

Executive Summary

1. This report examines the impact of differences between national contract laws on cross-border insurance business under the freedom to provide services and the freedom of establishment. The mandate of the Expert Group¹ is to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products. It does not relate to other differences which may influence cross-border insurance business. Nevertheless, the report recognises the significance of such other differences; some of them are of a factual, economic and social nature, others relate to areas of the law different from contract law, in particular to prudential regulation and taxation. These differences include: 'knowing your customer', understanding the true risk proposed for cover, language, culture, including expectations of the local policyholder, the need for local claims handling, the form and prevalence of frauds, the tax and labour law environment, the legal, regulatory and supervisory environment, and cross-border redress options. The members of the Group were drawing on their professional knowledge and expertise and were not considering statistical evidence except where explicitly mentioned.

2. Two approaches to handle this task have been adopted: The first starting from the differences in insurance contract law in general, i.e. without specifying any classes of insurance²; the second focusing on particular classes: life insurance³, liability insurance⁴, and motor insurance.⁵

3. With regard to large risks, the cross-border provision of insurance cover is already now a common occurrence; it rarely encounters obstacles arising from differences in insurance contract law since the parties are free to choose the applicable law.

4. By contrast, the law applicable to mass risk insurance can be chosen only in limited situations. Rome I calls for the application of the law of the Member State in which the risk is situated which in most cases of mass risk insurance is the Member State in which the policyholder is habitually resident. The legislator has adopted this system in order to protect the weaker party.

5. Where the law applicable to the contract differs from that of the insurer's country of origin which has served as the basis for the design of the contract and is mandatory, the contract, its marketing, and/or its administration by IT, call centres and legal departments will need adaptation. Differences in national mandatory rules may restrict the freedom of the insurer to provide its services cross border (and may thus form obstacles); such rules are important to protect European citizens as consumers or for example as victims of road accidents. These differences raise the costs of cross-border trade in insurance. These effects have been highlighted with regard to a number of rules governing several aspects of cross-border insurance contracts, for example pre-contractual duties, formalities of contracting, precautionary measures, the unfairness control of standard contract terms, and duration and renewal of policies.

6. Life insurance displays a great variety of types and functions. For some of them, especially pensions, tax law and social security regulations supersede insurance contract law as the principal source of regulation. Other life insurances are similar to financial instruments. In this context, divergent rules on pre-contractual information duties (which are particularly important for

1 OJ 2013 C 16/6.

2 See below paras. 4-193

3 See below paras. 194-234

4 See below paras. 235 - 280

5 See below paras. 281 - 313

consumers' confidence in cross-border trade) and on the calculation of surrender values were identified as highly relevant for cross-border life insurance. Differences in other rules relate to the withdrawal period, the consequences of cancellation, the drafting of questionnaires, the payment of premium and the insurance money, and to termination. They have the effect of increasing legal uncertainty and complexity, and of raising costs of cross-border activities. How insurers manage these requirements is a business decision driven by their commercial approach and attitude to risk.

7. The legal framework of liability insurance is particularly complex due to the involvement of third parties, the interrelation with liability law, and the variety of duties to insure imposed by national legislation or regulation. While it is not easy to isolate issues of pure insurance contract law, a number of legal divergences have been identified as causing costs and uncertainty. This notably applies to the various differences concerning compulsory insurances, to rules on the mitigation of loss, in particular on the cover of legal expenses incurred for the defence and on the time-span of the insurer's liability. The applicable rules on insurance contract law are only one element in the decision to offer cross-border liability cover alongside others; they do not appear to be the main element.

8. Motor liability insurance is compulsory under Dir. 2009/103/EC and one of the most widely spread insurances in Europe. Various specific features such as driving habits or liability regimes exist. Despite a basic harmonisation, differences between the relevant national contract laws subsist and raise the costs of entering a foreign market. These differences concern in particular specific punitive interest rates in the case of non-payment by the insurer, the reimbursement of legal expenses, the compulsory nature of Bonus/Malus systems in a few Member States, certain requirements as to the form and proof of motor liability insurance, the duty to accept risks and to submit offers to applicants, and the review of premium adjustment clauses under standards of unfairness.

Introduction

1. By Commission Decision of 17 January 2013 an Expert Group on European Insurance Contract Law was set up⁶. According to this Decision, the Expert Group's task was "to carry out an analysis in order to assist the Commission in examining whether differences in contract laws pose an obstacle to cross-border trade in insurance products"⁷. Where the Expert Group would find that such differences pose the said obstacles, it was further called upon to "identify the insurance areas which are likely to be particularly affected by such obstacles"⁸. The background of this decision emerges from its recitals. The mandate of the group was thus confined to contract law, thereby excluding an enquiry into divergences in other areas of the law which might equally influence cross-border insurance. The Expert Group has not carried out a detailed analysis of the borderline areas between contract law and other areas of law.

2. The 20 members of the Expert Group⁹, coming from a dozen of Member States, are of diverse occupational experience: the majority are practitioners representing various groups interested in insurance operations: life and non-life insurers, the users of insurance products, both from business and consumers, intermediaries, legal practitioners, and some are academics. To the extent that members were not appointed in their personal capacity, their respective organizations were represented by other persons in some of the meetings. The members of the Group were drawing on their professional knowledge and expertise and were not considering statistical evidence except where explicitly mentioned.

3. The Expert Group was convened for ten meetings in 2013 and 2014. The meetings were prepared by the European Commission which drafted discussion papers serving as a basis for the debate within the Expert Group. The present report resulted from these discussions and was drafted by members of the Expert Group. Its Chapters 1 and 2 are devoted to general aspects of the topic, in particular to the economic aspects and to the legal framework. Chapter 3 deals with the impact of insurance contract law rules on cross-border insurance business in general. Chapters 4, 5 and 6 take a closer look at specific branches of insurance, namely the areas of life insurance, liability insurance, and motor insurance. The Expert Group chose these sectors because there the impact of differences between national insurance contract laws on cross-border business may be especially perceptible and these branches deserve particular attention in view of their economic significance for the internal market.

⁶Commission Decision of 17 January 2013 an Expert Group on a European Insurance Contract Law, OJ 2013 C 16/6 (Commission Decision).

⁷Commission Decision, Art.2(1).

⁸Commission Decision, Art.2(2).

⁹ See Annex 1