

8-1-1990

## 1992: Single European Market Implications for the Insurance Sector

Jane Louise Powell

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>



Part of the [Insurance Law Commons](#)

---

### Recommended Citation

Jane Louise Powell, *1992: Single European Market Implications for the Insurance Sector*, 13 B.C. Int'l & Comp. L. Rev. 371 (1990), <http://lawdigitalcommons.bc.edu/iclr/vol13/iss2/4>

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact [nick.szydowski@bc.edu](mailto:nick.szydowski@bc.edu).

# 1992: Single European Market Implications for the Insurance Sector

*Jane Louise Powell\**

## I. INTRODUCTION

The advent of 1992 and the Single European Market is now upon us. The year 1992 signals the culmination of the Treaty of Rome's (EEC Treaty) dream of free movement of goods and services within a Single European Market.<sup>1</sup> The liberalization of restrictions in the insurance sector began in the 1960s with freedom to transact the business of reinsurance commencing around 1964.<sup>2</sup> More recently, the Commission of the European Com-

---

\* Articled Clerk, Kennedy's Solicitors, London, U.K.; B.A. (Law) Hons. Nottingham University, U.K.; Associate of the Chartered Insurance Institute.

<sup>1</sup> Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty].

<sup>2</sup> In the fields of reinsurance, common credit insurance, and motor insurance, directives have significantly liberalized the European insurance market while harmonizing conflicting member state regulation. These developments should offer U.S. insurers greater flexibility in establishing subsidiaries within the EEC as well as allowing insurers to provide coherent insurance plans. *See generally* Directive 64/225, Council Directive of 25 February 1964 on the Right of Establishment and Freedom to Supply Services in the Insurance Sector (Reinsurance and Retrocession), 7 J.O. COMM. EUR. (No. L 56) 878, 1 Common Mkt. Rep. (CCH) ¶ 1,349 (1964); Directive 70/509, Council Directive of 23 November 1970 on the Common Credit Insurance Policy for Medium- and Long-Term Transactions of Public Buyers, 13 J.O. COMM. EUR. (No. L 254) 1, 2 Common Mkt. Rep. (CCH) ¶ 3,816 (1970) [hereinafter Directive 70/509]; Directive 70/510, Council Directive of 23 November 1970 on the Common Credit Insurance Policy for Medium- and Long-Term Transactions of Private Buyers, 13 J.O. COMM. EUR. (No. L 254) 26, 2 Common Mkt. Rep. (CCH) ¶ 3,816 (1970) (Directives 70/509 and 70/510 established common credit insurance policies for risks insured on a supplier credit basis) [hereinafter Directive 70/510]; Directive 72/166, Council Directive of 24 April 1972 on the Approximation of Member State Laws on Insurance Against Civil Liability Arising from Motor Vehicle Accidents, 15 O.J. EUR. COMM. (No. L 103) 1, 2 Common Mkt. Rep. (CCH) ¶ 3,369 (1972) (directive addressing compulsory motor vehicle insurance, specifically third party insurance and conflict of laws issues) [hereinafter Directive 72/166]. It should be noted that not all signatories to Directive 72/166 were Community members. Therefore, the directive applies in any country which is a party to the agreement. *See* Motor Vehicles (No. 2), S.I. 1973, No. 2143 (U.K. Motor Vehicles regulation implementing Directive 72/166); Road Traffic Act 1988, ch.52, § 145, *reprinted in* 38 Halsbury's Statutes 997 (4th ed. 1989); Directive 84/5, Council Directive of 30 December 1983 on the Approximation of the Laws of the Member States

munities (Commission) has issued a multitude of directives and proposals in the area of direct insurance, both life and nonlife. These measures will establish a true single market for insurance within the European Economic Community (EEC or Community) by 1992 or soon thereafter. The United States, with its sophisticated insurance industry, is well-equipped to take advantage of the opportunities arising from this programme.

Although the U.S. insurance sector has suffered in recent years from the onset of cyclical soft and weak markets in terms of pricing strategies and claims payments,<sup>3</sup> the industry is perhaps still one of the most likely to benefit from expanding into the EEC. The U.S. insurance industry's experience in providing insurance coverage for interstate operations that span over many kilometers may have generated products suitable for and adaptable to the European arena.

Participation in the European market may reduce or counter the negative experiences of those U.S. insurers who have tended towards maintaining national rather than multinational operations. Emphasis on national operations has made U.S. insurers more susceptible to the swings in underwriting results within the United States. U.S. insurers remain subject to danger of ruin by moves such as California's recently passed Proposition 103 which significantly limits the activities of motor insurers.<sup>4</sup> Likewise, the

Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, 27 O.J. EUR. COMM. (No. L 8) 17, 2 Common Mkt. Rep. (CCH) ¶ 3,369 (1984) (directive mandating compulsory coverage of driver's liability for property damage and victims of unidentified and uninsured drivers) [hereinafter Directive 84/5]; see also Motor Vehicles, S.I. 1987, No. 2171 (U.K. Motor Vehicles regulation implementing Directive 84/5); Proposed Directive, 32 O.J. EUR. COMM. (No. C 16) (1989); Proposed Directive, 32 O.J. EUR. COMM. (No. C 65) (1989) (third and fourth proposed motor insurance directives requiring insurers to join bureau and appoint representative to handle settlement of claims).

<sup>3</sup> These cyclical U.S. insurance markets are evidenced by the trough during the years 1978-1984 which now appears to be recurring.

<sup>4</sup> 1988 Cal. Ins. Code § 1861. During the U.S. elections of 1988, Proposition 103 established a rate roll-back of 20 percent for property and casualty lines from the previous year's premiums, abolished territorial rates for motor vehicles, and installed a further rate roll-back of 20 percent for "good drivers." The proposition left the definition of what constitutes a "good driver" open to include those who have been convicted as drunk drivers. The proposition was somewhat tempered by the California Supreme Court. See *Calfarm Ins. Co. v. Duekmejjan*, 771 P.2d 1247, 258 Cal. Rptr. 161 (Cal. 1989). The court held, *inter alia*, that the provisions pertaining to the rate roll-back are not prima facie unconstitutional but that the insurer has a right to show that any particular rate imposed upon him is confiscatory. The court further found that it had no discretion to modify provisions and that the creation of a consumer advocacy body was invalid. *Id.*

U.S. public could be said to be retaliating from what appears, to some, as tyranny by insurers in deciding whether to charge high or low premiums and whether to expand or contract coverage provided under their policies with little or no thought given to consumer needs. Hence, U.S. insurers may find the EEC's economic climate a perfect alternative frontier in light of the increasing constraints imposed upon insurers within the United States.

This Article first suggests the method U.S. insurance companies should follow to enter the European market successfully. Second, the Article discusses, both categorically and chronologically, those directives which relate generally to the insurance business and also, more specifically, those which create frameworks and conditions for the pursuit of certain classes of insurance. Finally, the Article emphasizes certain proposed directives of particular importance to U.S. insurers and concludes that the United Kingdom may be a prime location for the establishment of U.S. subsidiaries in the EEC.

## II. FOREWARD: ESTABLISHMENT AS A PREREQUISITE FOR U.S. INVOLVEMENT IN THE EEC

U.S. insurers that wish to participate in the new European insurance market must form subsidiaries in one of the EEC's member states. Establishment in any of these countries would have, by definition, the same effect and carry with it the same obligations. For the purposes of this Article, the application of EEC directives in the United Kingdom will provide an expository framework from which to analyze the impact of this legislation on U.S. insurers within the Community.<sup>5</sup>

## III. RELEVANT DIRECTIVES REGULATING INSURANCE IN THE EEC

### A. *The Impact of the First Nonlife Insurance Directive*

In order to ensure the freedom of establishment to provide insurance services, the EEC passed a fundamental directive for

---

<sup>5</sup> Directorate General XV is the directorate in Brussels responsible for financial institutions and company law. Director-General, Mr. G.E. Fitchew, Berlaymont Building, Rue de la Loi 200, B-1049 Brussels, Belgium.

the insurance sector, Directive 73/239.<sup>6</sup> As the first nonlife insurance directive, Directive 73/239 concerns "the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life insurance."<sup>7</sup> Although the directive applies to a wide variety of classes of insurance,<sup>8</sup> it does not extend to life assurance, annuities, permanent health insurance, social security, or any supplementary insurance which may have been conducted by life assurance companies.<sup>9</sup> Bodies exempt from the directive's provisions include Crown Agents in the United Kingdom.<sup>10</sup> Likewise, mutual associations are exempted from the scope of the directive in regard to financial provisions since they were already subject to strict conditions pertaining to security.<sup>11</sup> Directive 73/239 attempts to eliminate divergencies among national supervisory legislation in the insurance sectors of member states by

<sup>6</sup> Directive 73/239, 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 Insurance, 16 O.J. EUR. COMM. (No. L 228) 3, 1 Common Mkt. Rep. (CCH) ¶ 1,486 (1973) [hereinafter Directive 73/239].

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at Annex (A). Directive 73/239 covers the following classes of insurance: accident (1), sickness (2), land vehicles (3), railway rolling stock (4), aircraft (5), ships (6), goods in transit (7), fire and natural forces (8), other damage to property (9), motor vehicle liability (10), aircraft liability (11), liability for ships (12), general liability (13), credit (14), suretyship (15), miscellaneous financial loss (16), legal expenses (17). *Id.* Subsequent footnotes will refer to the designated numbers assigned to each class of insurance.

<sup>9</sup> *Id.* at art. 2(1). Supplementary insurance may include "insurance against personal injury including incapacity for employment, insurance against death resulting from an accident, and insurance against disability resulting from an accident or sickness, where these various kinds of insurance are underwritten in addition to life assurance." *Id.*

<sup>10</sup> *Id.* at art. 4. Other exempt bodies include the Voluntary Health Insurance Board in Ireland; various monopoly-type organizations, state fire insurers, and buildings insurers in the Federal Republic of Germany; and the state or department fire insurers in France. *Id.*

<sup>11</sup> *Id.* at art. 3. Mutual associations are exempt from the provisions of the directive in so far as they fulfill the following conditions:

- the articles of association must contain provisions for calling up additional contributions or reducing their benefits,
- their business does not cover liability risks—unless the latter constitute ancillary cover within the meaning of subparagraph (C) of the Annex—or credit and suretyship risks,
- the annual contribution income for the activities covered by this Directive must not exceed one million units of account, and
- at least half of the contribution income from the activities covered by this Directive must come from persons who are members of the mutual association.

laying down certain common procedures and principles to which all member states must adhere. The directive also accounts for the need to provide the public with adequate protection by extending to both the insured and third parties.<sup>12</sup>

In order to achieve the aforementioned goals, Directive 73/239 establishes procedures for official authorization of insurance companies and defines conditions for the granting and withdrawal of such authorization.<sup>13</sup> Authorization must be sought from the "competent authority" of the member state in order to conduct direct insurance business. The authorization requirement extends to any company which locates its head office in the member state, opens a branch in the state with its head office in another member state, extends and conducts its class of business in the state, or extends business outside that part of the state in which it was previously authorized to operate.<sup>14</sup> Authorization to provide insurance services may be granted for a particular class of insurance<sup>15</sup> and for the entire national territory.<sup>16</sup> Hence, Directive 73/239 subjects an expansive variety of insurance companies to the authorization requirement.

Insurance companies applying for authorization must be of a specific form which will vary depending on the member state in which they are seeking authorization. In the United Kingdom, for instance, insurance companies must be: "incorporated companies limited by shares or by guarantee or unlimited,' 'societies registered under the Industrial and Provident Societies Act,' 'societies registered under the Friendly Societies Act[,] Lloyd's underwriters."<sup>17</sup> Under Directive 73/239, insurance companies complying with the form requirement must also submit a scheme of

---

<sup>12</sup> *Id.* at Introduction.

<sup>13</sup> *Id.* at arts. 6-12.

<sup>14</sup> *Id.* at art. 6.

<sup>15</sup> *Id.* at art. 7(2). Authorization shall cover the entire class "unless the applicant desires cover for only part of a class." For example, accident insurance with coverage limited to the passengers' personal injury could be considered coverage for "part of a class." *Id.*

<sup>16</sup> *Id.* at art. 7(1). Authorization shall cover the entire national territory "unless, and in so far as the national legislation permits, the applicant seeks permission to carry out his business only in a part of the national territory." *Id.*

<sup>17</sup> *Id.* at art. 8(1). The form requirements in the Federal Republic of Germany are: "Aktiengesellschaft,' 'Versicherungsverein auf Gegenseitigkeit,' 'Offentlich-rechtliches Wettbewerbs-Versicherung-Sunternehmen.'" In France, the form requirements are: "société anonyme,' 'société à forme mutuelle,' 'mutuelle,' 'union de mutuelles.'" *Id.*

operations<sup>18</sup> and limit their activities to the business of insurance and to any operations directly arising from the conduct of such business. If a company has its head office outside the member state yet opens a branch or agency within the member state, the company must have a minimum guarantee fund and supply a list of directors, a scheme of operations, and a certificate attesting to the classes of insurance it intends to conduct.<sup>19</sup> An authorized agent must be situated in the member state with a permanent residence in the state and sufficient power to bind the company in relation to third parties and authorities in the state. Furthermore, if the agent has a legal personality, the agent must also have its head office within the state.<sup>20</sup>

Directive 73/239 also provides for the protection of insurance companies from arbitrary refusals or deleterious delays in authorization.<sup>21</sup> Any refusal of authorization must be accompanied by a statement of precise reasons. The state must make provisions for court appeals in the event of a refusal or an application left outstanding for over six months without the competent authority's decision.<sup>22</sup> Thus, the directive mandates fulfillment of certain administrative requirements before authorization to establish and provide insurance services will issue.

In keeping with the directive's aim to eliminate divergent national legislation while fulfilling public needs, Directive 73/239 harmonizes the rules for determining the solvency of insurance

<sup>18</sup> *Id.* at art. 9. The scheme must contain information regarding:

- (a) The nature of the risks which the undertaking proposes to cover; the general and special policy conditions which it proposes to use;
- (b) The tariffs which it is proposed to apply for each category of business;
- (c) The guiding principles as to reinsurance;
- (d) The items constituting the minimum guarantee fund;
- (e) Estimates relating to the expenses of installing the administrative services and the organization for securing business; the financial resources intended to cover them.

*Id.* Extra requirements are included in relation to the first three years of business and are detailed in article 9 as are those classes of business excluded from the provisions or subject to other provisions. *Id.*

<sup>19</sup> *Id.* at art. 10(1). Instead of requiring guarantee fund information, the scheme of operations for these companies under article 10(1) should contain all the elements in article 9 and "[t]he state of the solvency margin of the undertaking." *Id.* at art. 11(1). The scheme must be accompanied by a balance sheet and a profit and loss account for the past three years unless the company has not been in business for that length of time. *Id.* at art. 11(2).

<sup>20</sup> *Id.* at art. 10(1).

<sup>21</sup> *Id.* at art. 12.

<sup>22</sup> *Id.*

companies.<sup>23</sup> The directive requires state financial supervision of authorized insurers with stringent rules regarding technical reserves.<sup>24</sup> At the very core of the directive are the provisions requiring adequate solvency margins in respect to the insurers' overall undertakings on either a premiums or claims basis.<sup>25</sup> One third of the solvency margin is to constitute a guarantee fund.<sup>26</sup> Undertakings must also produce annual accounts covering their operations, financial situation, and solvency margins.<sup>27</sup> In this manner, the directive subjects insurance companies and the state's exercise of authority to a degree of accountability to protect the stability of the market and the provision of adequate service to the public.

Of special interest to U.S. insurers contemplating establishment in the EEC is article 23 of Directive 73/239. This article provides for the authorization of agencies or branches of a company having its head office outside the Community.<sup>28</sup> The agency or branch must comply with all the directive's requirements as regards solvency, authorized agents, and accounting.<sup>29</sup> Further pro-

---

<sup>23</sup> See *id.* at arts. 13–21.

<sup>24</sup> *Id.* at art. 15.

<sup>25</sup> *Id.* at art. 16. The premiums basis is outlined in article 16(3). This basis is composed of the premiums and contributions due in respect to all business in the last financial year and the premiums for reinsurance accepted for reinsurance for the last year. The premiums or contributions cancelled in the last year as well as the total amounts of taxes and levies is subtracted from the sum. The sum is then divided into two portions of which 18 percent and 16 percent are calculated. Note that the first portion may extend up to ten million units of account, and the second comprises the excess. The two portions are then added together. This sum is then multiplied by the ratio of claims outstanding from the previous year after deductions of transfers of reinsurance and the gross amount of claims. The resulting amount must at least equal 50 percent. *Id.* at 16(3). The equally complex claims basis is also detailed in article 16. *Id.*

<sup>26</sup> *Id.* at art. 17. Article 17(2) sets the units of accounts required to constitute guarantee funds for different classes of insurance. *Id.* at art. 17(2).

<sup>27</sup> *Id.* at art. 19.

<sup>28</sup> *Id.* at art. 23(2).

<sup>29</sup> *Id.* Article 23(2) states:

A Member State may grant an authorization if the undertaking fulfills at least the following conditions:

- (a) It is entitled to undertake insurance business under its national law;
- (b) It establishes an agency or branch in the territory of such Member State;
- (c) It undertakes to establish at the place of management of the agency or branch accounts specific to the business which it undertakes there, and to keep there all the records relating to the business transacted;
- (d) It designates an authorized agent, to be approved by the competent authorities;
- (e) It possesses in the country where it carries on its business assets of an



visions of the directive govern the withdrawal of authorization and communication of the withdrawal to those member states where an undertaking may be doing business.<sup>30</sup> Thus, if established within the Community, it is possible for subsidiaries of U.S. insurers to be authorized to provide nonlife insurance services in the EEC. U.S. insurance companies considering establishment in the United Kingdom should note that the Insurance Companies Act of 1974<sup>31</sup> implemented the first nonlife insurance directive in the United Kingdom.

Directive 73/240<sup>32</sup> further abolishes restrictions on the freedom of establishment in direct nonlife insurance. In particular, this directive seeks to abolish restrictions that prevent "beneficiaries" from establishing themselves in host states under the same conditions and with the same rights as nationals of that state.<sup>33</sup> The directive also extends to those rights achieved by reason of administrative practices which discriminate against beneficiaries as compared to nationals. Rights derived from specific measures designed to limit or prevent the establishment of beneficiaries in member states are likewise subject to the directive.<sup>34</sup> Henceforth, it could be said that freedom of establishment to provide direct nonlife insurance has, to a large extent, been achieved.

amount equal to at least one half of the minimum amount prescribed in Article 17(2), in respect of the guarantee fund, and deposits one-fourth of the minimum amount as security;

(f) It undertakes to keep a margin of solvency . . . ;

(g) It submits a scheme of operations . . . .

*Id.*

<sup>30</sup> See *id.* at arts. 22–29. Article 26 lists advantages which may be obtained by companies that have set up more than one branch or agency in the Community. For example, the guarantee fund can be lodged in only one member state without a deposit of the minimum guarantee fund in every member state in which it deals. *Id.* at art. 26(1).

<sup>31</sup> Insurance Companies Act 1974, ch.49, reprinted in 22 Halsbury's Statutes (4th ed. 1989).

<sup>32</sup> Directive 73/240, Council Directive of 24 July 1973 on the Right of Establishment in the Business of Direct Insurance Other Than Life Insurance, 16 O.J. EUR. COMM. (No. L 228) 20, 1 Common Mkt. Rep. ¶ 1,349 (1973) [hereinafter Directive 73/240].

<sup>33</sup> *Id.* at art. 2. "Beneficiaries" are "natural persons and undertakings" from a foreign member state wishing to establish themselves in a host state. *Id.* at art. 1. As a result of Directive 73/240, Belgium will no longer require the obligation to hold a *carte professionnelle* before conducting business, while Germany will no longer be able to enforce provisions allowing the Federal Ministry of Economic Affairs to impose on foreign nationals its own conditions of access to the business and to stop them from conducting their business. *Id.* at art. 2(2).

<sup>34</sup> See *id.* at arts. 4–5.

## B. *Recent Directives Facilitating Freedom of Establishment and Provision of Insurance Services*

### 1. Agents and Brokers

Adoption of Directive 77/92 in 1977 was the next major event in the completion of the Single European Market for insurance.<sup>35</sup> This directive aims to facilitate insurance agents' and brokers' effective exercise of freedom of establishment and provision of services. According to the directive, member states should provide information to anyone intending to pursue activities in their territory as to any specific qualifying conditions necessary for establishment in the state even in a temporary capacity. Member states are also asked to take experience gained in other member states as sufficient evidence of knowledge and ability in these professions. A certificate issued by the competent authority of the person's member state or other point of origin is proof of the requisite experience. Where nationals are required to prove that they are of good repute and have never been declared bankrupt, the host state is ordered to accept as proof a document from the judicial or competent authority of the member state of origin. The same documentary requirements apply for proof of financial standing. Under this directive, certificates issued by banks will be valid in any member state.<sup>36</sup> Hence, professional qualifications gained in one member state may no longer serve as a basis for restricting agents and brokers from offering their services in another member state.

### 2. Co-insurance

Directive 78/473 concerning Community co-insurance was adopted in 1978.<sup>37</sup> This directive coordinates the rules, regulations, and administrative provisions relating to co-insurance. As

---

<sup>35</sup> Directive 77/92, Council Directive of 13 December 1976 on the Measures to Facilitate the Effective Exercise of Freedom of Establishment and Freedom to Provide Services in Respect of the Activities of Insurance Agents and Brokers (ex ISIC Group 630) and, in particular, Transitional Measures in Respect of Those Activities, 20 O.J. EUR. COMM. (No. L 26) 14, 1 Common Mkt. Rep. (CCH) ¶ 1,486 (1977).

<sup>36</sup> *Id.* at arts. 3-6, 10(1), 10(5).

<sup>37</sup> Directive 78/473, Council Directive of 30 May 1978 on the Coordination of Laws, Regulations, and Administrative Provisions Relating to Community Co-Insurance, 21 O.J. EUR. COMM. (No. L 151) 25, 1 Common Mkt. Rep. (CCH) ¶ 1,486 (1978) [hereinafter Directive 78/473].

the first step towards freedom of services for co-insurance, the directive provides for the co-insurance of large risks by insurers in more than one member state.<sup>38</sup> The directive defines co-insurance<sup>39</sup> and sets the conditions and procedures required for this sort of insurance.<sup>40</sup> Closely related to this directive are subsequent judgments of the European Court of Justice (European Court) which in 1986 ruled that member states were not justified in requiring the lead insurer in a co-insurance operation to be established in the member state where the risk was situated.<sup>41</sup> The European Court found this requirement incompatible with articles 59 and 60 of the EEC Treaty.<sup>42</sup> Hence, Directive 78/473 and the subsequent European Court rulings significantly expand

<sup>38</sup> *Id.* at art. 1(2).

<sup>39</sup> Directive 78/473 defines co-insurance as being necessitated where it is felt that the risks, according to their size, merit the participation of several insured for their coverage. The risk must be within the Community and covered by a single contract at an overall premium for the same period by two or more insurers. At least one of the insurers must be participating in the contract by means of an office, branch, or agency in a member state other than that of the leading insurer. The leading insurer must assume full responsibility for the co-insurance practice determining the terms and conditions of insurance and rating. *Id.* at arts. 1-2(1).

<sup>40</sup> *Id.* at arts. 4-7.

<sup>41</sup> See *Commission v. Germany*, 1987 E. Comm. Ct. J. Rep. 205, 49 Comm. Mkt. L.R. 69 (1987); *Commission v. Ireland*, 1987 E. Comm. Ct. J. Rep. 206, 49 Comm. Mkt. L.R. 150 (1987); *Commission v. France*, 1987 E. Comm. Ct. J. Rep. 220, 49 Comm. Mkt. L.R. 113 (1987); *Commission v. Denmark*, 1987 E. Comm. Ct. J. Rep. 252, 49 Comm. Mkt. L.R. 169 (1987).

<sup>42</sup> See, e.g., *Commission v. Germany*, *supra* note 41, at 112. Article 59 of the EEC Treaty states:

Within the framework of the [stated] provisions . . . , restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting unanimously on a proposal from the Commission, extend the provisions of this Chapter to nationals of a third country who provide services and who are established within the Community.

EEC Treaty, *supra* note 1, at art. 59. Article 60 of the EEC Treaty which was also violated states, in pertinent part:

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals.

*Id.* at art. 60. Indeed, the four judgments delivered on December 4, 1986, paved the way for the nonlife insurance services directive implemented in 1988. See Directive 88/357, *infra* note 66. These European Court judgments made it clear that although a requirement of establishment infringed the relevant EEC Treaty articles, there was no infringement by requirements for minimum guarantee funds and the authorization of foreign enterprises within member states to conduct business in other member states.

the capacity of co-insurers to insure a variety of risks without limitations on establishment.

### 3. Life Assurance

Directive 79/267, the first life assurance directive, was adopted in 1979.<sup>43</sup> Directive 79/267 contains provisions which are closely linked to the provisions of the first nonlife insurance directive, Directive 73/239.<sup>44</sup> The categories of insurance not covered by the latter are the subject of the former.<sup>45</sup> Directive 79/267 disregards, however, the activities of small mutual organizations, social security organizations (not managed by assurance undertakings), and groups of tradesmen organizing death benefits, irrespective of whether the organizations have what could be described as adequate reserves.<sup>46</sup> A group of insurance policies are still exempt from the regulations because they are subject to supervision by administrative bodies concerned with private insurance.<sup>47</sup> In regard to official authorization requirements, the same rules applying to nonlife insurance apply to life assurance as well as the regulations concerning the form such companies must take, solvency margins, and scheme of operations.<sup>48</sup> The rules formulated in Directive 73/239 as to the setting up of agencies in other member states are identical to those in Directive 79/267 also requiring a resident representative.<sup>49</sup> Likewise, the rules as to the setting up of branches and agencies within the Community by companies with their head offices outside the Community in Directive 73/239 are similarly governed under this directive's article 10.<sup>50</sup> For U.S. insurance companies, the parallel treatment of establishment requirements for nonlife insurance and life assur-

---

<sup>43</sup> Directive 79/267, Council Directive 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, 22 O.J. EUR. COMM. (No. L 63) 1 (1979) [hereinafter Directive 79/267].

<sup>44</sup> See *supra* notes 6–31 and accompanying text.

<sup>45</sup> See *supra* text accompanying note 9.

<sup>46</sup> Directive 79/267, *supra* note 43, at art. 2.

<sup>47</sup> *Id.* at art. 1(2). Also not subject to the requirements of Directive 79/267 are management of group pension funds, operations covering conservation of capital or payment of minimum interest, and operations of the companies referred to in chapter 1, title 4 of book IV of the French "Code des assurances." *Id.*

<sup>48</sup> *Id.* at art. 8.

<sup>49</sup> *Id.*; see *supra* notes 28–30 and accompanying text.

<sup>50</sup> Directive 79/267, *supra* note 43, at art. 10; see Directive 73/239, *supra* note 6, at art. 27; see also *supra* notes 28–30 and accompanying text.

ance will minimize any potential confusion that could be caused by disparate rules.

Two further directives are planned relating to life assurance as a result of the nonlife insurance directive.<sup>51</sup> The first of these proposed directives is the second life assurance directive (or life services directive) designed to offer freedom to provide services in the field of life assurance.<sup>52</sup> The first proposed directive will be limited to insurance taken out by private individuals and establishes two regimes. The first regime is for the purchase of life assurance instituted by the individual, of his own accord, approaching the insurer in another state. The second regime, subject to a more detailed procedure, applies to the cross-frontier request for life assurance resulting from the assurer's approach canvassing for business. Although these proposed regimes do not affect branches of nonmember state insurers within the Community, there is also, in draft, a reciprocity clause dealing with the treatment of non-EEC insurance companies seeking to operate in the EEC through a subsidiary or through a takeover of an existing company. This clause, however, will be discretionary. These developments are similar to changes going on in the banking sector.<sup>53</sup>

A separate proposal is planned relating to the pensions business, the collective business of life assurance, and the individual contracts relating to the insureds' employment which were excluded from the ambit of the freedom of services proposals.<sup>54</sup> While the existing directives ensure freedom of establishment for life assurance companies, the proposed directives signal the Community's desire to likewise allow freedom to provide life assurance services. Hence, the passage of these proposed directives could be critical to the interests of those U.S. insurers planning to provide life assurance services within the EEC.

---

<sup>51</sup> See Directive 73/239, *supra* note 6.

<sup>52</sup> Proposed Directive, 32 O.J. EUR. COMM. (No. C 38) 7 (1989).

<sup>53</sup> See Second Banking Coordination Directive, 32 O.J. EUR. COMM. (No. C 167) (1989), COM(89) 190; Investment Services Directive, 32 O.J. EUR. COMM. (No. C 43/7) (1989), COM(88) 778.

<sup>54</sup> As of this writing, there is no text on this proposal, but recommendations are expected in the second half of 1990. There is also a life framework directive to be proposed and implemented around the same time in order to complete the Single European Market in life insurance.

#### 4. Export Credit Insurance

In 1984, a specific directive, Directive 84/568, dealt with European export credit insurance.<sup>55</sup> By encouraging cooperation among credit insurers in the various member states, the directive addresses the growth of exports within the Community and the need to make Community products more competitive in third countries. Member states must comply with a specimen agreement in dealing with guarantees of organizations in other member states involving one or more subcontracts.<sup>56</sup> The agreement is very specific regarding the principal insurer and joint insurers' obligations in these situations.<sup>57</sup> As a result, this specific agreement should be borne in mind when dealing in export credit insurance.

#### 5. Credit Insurance, Suretyship, and Legal Expenses Insurance

In 1987, Directive 87/343<sup>58</sup> amended Directive 73/239, the first nonlife insurance directive, in the fields of credit insurance and suretyship. Leaving these fields outside the scope of Directive 73/239, the Commission had preferred to deliberate separately on these areas. As a result of Directive 87/343, a requirement in the law of the Federal Republic of Germany was abolished regarding the specialization of companies involved in writing this type of business on German territory.<sup>59</sup> In addition, the directive lays down financial safeguards for companies which underwrite a significant volume of credit and suretyship insurance.<sup>60</sup> In re-

---

<sup>55</sup> Directive 84/568, Council Directive of 27 November 1984 Concerning the Reciprocal Obligations of Export Credit Insurance Organizations of the Member States Acting on Behalf of the State or with its Support, or of Public Departments Acting in Place of Such Organizations, in the Case of Joint Guarantees for a Contract Involving One or More Subcontracts in One or More Member States of the European Communities, 27 O.J. EUR. COMM. (No. L 314) 24 (1984).

<sup>56</sup> *Id.* at art. 1(1).

<sup>57</sup> *Id.* at Annex.

<sup>58</sup> Directive 87/343, Council Directive of 22 June 1987 Amending, 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 Directive Insurance Other than Life Assurance, 30 O.J. EUR. COMM. (No. L 185) 72 (1987).

<sup>59</sup> *Id.* at Introduction.

<sup>60</sup> *Id.* at art. 1.

sponse to this directive, equalization reserves were created and a large increase in the guarantee funds of companies transacting in these fields was thought to be prudent.<sup>61</sup>

In the same year, Directive 87/344 dealt with the subject of legal expenses insurance.<sup>62</sup> This directive had the same aim as Directive 87/343 to eliminate the Federal Republic of Germany's specialization requirements.<sup>63</sup> The directive replaces the German provision with guidelines for conducting this business to prevent any conflict of interest between the person insured and his legal expenses insurer.<sup>64</sup> Directive 87/344 also sets measures for the management of insurance companies and the types of insurance contracts that can be created.<sup>65</sup> Therefore, both Directives 87/343 and 87/344 remove restrictions to encourage the provision of credit insurance, suretyship, and legal expenses insurance.

## 6. Nonlife Insurance Services Directive

The final adopted directive, Directive 88/357, is the nonlife insurance services directive.<sup>66</sup> This directive amends Directive 73/239, the first nonlife insurance directive discussed earlier, in that it provides a framework within which insurers can cover most nonlife risks through the provision of cross-frontier services.<sup>67</sup> Much difficulty was initially encountered in agreeing on proposals for this directive, the first proposal being made in 1975 and amended in 1978. Fortunately, the Single European Act's qualified majority voting requirement<sup>68</sup> facilitated passage of this proposal.

---

<sup>61</sup> *Id.*

<sup>62</sup> Directive 87/344, Council Directive of 22 June 1987 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Legal Expenses Insurance, 30 O.J. EUR. COMM. (No. L 185) 77 (1987).

<sup>63</sup> *Id.* at Introduction.

<sup>64</sup> *Id.* at arts. 1-10.

<sup>65</sup> *Id.* at art. 4.

<sup>66</sup> Directive 88/357, Council Directive 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, 31 O.J. EUR. COMM. (No. L 172) 1 (1988) [hereinafter Directive 88/357].

<sup>67</sup> *Id.* One exception to the scope of this directive is motor liability insurance. *Id.* at art. 12.

<sup>68</sup> Single European Act, Feb. 17, 1986, 29 O.J. EUR. COMM. (No. L 169) 1 (1987), art. 149. Previously, the EEC Treaty required unanimity. Thus, one member state could block any proposal.

In February 1988, agreement was reached on the principle on which the proposal was to be based. The proposal incorporated the principle of "home state" control affording "mass" risks protection while allowing greater flexibility to implement the single market in "large" risks by 1992. Under Directive 88/357, at the option of the host country, "mass" risks<sup>69</sup> continue to be governed by authorities in the state in which the risk is located with authorization requirements, supervised premium scales, policy conditions, and reserves held to meet underwriting liabilities.<sup>70</sup> "Large" risks<sup>71</sup> are governed by a simplified regime of "home country control" where financial supervision of the companies will take place. The host state in which the risk is situated can decide on any application to supply services and can supplement the laws governing policy conditions and premium scales if it feels the rules in the other member state are not sufficient to achieve the requisite market protection.<sup>72</sup> Transitional provisions have been prepared for Greece, Ireland, Spain, and Portugal, which may apply the detailed regime to all risks until the end of 1992. After 1992, the countries must simplify the regime fully with compliance required by 1997 for Spain and 1992 for Greece, Ireland, and Portugal.<sup>73</sup>

Further provisions in Directive 88/357 relate to large risks and risks insured by unauthorized services which are already established in a member state permitting their establishment.<sup>74</sup> The policy entered into on a services basis must indicate to the policyholder in which member state the insurer has its head office.<sup>75</sup> Insurance contracts written on a services basis are subject to indirect taxes in the state in which the risk is situated.<sup>76</sup> In Spain,

---

<sup>69</sup> Directive 88/357, *supra* note 66, at art. 13. The term "mass risks" describes business, personal, and commercial risks.

<sup>70</sup> *Id.* at art. 14.

<sup>71</sup> The term "large risks" describes risks classified under classes 4, 5, 6, 7, 11, and 12; risks under classes 14 and 15 if the policyholder is professionally engaged in industrial or commercial activity or in a liberal profession; or risks under classes 8, 9, 13, and 16 if the policyholder exceeds two of the following criteria by December 31, 1992: a balance sheet total of 12.4 million ECU, a net turnover of 24 million ECU, or an average number of employees of 500. *Id.* at art. 5; *see supra* note 8.

<sup>72</sup> *Id.* at art. 7.

<sup>73</sup> *Id.* at art. 27.

<sup>74</sup> *Id.* at art. 13.

<sup>75</sup> *Id.* at art. 21.

<sup>76</sup> *Id.* at art. 25.



surcharges will need to be added to the premiums.<sup>77</sup> The directive refers to the co-insurance directive, Directive 78/473;<sup>78</sup> and therefore, the leader of a Community co-insurance policy is subject to the provisions of this directive on services. The criteria for risks as governed by the terms of Directive 78/473 are the same as those governed by Directive 88/357. Naturally, the freedom of services provisions will only apply to insurers "established" within the Community. Therefore, it will not be possible for branches or agencies of nonmember state insurers to take advantage of these provisions without setting up a subsidiary within the EEC or taking over an established insurer.

#### IV. FUTURE DEVELOPMENTS: PROPOSED DIRECTIVES

In recent years, there have been three proposals for further directives in the fields of accounts of insurance companies;<sup>79</sup> winding-up of insurance companies;<sup>80</sup> and coordination of the laws, regulations, and administrative provisions relating to insurance contracts.<sup>81</sup> The first proposed directive in the field of accounts of insurance companies is designed to apply the provisions of the fourth directive on company law<sup>82</sup> to insurance undertakings. The proposed directive would apply accounting procedures to legal forms not contemplated by the company law directive in order not to distort competition within the insurance sector. The proposed directive also provides for disclosure by insurance companies of the details of their economic and financial situation and of their operating results at the end of the financial year.

<sup>77</sup> *Id.* Insurers must pay surcharges set by the Spanish "Consortio de compensación de Seguros" which creates an additional reserve in order to compensate for extraordinary losses in that member state. *Id.*

<sup>78</sup> See Directive 78/473, *supra* note 37.

<sup>79</sup> Proposal for a Council Directive on the Annual Accounts and Consolidated Accounts of Insurance Undertakings, 30 O.J. EUR. COMM. (No. C 131) 1 (1987), COM(86) 764 final, COM(89) 474 final.

<sup>80</sup> Proposal for a Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Compulsory Winding-up of Direct Insurance Undertakings, 30 O.J. EUR. COMM. (No. C 71) (1987), COM(86) 768 final, COM(89) 394 final C/253/3-6.10.89.

<sup>81</sup> Amendment of the Proposal for a Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Insurance Contracts, 23 O.J. EUR. COMM. (No. C 355) (1980).

<sup>82</sup> Directive 78/660, Fourth Council Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the Annual Accounts of Certain Types of Companies, 21 O.J. EUR. COMM. (No. L 222) 11 (1978); see *supra* note 79.

The second proposed directive<sup>83</sup> is intended to establish a legal framework of unified procedures for the compulsory winding-up of insurance companies in the EEC. The main purpose of this proposed directive is to ensure that creditors of the insurance companies are treated equally in the dissolution process. The main scenario envisaged by the proposed directive is the withdrawal of authorization leading to a winding-up. There is to be a "special compulsory winding-up" procedure for insolvent undertakings and a "normal compulsory winding-up" procedure for any other circumstances which require the business of a solvent company to be terminated.

The third and final proposed directive for the administration of insurance contracts is intended to establish common legal standards in member states for policy documentation, nondisclosure of information by the policyholder, and termination of insurance contracts.<sup>84</sup> The third proposed directive addresses only nonlife insurance contracts. It should be noted that this proposed directive does not substantially modify the 1980 text. Therefore, this proposal may either be dropped or changed beyond recognition and incorporated into the nonlife framework directive.<sup>85</sup> These proposed directives indicate the EEC's desire to eliminate any potential distortions in competition and to harmonize the laws in member states in order to establish a true Single European Market for the insurance sector.

## V. CONCLUSION

The liberalization of restrictions on establishment and the provision of services in the field of insurance is progressing fairly rapidly. Freedom of establishment is complete for all intents and purposes. Freedom to provide services has not progressed quite as far as establishment although, in terms of the large-scale risks, it is almost as complete as envisaged. A lot, however, still must be done in the sphere of "mass" risks as it is presently uncertain how the market intends to clear barriers to providing services for these risks while maintaining sufficient safeguards to protect the policyholder.

---

<sup>83</sup> See *supra* note 80.

<sup>84</sup> See *supra* note 81.

<sup>85</sup> The nonlife framework directive is the counterpart of the life framework directive intended to follow the implementation of the nonlife services directive discussed earlier. See Directive 88/357, *supra* note 66.

As regards the separate EEC member states, there have been differing responses to the idea of foreign participation in their home markets. The United Kingdom has long been one of the most relaxed and tolerant members having allowed foreign participation for a considerable time. Yet, some countries, such as Spain and Greece, had previously kept up relatively strict barriers to foreign entry. Some countries, especially Denmark, allow establishment by nonmember state insurers but will insist on reciprocal rights of establishment in the country seeking authorization. Countries, like France and Portugal, have constructed such a complex system in order for foreign competitors to take over one of their companies or establish a subsidiary that representation by an agent is sometimes a far less time-consuming and more acceptable alternative.

Whether the United Kingdom's prior experience with cross-frontier competition will put it on a better footing as regards further expansion into the Community remains to be seen. From the U.S. insurers point of view, the United Kingdom would probably be a good location for establishing subsidiaries to participate in the EEC because it has the most relaxed rules for the takeover of domestic insurers by foreign companies. Likewise, the United Kingdom, as a result of the Lloyd's market, has historically been the leader of insurance operations.

Since a large majority of U.S. companies are life assurance companies, the benefits of participation in the European market may accrue more slowly because host country control remains pervasive in this area. The differing taxation systems in the member states create more havoc in the life assurance area than any other because of the intricate tax repercussions. Although speedy resolution of the taxation problems is unlikely since member states have strong vested interests in retaining their own systems, attempts to harmonize the company taxation and dividend systems have been discussed for years. Thus, a U.S. subsidiary's participation in other areas of insurance business would certainly be worthwhile. Until agreement has been reached on harmonization issues, a U.S. subsidiary should establish contacts and become familiar with the workings of the market. Attention must be focused on the acquisition costs and costs of establishment for the foreign insurer because of the currently small profit margins of member state domestic insurers. Investment opportunities will also influence the potential profits of new entries into the Community markets. The United Kingdom also represents a prime

location for establishment in the EEC as it has historically offered a wide range of investment opportunities. Therefore, U.S. insurers and their advisers should strongly consider the opportunities that participation in the European market may offer. Notwithstanding the fairly extensive legal requirements outlined above, 1992 will still represent a unique opportunity for expansion out of the home market.