance. Effective duties of disclosure only exist in the field of life assurance. Moreover, it is argued that even if appropriate information is given the information model lacks efficiency due to the complexity of the ‘product‘. Section III will therefore present possible solutions to perfect the information idea.

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[400] For the advantages and disadvantages of unification or diversity of law in general see W. Kerber and in: Systembildung und Systemlücken, p 67-97.

II. Harmonisation of Insurance Contract Law

1. The State of the Art in EC Secondary Legislation

According to the General Programme for the abolition of restrictions on freedom to provide services[401] the Commission soon began with the preparatory work for a coordination of insurance contract law. The parties to an insurance contract should be free to choose the applicable law without disturbing competition and without losing proper protection by the application of different laws. This was seen to be necessary for mass risks as well as life and health assurance; transport and large risks were not part of the coordination plan. The preparatory work resulted in a proposal for a directive in 1979 providing for a certain harmonisation in regard to insurance policies, pre-contractual duties of disclosure, increase of risks, restitution of premiums, compensation, cancellation of the contract, duties of the policyholder, and so on.[402] The provisions were foreseen to be half mandatory in the Member States i.e. they could not be altered to the disadvantage of the policyholder. Political consensus, however, could not be achieved and the directive was never enacted.[403]

Today, on the other hand, the prospects for a common insurance contract law are seen to be more favourable, and, no less important, to be given preference against further liberalising the relevant private international law by allowing a free choice of the law in general, i.e. also for mass and life insurance contracts.[404] Experts agree, however, that such an undertaking would presuppose new and sound preparatory work on the basis of detailed comparative law studies.[405]

The private initiatives which will be presented later are partly planned to constitute such preparatory work.[406] It will also be shown that such measures may hold up on their own, independent of further action. Other ‘alternative actors’ for achieving harmonisation in insurance contract law are also imaginable.

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[401] OJ 1962 No 2/32.

[402] OJ 1979 No C 190/2; amended by OJ 1980 No C 355/30.

[403] H. Müller, Versicherungsbinnenmarkt, p 37 et seq.

[404] The recent proposal for a Fourth Life Insurance Directive, however, does not move in that direction, cf Chapter One III.7.

[405] Cf F. Reichert-Facilides and J. Basedow, in: Versicherungsrecht in Europa, p 1-11 (at p 9 et seq) and p 13-30 (at p 20 et seq); the topic was recently discussed again in a symposium in Louvain, Belgium, June 16th/17th 2000.

[406] Cf J. Basedow and F. Reichert-Facilides, in: Versicherungsrecht in Europa, p 1-30.

2. A Change of the Actor?

a) Private Initiatives

Soft law and (*the new*) *lex mercatoria* are common expressions in regard to international contracts or business relations. While it is true that the discussion whether one can speak of *law* (in a narrow sense) at all has not been overcome yet,[407] it is undeniable that different kinds of ‘modern‘ law, i.e. rules which are not enacted in the classical sense in that they do not have ultimate binding effect, play an important role in different industry sectors.

Admittedly *lex mercatoria* does not present itself as ‘properly unified law‘; nonetheless it has harmonising effects in practice, as economic players often agree on *lex mercatoria* rules rather than letting their contractual relations be ruled by the national law, which applies according to the respective conflict rules; national mandatory provisions, however, cannot be circumvented that way; they always apply.[408]

Noticing the persuasive effects of *soft law* also the Commission began to think of the possibility of involving ‘alternative approaches’. As far as the business communications sector is concerned, for example, a system involving both Member States as well as EC representatives has been set up to elaborate common features and differences to then find possible solutions for non-integrated issues.[409] But also in regard to insurance law the possibility of elaborating *codes of conducts* has been addressed.[410] Moreover, a ‘dialogue‘ was initiated in order to establish a form of co-operation between representatives of both the industry and the policyholder side with the aim of relying on means of non-legislative instruments.[411]

For the topic at issue two *codes* of *soft law* are of particular interest in terms of a comparison: the UNIDROIT Principles of International Commercial Contracts intended for a world wide application[412] and the Principles of European Contract Law, drafted by the Lando Commission and tailored for European needs.[413]

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[407] See for the discussion e.g. M. J. Bonell, ZfRV 1996, p 152-157.

[408] G.Broggini, ZfRV 1997, p 221-229 (at p 228); R. Schulze, ZfRV 1997, p 183-197 (at p 192); thinking of international arbitration in particular the harmonising effect becomes even more significant; cf E.A. Kramer, ÖBA 1991, p 621-626.

[409] Communication from the Commission to the European Parliament and the Council: Mutual Recognition in the context of the follow-up to the Action Plan for the Single Market, p 10.

[410] Again talking of a dialogue between insurers and consumers, cf ECOSOC report, OJ 1998 No 95/72 point 1.13 et seq.

[411] Initiated as early as 1997 by Mario Monti and Emma Bonino, cf http://europa.eu.int/-comm/consumers/policy/developments/fina_serv/fina_serv_intro_en.html.

[412] UNIDROIT (ed). Principles of International Commercial Contracts (Rome 1994); in the meantime a working group was set up for the preparation of a second enlarged edition of the Principles (http://www.unidroit.org/english/principles/pr-main.htm).

[413] O. Lando and H. Beale, Principles of European Contract Law. Parts I and II concerning e.g. the conclusion of contracts, performance, non-performance and remedies, agency and

Parties who wish their agreements to be governed by one of these principles can do so in a ‘choice of *law* clause’.[414]

Insurance contract law is not part of either of the aforementioned works. Several private initiatives on the topic have in the mean time emerged, though. To point out one example, a project initiated by Fritz Reichert-Facilides at the Department for Private Comparative and Private International Law of the University of Innsbruck, Austria, shall be presented. The aim of the project is to draft a ’model law’ for insurance contracts in Europe. Similar to the Lando approach the goal of this project is not a unification on the basis of ’hard law’. Rather it is designed to produce provisions which, due to their authority and reasoning could influence the national legislator. The Reichert project, however, also allows a comparison with the US American idea of drafting ’Restatements’, a concept which has proved to be very successful. The *American Law Institute*, a non-governmental body, thereby elaborates common principles of private law in the single states by means of comparing the different legal systems and using them as a basis for uniform models of rules, which are well-founded from a scientific point of view and are meant to serve as persuasive authorities for the courts and state legislators.

Although it has been doubted that such a model is transferable to Europe, in particular because of the existence of both civil and common law systems, it is nowadays a realistic approach, in particular after the ‘successes’ of the Lando Commission. Regarding insurance contract law the chances of realising a ’Restatement’ project are seen to be even bigger because, in spite of the national differences, the European insurance contract laws do show a certain degree of homogeneity of structure which is inherent to the nature of this field of law.[415]

The outcome of such a project could assume a role similar to the UNIDROIT or Lando principles. The usefulness as preparatory work for ’real’ harmonisation has already been addressed.[416]

b) Comitology

> ’Comitology marks the transformation of the ’old’ European Economic Communities into a European polity. Committees are an institutional means of creating policy for the European internal market that involves not only a plethora of policy

interpretation; the Commission is currently continuing with a third part involving issues such as assignment, assumption of debt, conditions and so on; for a description of the work see O. Lando, in: Recht und Europa 3, p 41-49 also presenting the practical difficulties of such Commission work and K. Nemeth, discussion p 49-50.

[414] H. Heiss, ZfRV 1995, p 54-61 (at p 56); see for cases of application of the UNIDROIT principles http://www.unidroit.org/english/-principles/caselaw/caselaw-main.htm.

[415] See F. Reichert-Facilides, in: FS Drobnig, p 119-134.

[416] Cf also Ch. Kirchner, in: Systembildung und Systemlücken, p 99-113.

> objectives, regulatory techniques and specific structures of governance, but also a perceptible legitimacy problem.'[417]

Over the years an 'institutional' change could be observed in Europe shifting the topic of European Administrative Law more and more to the centre of attention. New 'institutions' exist in various forms: semi-autonomous agencies, committees and less formal semi-private and private networks. They evolved as a means to achieve effective and efficient solutions mediating between the different Member States' laws and between the realisation of the freedoms while maintaining a high level of protection.[418]

In the context of insurance one committee is known. The IC was set up to be involved in the adoption of measures the Commission is allowed to prescribe independently. This concerns mainly technical adjustments and the authorisation procedure for third country insurers.[419] Due to what has been described in Chapter One III.6.f. the IC fits neatly into the *regulatory committee procedure*.[420]

In regard to the provisions concerned the IC has no influence as to insurance contract law. Neither does it seem likely at the moment that more power will be delegated to the Commission and consequently to the IC. But even if this were the case, a political problem would arise. The IC is composed of Member States representatives (in the form of representatives of the respective insurance supervisory boards) and therefore constitutes a real *policy making committee* as opposed to *scientific* and *interest committees*.[421] This bears the danger that the same political interest conflicts would arise that have, up until now, blocked harmonisation measures in the Council.[422] Other committees might seem more suitable. The *Consumer Committee*, however, which is composed of representatives of national consumer organisations, is different in structure as it was set up by the Commission and has mere advisory functions.[423]

Despite all that it needs to be considered that also committees of any form could constitute possible platforms to work out common standards or proposals. In so far as the catch-phrase *standard setting* is concerned the setting up of 'European standard policy terms' could indeed be considered.

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[417] Ch. Joerges, Bureaucratic Nightmare, Technocratic Regime and the Dream of Good Transnational Governance, in: EU Committees, p 3-17 (at p 3); the legitimacy problem, shall – although it is certainly of great importance – not be addressed in the present thesis.

[418] Ch. Joerges (cited note 417) at p 5 et seq.

[419] See Chapter One III.6.f.

[420] See E. Vos, EU Committees: the Evolution of Unforeseen Institutional Actors in European Product Regulation, in: EU Committees, p 19-47 (at p 25).

[421] E. Vos, in: EU Committees, p 19-47 (at p 22).

[422] See. E. Vos, in: EU Committees, p 19-47 (at p 33) who also makes clear that for some issues an expert decision alone is not sufficient but needs some political discussion.

[423] By decision 2000/323/EC.

c) Independent Agencies

Giandomenico Majone's preference to solve problems with positive integration by establishing independent agencies according to the US example shall be examined as the last option for involving an alternative actor.[424]

It is true that such agencies are a firmly established option in the United States, where a real delegation of power has taken place regarding issues such as competition policy. An agency system, however, requires that the agency's tasks and procedural rules are clearly defined by legislation; moreover, an efficient control mechanism in the form of judicial review is indispensable.

However, experience shows that such systems could not take hold in the European context. In fact, the few agencies that were established did not copy the American example as no real delegation of power took place.[425]

However that may be, what could an agency system do for the insurance industry? The only thinkable variant would be to let the 'European Insurance Agency' serve as some sort of European supervisory authority.[426] Fantasy then allows two modes of action: the agency could 'recommend' the adoption of certain standard policy conditions just like the national insurer associations do. The other option would focus on the control of standard policy terms, giving the agency the power to check the standard policy terms in use, whether this control would be *ex ante* (which would be a step back) or *ex post* (which would replace or accompany the court system) shall be left open at this point.

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[424] Quoted according to Ch. Joerges, in: EU Committees, p 3-17 (at p 8).

[425] Ch. Joerges, in: EU Committees, p 3-17 (at p 8).

[426] It is worth noting in that context that in some Member States a new organisation of the respective insurance supervisory authorities can be observed. In Holland, e.g. the authority was privatised, in Portugal, Luxembourg and Belgium the authorities were given more autonomy, cf J. Knospe, ZVersWes 1999, p 188-189.

III. Proper Information?

1. The 'Informed Policyholder'

The second way of achieving further integration to be examined is the possibility of perfecting the information concept.

The so-called 'well informed *consumer'* has always been regarded an essential element of the principle of mutual recognition of national provisions. The supplier has to provide all the necessary information for the consumer to be able to distinguish the characteristics of a foreign product, in particular as far as it deviates from what is offered in his home country, and therefore to guarantee a free choice.[427] It is argued that positive integration, and with it any institutional considerations, can be abandoned if the information policy measures work.[428]

This policy is partly reflected in the insurance directives. A 'well informed policyholder' does not seem to exist, however.

2. Consumer Associations

> 'Per aiutare i consumatori a districarsi nella giungla delle tariffe, ADICONSUM ha attivato un servizio che permette di scegliere consapevolmente la compagnia assicuratrice più conveniente e di sfruttare al meglio la concorrenza.' [429]

Slogans such as the one from the Italian consumer association ADICONSUM can be found increasingly among the national consumer organisations. Lately even more specialised associations, with the aim of establishing a platform for policyholders in particular, have emerged, e.g. the German BdV[430] and, even more recently, the Austrian HÖKV (Hauptverband österreichischer Kredit- und Versicherungsnehmer), which was only founded in 1999.[431] The former even offers its own insurance products.

The associations just mentioned definitely play an important role in providing more product transparency; nonetheless they mainly act on a national basis and therefore play a limited role in the integration process.

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[427] As soon as Case C 120/78, *Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*) [1979] ECR 649.

[428] Cf. Ch. Joerges, in: EU Committees, p 3-17 (at p 7).

[429] Http://www.adiconsum.it/pubblicazioni/guide/adi13_00.pdf.

[430] See *supra* note 399.

[431] Http://www.hoekv.at/.

European consumer associations, on the other hand, could prove to be more successful.[432] They do not have a particular focus on policyholders, however.[433]

3. A New Insurance Intermediary?

If pure information is insufficient to guarantee free choice the idea of providing the 'consumer' with a professional advisor arises.[434] In regard to the insurance industry professional advise has always played a key role.[435] Community legislation covering insurance broking, on the other hand, is very small.

An early directive, enacted in 1976, only provided for a certain facilitation of the cross border activities of insurance intermediaries.[436] In response to the criticism that the directive did not achieve any harmonisation in regard to professional capability and objectivity of the advice given the Commission issued a recommendation in 1991 emphasising the importance of such criteria.[437] Due to a lack of political will the recommendation was not followed by the Member States, however.[438]

Therefore the Commission was currently working on a revised directive concerning insurance intermediaries. The official proposal was adopted on 25 September 2000.[439] The aim of the new directive is to grant a single passport to insurance intermediaries on the basis of registration and fulfilment of professional requirements in the home Member State. The planned directive would also provide for a harmonisation of professional skills, access (compulsory licensing or registration), the exercise of the profession, the

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[432] Cf, for instance, *CLAB*, the European electronic database for unfair terms in consumer contracts (http://europa.eu.int/clab/).

[433] See for the difference in personal scope *supra* Chapter One IV.3.d.

[434] Cf K. Koban, in: Neue Wege der Zusammenarbeit..., p 67-90 (at p 68 et seq).

[435] See e.g. the report of the Austrian Federal Ministry of Justice on the consumer situation 1999, at p 27; for historical aspects see M. Zinnert, VersR 2000, p 399-407 (at p 399).

[436] Council Directive 77/92/EEC of 13 December 1976, OJ 1977 No L 26/14 regarding insurance agents (who act on behalf and for the account of, or solely on behalf of, one or more insurance undertakings) and independent brokers (whose professional activity consists in particular in bringing together persons seeking insurance and insurance undertakings without being bound in the choice of the latter, with a view to covering risks to be insured, and who carry out work preparatory to the conclusion of policies and assist in the administration and performance of such policies, in particular in the event of claim) as well as ad-hoc intermediaries.

[437] Recommendation 92/48/EEC of 18 December 1991, OJ 1992 No L 19/32.

[438] ECOSOC report, OJ 1998 No 95/72 point 2.1.8. et seq; note the differences in legislation; in Austria, as opposed to Germany e.g., brokers are subject to explicit legislation in form of the *Maklergesetz*, BGBl I 1996/262; see also the review of Directive 77/92 and Recommendation 92/48, launched by DG XV in 1997 cf http://europa.eu.int/-comm/consumers/policy/developments/fina_serv/fina_serv_intro_en.html.

[439] Proposal for a Directive of the European Parliament and of the Council on insurance mediation, COM (2000) 511 final.

relationship to policyholders (information and advice obligations), disclosure of links with service producers (independence, fees,...) as well as indemnity insurance and financial capacity.

How can such a development contribute to a further integration of the insurance market? First of all it needs to be pointed out that the idea presented in the following only regards *independent brokers* as only they can be exploited to find the most appropriated product. An insurance agent who is in a long term contractual relationship with certain insurers, on the other hand, can never guarantee unbiased advice. It is seriously doubted, however, whether really independent brokers exist, as influence might also come from different means of payment and other advantages granted by the different insurance undertakings.

The planned directive tries to guarantee independence through detailed duties of disclosure. In the best case this would lead to real independent *best advice*[440] and consequently to a policyholder who can actively go and 'grab' the insurance coverage that suits him best. On top of that the policyholder would still be protected by means of private international law as the contracts would be governed by the law of his/her home state.

Whether this, on the other hand, also increases the insurers' readiness to provide their services cross borderly can only be answered partly in the affirmative. The insurers' transaction costs were presented as threefold in the foregoing;[441] the intermediary version brings relief for only two facets, as a properly informed policyholder means less information costs in regard to product information and market research. As far as the private international law system is concerned the insurance undertaking is still faced with the applicability of fifteen different systems. A certain improvement, however, can be expected.

Another point of criticism against the information approach, however, remains. The quality of the advice given becomes relative when one considers the possibility of really being adequately informed about fifteen different insurance contract laws.

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[440] Expression taken from liability law (see E. Prölss and A. Martin, Versicherungsvertragsgesetz, Annex to Arts 43-48 para 9).

[441] Cf Chapter Two II.5.

Summary of the Results and Concluding Remarks

(1) The single market naturally encompasses the insurance industry.

(2) Socio-economically, insurance has always been a very sensitive field of law. The removal of market entry barriers by means of negative integration therefore had to be accompanied by the establishment of a certain regulatory framework.

(3) After three generations of insurance directives freedom of establishment could be realised; freedom to provide services, on the other hand, could only be perfected in regard to large risks.

(4) The private international law approach chosen to tackle the aim of guaranteeing freedom to provide services failed. Only in regard to large risks are parties free to choose the applicable law. For the remaining contracts the governing law is, in general, the law of the Member State where the policyholder has his/her habitual residence.

(5) The non-existence of a harmonised insurance contract law is seen to be the main obstacle of a single insurance market. Insurers are not willing to face the high transaction costs of informing themselves about fifteen different insurance contract laws.

(6) When thinking of further harmonisation other actors and soft law approaches also have to be considered seriously.

(7) The second big obstacle is the information problem the policyholder side faces. In establishing a European wide system of independent insurance broking an improvement can be expected. The applicability of fifteen different insurance contract laws, however, stays the same.

Bearing all the problems and alternative solutions discussed in mind, it does not seem likely that a single solution can be found. The chances, however, to come to satisfactory results by combining the methods described seem promising.

Bibliography[*]

Austrian Federal Ministry of Justice Bericht zur Lage der Verbraucherinnen und Verbraucher 1999 (Report on the Situation of the Consumer), 51 Blg NR XXI. GP.

Baran Peter Wichtige Neuerungen der VAG-Novelle 1996, VR 1996, p 57-61.

Basedow Jürgen Deregulierungspolitik und Deregulierungspflichten - Vom Zwang zur Marktöffnung in der EG, in Brohm, Winfried and others (ed), Staatswissenschaften und Staatspraxis (Nomos, Baden-Baden 1991) p 151-169.
Das neue Internationale Versicherungsvertragsrecht, NJW 1991, p 785-795.
Das österreichische Bundesgesetz über internationales Versicherungsvertragsrecht – Eine rechtspolitische Würdigung, in: MPI (ed), Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum (Mohr Siebeck, Tübingen 1994) p 89-100.
Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis, RabelsZ 59 (1995) p 1-55.
Transparenz als Prinzip des (Versicherungs)Vertragsrechts, VersR 1999, p 1045-1055.
Die Gesetzgebung zum Versicherungsvertrag zwischen europäischer Integration und Verbraucherpolitik, in: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 13-30.

Bittl Andreas Transparenz in der Versicherungswirtschaft – eine Frage der Kommunikation, ZVersWes 2000, p 174-183.

Blaurock Uwe Verbraucherkredit und Verbraucherleitbild in der Europäischen Union, JZ 1999, p 801-809.

Bonell Michael Joachim Die UNIDROIT-Prinzipien der internationalen Handelsverträge: Eine neue Lex Mercatoria?, ZfRV 1996, p 152-157.

Borch Karl Economics of Insurance (North-Holland, Amsterdam/-New York/Oxford/Tokio 1990).

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[*] The EC documents used are not listed separately.

Brandner Hans Erich Auswirkungen der EU-Richtlinie über mißbräuchliche Vertragsklauseln auf Versicherungsverträge, in: J. Basedow, E. Schwark and H.-P. Schwintowski (eds), Informationspflichten, Europäisierung des Versicherungswesens, Anerkannte Grundsätze der Versicherungsmathematik (Nomos, Baden-Baden 1995) p 67-73.

Brittan Leon Der Europäische Binnenmarkt der Versicherungen: Was noch zu tun bleibt, VW 1990, p 754-761.

Broggini Gerardo Was bedeutet heute gemeineuropäisches Vertragsrecht?, ZfRV 1997, p 221-229.

Cartwright Peter Consumer Protection in Financial Services (Kluwer Law International, The Hague/London/Boston 1999).

Clarke Malcolm A. The Law of Insurance Contracts, 3rd ed (LLP Limited, London/Hongkong 1997).
Policies and Perceptions of Insurance, An Introduction of Insurance Law (Clarendon Press, Oxford 1999).

Craig Paul
De Búrca Gráinne (eds) EU Law: Text, Cases and Materials, 2nd ed (Oxford University Press, Oxford and New York 1998).

Czernich Dietmar
Heiss Helmut (eds) EVÜ – Das Europäische Schuldvertragsübereinkommen (Verlag Orac, Vienna 1999).

Dauses Manfred A. Die Rechtsprechung des EuGH zum Verbraucherschutz und zur Werbefreiheit im Binnenmarkt, EuZW 1995, p 425-431.

Deringer Arved Stellungnahmen zum Weißbuch der Europäischen Kommission über die Modernisierung der Vorschriften zur Anwendung der Art 85 und 86 EG-Vertrag (Art 81 und 82 EG), EuZW 2000, p 5-11.

Doralt Werner (ed) Kodex Versicherungsrecht, 4th ed (Orac-Verlag, Vienna 2000).

Dreher Meinrad Die Versicherung als Rechtsprodukt (Mohr Siebeck, Tübingen 1991).

Ehrenberg Victor Versicherungsrecht, Volume I (Dunker, Leipzig 1893).

Eisen Roland Neue Produkte auf dem EU-Versicherungsmarkt, ZVersWiss 1997, p 553-567.

Ellis T.H. European Integration and Insurance (Witherby & Co.ltd., London 1979).

Engeländer Stefan	Großbritannien ist kein Vorbild beim Verbraucherschutz, ZVersWes 2000, p 78-79.
Everson Michelle	Laws in Conflict – A Rationally Integrated European Insurance Market?, Doctoral Thesis (European University Institute, Florence 1993). The German Federal Supervisory Authority for Insurance, in Majone Giandomenico (ed), Regulating Europe (Routledge, London and New York 1996) p 202-228.
Faber Wolfgang	Elemente verschiedener Verbraucherbegriffe in EG-Richtlinien, zwischenstaatlichen Übereinkommen und nationalem Zivil- und Kollisionsrecht, ZEuP 1998, p 854-892.
Fahr Ulrich	Entwicklung von Versicherungsprodukten unter neuen verbraucherrechtlichen Vorzeichen, unpublished speech (4. Tagessympoisium des VersicherungsForum „VVG und VAG“, Karlsruhe, 16/17 February 2000).
Feldman Roger **Escribano Carlos** **Pellisé Laura**	The Role of Government in Competitive Insurance Markets with Adverse Selection (Working Paper 97-07, Universidad Carlos III, Madrid 1997).
Fenyves Attila **Kronsteiner Franz** **Schauer Martin**	Kommentar zu den Novellen zum VersVG (Springer, Vienna and New York 1998).
Fenyves Attila **Korinek Stephan**	Das österreichische Versicherungsaufsichtsrecht im Überblick, ZfV 1999, p 158-187.
Fitz Hanns **Gamerith Helmut**	Wettbewerbsrecht: Unlauterer Wettbewerb und Kartelle, 2nd ed (Orac Verlag, Vienna 1997).
Fitzsimmons Anthony	Insurance Competition Law (Graham & Trotman/-Martinus Nijhoff, London/Dordrecht/Boston 1994).
Grassl-Palten Eva	Blindflug in den Bedingungsdschungel. OGH äußert sich erstmals zur Reichweite der Pflicht zur Aushändigung, RdW 2000, p 72-75.
Greaves Rosa	EC Competition Law: Banking and Insurance Services (Chancery Law Publishing, London 1992).
Grundmann Stefan	Europäisches Vertragsrechtsübereinkommen, EWG-Vertrag und § 12 AGBG, IPRax 1992, p 1-5.
Heiss Helmut	Europäisches Vertragsrecht: in statu nascendi?, ZfRV 1995, p 54-61.

	Verbraucherschutz im Binnenmarkt: Art 129a EGV und die wirtschaftlichen Verbraucherinteressen, ZEuP 1996, p 625-647. Gerichtsstandsfragen in Versicherungssachen nach europäischem Recht; in: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 105-151.
Hoeren Thomas	Selbstregulierung im Banken- und Versicherungsrecht (Verlag Versicherungswirtschaft, Karlsruhe 1995).
Hohlfeld Knut	Erste Erfahrungen im europäischen Binnenmarkt, VW 1998, p 680-682.
Joerges Christian **Vos Ellen (eds)**	EU Committees: Social Regulation, Law and Politics (Hart Publishing, Oxford and Portland 1999).
Kerber Wolfgang	Rechtseinheit und Rechtsvielfalt aus ökonomischer Sicht, in: St. Grundmann (ed), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (Mohr Siebeck, Tübingen 2000) p 67-97.
Kern Holger	"Is big really beautiful" – Alternativen zur Merger-mania im Versicherungssektor, VW 1999, p 218-220.
Kirchner Christian	Ein Regelungsrahmen für Rechtseinheitlichkeit und Rechtsvielfalt in der Gemeinschaft, in: St. Grundmann (ed), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (Mohr Siebeck, Tübingen 2000) p 99-113.
Knospe Jörg	Die Versicherungsaufsicht privatisieren?, ZVersWes 1999, p 188-189.
Koban Klaus	Neueste Entwicklungen im europäischen Versicherungs-vermittlerrecht, in A. Fenyves and K. Koban (eds), Neue Wege der Zusammenarbeit von Versicherungen und Versicherungsmaklern (Orac, Wien 2000) p 67-90.
Koch Peter	Geschichte der Versicherung, in D. Farny, E. Helten, P. Koch and R. Schmid (eds), Handwörterbuch der Versicherung (HdV) (Verlag Versicherungswirtschaft, Karlsruhe 1988) p 223-232.
Köhne Thomas	Zur Konzeption des Versicherungsproduktes, ZversWiss 1998, p 143-191.
Koppensteiner Hans-Georg (ed)-	Österreichisches und europäisches Wettbewerbsrecht: Wettbe werbsbeschränkungen, Unlauterer Wettbewerb,

	Marken, 3rd ed (Orac-Verlag, Vienna 1996).
Kramer Ernst A.	Globalisierung der Wirtschaft – Internationalisierung des privaten Wirtschaftsrechts, ÖBA 1991, 621-626.
Kuscher Jeannette	Kooperation in der europäischen Versicherungswirtschaft (Libertas Verlag, Sindelfingen 1995).
Lando Ole	Einheitliches materielles Privatrecht in Europa, in F. Reichert-Facilides (ed), Recht und Europa 3 (Verlag Braumüller, Vienna 1999) p 41-49.
Lando Ole **Beale Hugh**	Principles of European Contract Law. Parts I and II, prepared by the Commission on European Contract Law (Kluwer Law International, The Hague, London, Boston 1999).
Langheid Theo	§ 8 AGB-Gesetz im Lichte der EG-AGB-Richtlinie: Kontrollfähigkeit von Leistungsbeschreibungen durch Intransparenz, NVersZ 2000, p 63-68.
Lowry, Johne **Rawlings, Philip**	Insurance Law: Doctrines and Principles (Hart Publishing, Ox-ford and Portland Oregon 1999).
Mächler-Erne Monika	Internationale Versicherungsverträge – Formen und Inhalt, in: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 153-167.
Martinek Michael	Unsystematische Überregulierung und kontraintentionale Effekte im europäischen Verbraucherschutzrecht oder: Weniger wäre mehr, in: St. Grundmann (ed), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (Mohr Siebeck, Tübingen 2000) p 511-557.
Meier Kenneth	Political Economy of Regulation – The Case of Insurance (State University of New York Press, Albany 1988).
Merkin Robert **Rodger Angus**	EC Insurance Law (Longman, London/New York 1997).
Meyer Alfred-Hagen	Das Verbraucherleitbild des Europäischen Gerichtshofs – Abkehr vom „flüchtigen" Verbraucher –, WRP 1993, p 215-224.
Meyer Hans Dieter	Verbraucherpolitische Informationen und Forderungen, in: J. Basedow, U. Meyer and H.-P. Schwintowski (eds),

Lebensversicherung, Internationale Versicherungsverträge und Verbraucherschutz, Versicherungsbetrieb (Nomos, Baden-Baden 1996) p 157-250.

Müller Helmut Verbraucherschutz im Versicherungswesen durch Information der Versicherten (Verlag Versicherungswirtschaft e.V., Karlsruhe 1992)
Die Kooperation der Versicherungsaufsichtsbehörden in der Europäischen Union, in: J. Basedow, E. Schwark and H.-P. Schwintowski (eds), Informationspflichten, Europäisierung des Versicherungswesens, Anerkannte Grundsätze der Versicherungsmathematik (Nomos, Baden-Baden 1995) p 55-66.
Versicherungsbinnenmarkt: Die europäische Integration im Versicherungswesen (Verlag C.H. Beck, München 1995).

Nemeth Kristin Kollisionsrechtlicher Verbraucherschutz in Europa – Art 5 EVÜ und die einschlägigen Richtlinienbestimmungen (Manz, Wien 2000).

Núñez, Clara Eugenia (ed) Insurance in Industrial Societies: Economic Role Agents and Market from 18th Century to Today (Madrid Fundacion fomento de la historia economica, Sevilla 1998).

OECD Policy Issues in Insurance (Publication Service, OECD, Paris 1993).

Osing Stefan Informationspflichten des Versicherers und Abschluß des Versicherungsvertrages (Verlag Versicherungswirtschaft e.V., Karlsruhe 1996).

Peiner Wolfgang Aufbruch in ein neues Wettbewerbszeitalter, VW 1998, p 226-232.

Pfennigstorf Werner Chapter 7: Public Law of Insurance, in: Jacob S. Ziegel (ed), International Encyclopedia of Comparative Law, Volume IX: Commercial Transactions and Institutions, (J.C.B. Mohr, Tübingen and Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster 1996).

Präve Peter Das Recht der Allgemeinen Geschäftsbedingungen und die Versicherungswirtschaft, NVersZ 1998, p 49-54.
Die selbständige Dread-Disease-Versicherung, ZVersWiss 1998, p 355-367.
Fernabsatz von Versicherungen I and II, VW 1999, p 1410-1414 and p 1511-1517.
Versicherungsbedingungen: Grundsätze und Reformen (II), VW 2000, p 450-457.

Die Gestaltung der Versicherungsbedingungen in der Lebensversicherung unter Berücksichtigung des AGB-Gesetzes, ZVersWes 2000, p 549-555.
Verbraucherschutz und Reformbedarf, NVersZ 2000, p 201-207.

Prölss Erich R.
Martin Anton
Versicherungsvertragsgesetz, Kommentar zu VVG und EGVVG sowie Kommentierung wichtiger Versicherungsbedingungen - unter Berücksichtigung des ÖVVG und österreichischer Rechtsprechung, 26th ed (C.H. Beck, Munich 1998).

Rambow Gerhard
Möglichkeiten und Grenzen der Verbraucherpolitik im gemeinsamen Markt, EuR 1981, p 240-252.

Reich Norbert
Zur Theorie des Europäischen Verbraucherrechts, ZEuP 1994, p 381-407.
Privatrecht und Verbraucherschutz in der Europäischen Union (Vorträge und Berichte/Zentrum für Europäisches Wirtschaftsrecht 45, Bonn 1995).
Verbraucherrechte als – unverzichtbare – subjektive Rechte passiver Mitbürger, in: St. Grundmann (ed), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts (Mohr Siebeck, Tübingen 2000) p 481-509.

Reichert-Facilides Fritz
Einführung in die Thematik „Internationales Verbraucherschutzrecht" in: A.K. Schnyder, H. Heiss and B. Rudisch (eds), Internationales Verbraucherschutzrecht (Mohr Siebeck, Tübingen 1995) p 1-9.
Gerichtliche Zuständigkeit und anwendbares Recht, in: J. Basedow, U. Meyer and H.-P. Schwintowski (eds), Lebensversicherung, Internationale Versicherungsverträge und Verbraucherschutz, Versicherungsbetrieb (Nomos, Baden-Baden 1996) p 77-84.
Europäisches Versicherungsvertragsrecht?, in Basedow, Jürgen, Hopt, Klaus J. and Kötz, Hein (eds): Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag (Mohr Siebeck, Tübingen 1998), p 119-134.
Duration of the insurance relationship, in R. David and others (eds), International Encyclopedia of Comparative Law, Law of Insurance Contracts (Mohr Siebeck, Tübingen, and Martinus Nijhoff, Dordrecht, Boston and Lancaster) forthcoming.
Gesetzgebung in Versicherungsvertragssachen – Stand und Ausblick, in: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 1-11.

Reichert-Facilides Fritz Schnyder Anton K. (eds) Versicherungsrecht in Europa, Kernperspektive am Ende des 20. Jahrhunderts, Beiheft 34 zur ZSR (Helbing und Lichtenhahn, Basel 2000).

Reithmann Christoph Martiny Dieter (eds) Internationales Vertragsrecht, 5th ed (Schmidt Verlag, Köln 1996).

Remien Oliver AGB-Gesetz und Richtlinie über mißbräuchliche Verbrauchervertragsklauseln in ihrem europäischen Umfeld ZEuP 1994, p 34-66.

Rinkes Jac G.J. The Consumer Perspective on the Completion of the Single Market in Insurance, in: A. McGee and W. Heusel (eds), The Law and Practice of Insurance in the Single Market (Bundesanzeiger VerlagsgesmbH, Köln 1995) p 11-24.

Römer Wolfgang Gerichtliche Kontrolle Allgemeiner Versicherungsbedingungen nach den §§ 8, 9 AGBG, NVersZ 1999, p 97-104.

Roth Wulf-Henning Der Einfluß des Europäischen Gemeinschaftsrechts auf das internationale Privatrecht, RabelsZ 55 (1991) p 623-673.
Die Freiheiten des EG-Vertrages und das nationale Privatrecht, ZEuP 1994, p 5-33.
Dienstleistungsfreiheit und Allgemeininteresse im europäischen internationalen Versicherungsvertragsrecht, in: MPI (ed), Aspekte des internationalen Versicherungsvertragsrechts im Europäischen Wirtschaftsraum (Mohr Siebeck, Tübingen 1994), p 1-41.
Case Note on C-212/97, 37 CML Rev. (2000), p 147-155.

Rudisch Bernhard Der Beitrag der sogenannten Zweiten Nicht-Lebensversicherungsrichtlinie zur Herstellung eines europäischen Binnenmarktes für die Versicherungswirtschaft (Master-Thesis Florenz 1990).
Das österreichische Versicherungsrecht und der EWR, in Müller, Lothar, Mascher, Christine and Prantl Barbara (eds): Wieviel Europa verträgt Österreich? (Österreichischer Studienverlag, Wien 1993) p 129-143.
Österreichisches internationales Versicherungsvertragsrecht. Das Kollisionsrecht des Versicherungsvertrages vor und nach einem EWR- bzw EG-Beitritt (Verlag Orac, Wien 1994).
Österreichisches internationales Versicherungsvertragsrecht für den EWR, ZEuP 1995, p 45-59.

Rüffler Friedrich Europäisches Verbraucherleitbild und Demoskopie, WBl 1998, p 381-385.

Schaer Roland Anforderungen der Assekuranz an ein künftiges Versicherungsvertragsrecht, in F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 31-58.

Schauer Martin Das österreichische Versicherungsvertragsrecht, 3rd ed (Service Fachverlag. Wien 1995).

Schulze Reiner Vergleichende Gesetzesauslegung und Rechtsangleichung, ZfRV 1997, p 183-197.

Schwintowski Hans-Peter Transparenz und Verständlichkeit von Allgemeinen Versicherungsbedingungen und Prämien, NVersZ 1998, p 97-102.

Stiglitz Joseph E. Rethinking the Economic Role of the State: Publicly Provided Private Goods," lecture delivered at the Universitat Pompeu Fabra. Barcelona, Spain, 15 November 1992.

Surminski Arno Das Zeitalter der Fusionen, ZVersWes 2000, p 67-74.

UNIDROIT Principles of Commercial Contracts (Unidroit, Rome 1994).

United Nations[442] International Tradability in Insurance Services (United Nations Publication, New York 1993).

Völkl Wolfgang Der Umfang des Versicherungsschutzes nach den allgemeinen Versicherungsbedingungen zur Haftpflichtversicherung für Vermögensschäden (AVBV), AnwBl 1995, p 166-180.

Wagner Fred Risk Securitization als alternatives Mittel des Risikotransfers von Versicherungsunternehmen, ZVersWiss 1997, p 511-552.
Internationalisierung und Globalisierung – Strategien für deutsche Erstversicherer?, VW 1998, p 732-740 and p 811-819.

[442] Transnational Corporations and Management Division, Department of Economic and Social Development.

Wandt Manfred Internationales Privatrecht der Versicherungsverträge, in: F. Reichert-Facilides and A.K. Schnyder (eds), Versicherungsrecht in Europa – Kernperspektiven am Ende des 20. Jahrhunderts, p 85-103.

Weatherill Stephen EC Consumer Law and Policy (Longman, London and New York 1997).

Wördemann Nils International zwingende Normen im internationalen Privatrecht des europäischen Versicherungsvertragsrechts (Verlag Versicherungswirtschaft, Karlsruhe 1997).

Zietsch Dietmar Die europäische Herausforderung für den deutschen Lebensversicherungsmarkt, VW 1998, p 150-155.

Zinnert Mario Das Recht des Versicherungsmaklers am Anfang des 21. Jahrhunderts – rechtliche und rechtspolitische Streiflichter, VersR 2000, p 399-407.

Zwonicek Charles Die indirekte Besteuerung der Versicherungsverträge in Europa, VW 1998, p 26-27.