

## EICL - Insurance Europe Response to Discussion Paper VII

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### Summary

Insurance Europe welcomes the opportunity to comment in writing on Discussion Paper VII, forming the basis of discussions during the seventh meeting of the expert group on European insurance contract law (EICL) (held on 12-13 November 2013), and the relevant section of the final report that will represent the work-output of the expert group by the end of 2013.

Discussion Paper VII, Section	Insurance Europe response
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procedure. Such laws differ with respect to liability rules, causation, loss, procedural issues (such as “trigger” events) and settlements. The criteria for economic loss also differs across the EU.

Other factors include the entire system of civil law, including the civil code, laws governing general terms and conditions of business, commercial law, etc. Questions of access, errors and appeals, the enforcement of damages claims by injured parties and the enforcement of claims by the insurer, differ from member state to member state. For example, in the UK motor insurance contracts reflect requirements set down in the Road Traffic Act 1988, as well as legislation and regulations around speed, alcohol testing and vehicle licensing. Any attempt to harmonise these requirements would mean an overhaul of national legislation across the EU. Additionally, the UK operates a common law system, meaning that policies must evolve to take into account the changing case law.

#### ■ **Regulatory factors impact business decisions to offer insurance**

The social security systems in the various countries are also different, which has a substantial impact on the insurer's damage and recourse payments in case of personal injury. Similarly, different tax systems require fundamentally different and costly business processes for each individual country in which the insurer seeks to operate. In other words, tax on insurance premiums is nearly 60% in Denmark while several other countries, such as the Czech Republic, Estonia and Norway, do not impose such taxes. Motor insurance is a mass market product which is organised by means of automated processes. Conditions are determined not so much in reference to insurance contract laws, but by the wider legal framework.

#### ■ **EU Motor Insurance Directive and compulsory amounts**

As also noted in the discussion paper, motor insurance is regulated via the EU 5<sup>th</sup> Codified Motor Insurance Directive (MID). Amounts of EUR 1.120 million per victim or EUR 5.600 million per claim for personal injury, as well as EUR 1.120 million per claim for property damages, currently set the minimum amounts of cover under the MID. Article 9, however, gives member states discretion to set higher amounts. While the paper notes differences between member states' minimum compulsory insurance amounts, these amounts are generally designed in consideration of the expected damages and costs associated with motor liability risks in these countries, which naturally result from different compensation systems.

#### ■ **Green Card system and motor insurance bureaux**

Additionally, Insurance Europe would like to highlight the benefits of the Green Card system in Europe, which was first established in 1949 and has now been joined by more than 40 countries. The purpose of this system is to protect victims of road traffic accidents involving foreign motor vehicles from those countries. The MID further provides for cooperation between national insurers' bureaux as per Article 6, which help facilitate compensation in such cross-border cases. Chapter 4 of the MID moreover outlines the compensation procedure for damage caused by an unidentified vehicle or a vehicle for which the insurance obligation has not been satisfied, which is then handled by the national guarantee fund in accordance with Article 25.

#### ■ **Having the expertise and resources to offer multi-state insurance cover**

Regarding offerings of MTPL insurance, any development of a suitable and effective cover must entail a thorough analysis of the member state's motor liability law as well as the legal processes and administrative procedures of the jurisdiction in which the policyholder's insured activities take place. Considering this, as well as the risks particular to a specific jurisdiction, not all insurers may be entirely capable (either in terms of financial capacity and/or expertise) to cover foreign risks or else have the risk appetite (ie business strategy) to offer products in a foreign market. Without adequate local knowledge of the specific risks, in most instances it

would not make commercial sense for an insurer to enter a foreign market given the inevitable potential for either over or under-competitive pricing.

Regardless, there are multinational insurance companies offering multi-state MTPL policies as well as local insurers that can offer endorsements and/or extensions to accommodate customers driving cross-border. Considering that these options exist, insurers can work with their policyholders to custom-design a policy or policy extension that adequately covers their potential risk exposure in the foreign member state. In this regard, policyholders seeking to extend their insurance cover may discuss the matter with their insurers directly or consider the common practice of using an insurance intermediary, such as a broker, to obtain information about other products.

In other words, under freedom of establishment insurers *can and do have branches or subsidiaries in several member states*, thus allowing them to operate across multiple jurisdictions while providing local services tailored to the needs of their customers. This enables insurers to build up knowledge and experience of local risks, as well as different legal, regulatory and claims systems, in order to price their products accurately. For example, insurers can initially enter new markets or jurisdictions through underwriting a broker's existing book of motor business to provide a platform for building up local underwriting knowledge. It is also possible for insurers to initially delegate underwriting to local brokers.

As with any liability insurance policy, MTPL insurers must also still compensate for the additional costs of providing legal and/or risk assessment experts for the foreign jurisdiction, conducting transactions in the language of the foreign jurisdiction, obtaining and analysing risk data from the foreign jurisdiction, and so forth. It is moreover necessary for insurers to safeguard their ability to cover these costs without failing to comply with legislative solvency requirements and their financial obligations to investors (ie in the form of returns), both of which are intended to secure insurance capacity for the cover of potential claims.

■ **There is no evidence to suggest that consumer demand is not met**

At this time there appears to be no concrete evidence that current demand for cross-border provision of MTPL is not being met. There is moreover no evidence of a widespread inability to access cross-border MTPL due to insurance contract law differences or evidence to support that a cross-border motor insurance market *would* develop if alleged obstacles posed by differences in contract law were overcome. To the contrary, motor insurance is a highly competitive market with a variety of insurance products available to European consumers. There additionally appears to be no evidence suggesting that insurance contract laws are impacting the availability and/or provision of insurance to the point of hindering consumers' freedom of movement or establishment or freedom to provide services.

## 1. The Motor Insurance Market in the EU

In 2011 European motor insurers generated total premium income of €129bn, compared to €124bn in 2010. This corresponds to a growth of 4%, against +1.2% the previous year<sup>1</sup>. The European motor insurance market is led by Germany, Italy, France and the UK, which together represent around 60% of all European motor premiums; market shares were 16% in Germany, 16% in Italy, 15% in France and 14% in the UK. The first three markets each recorded a rise of about 4% in 2011, while the UK saw its motor premium revenue increase by 14%. These developments are the consequences of recovering from 2010 losses, which were

<sup>1</sup> According to Insurance Europe's "Statistics N°46: European Insurance in Figures", published January 2013, and available at: <http://www.insuranceeurope.eu/uploads/Modules/Publications/eif-2013-final.pdf>

brought about by the rising costs of personal injury claims. Most large motor insurance markets witnessed an increase in premiums in 2011, with the exception of Spain (the fifth largest market with an 8% market share). After two successive falls of 6% in 2009 and 2010, Spain experienced another, although less substantial, decline of 2%. These developments are mainly related to the recession.

The overall increase in premiums reflects the fact that competition remains as high as in previous years. At the same time, motor insurers are offering more services in addition to traditional cover (eg assistance), new products (eg cover for occasional drivers) and more advantageous policy conditions (eg no change in bonus-malus for drivers who have had few accidents, profit sharing). However, these measures are individual business decisions that are made on a *voluntary* basis in a competitive market. This reflects the importance of safeguarding insurers' freedom to contract, in order that they are able to continue to respond to consumer needs and demands through product innovation.

In this section Insurance Europe also questions the relevance of the following statement:

- Specialist motor insurers exist in all Member States, although the leading operators are generalist, multi-line insurers. (p 1).

The above statement from the discussion paper represents a simplified separation of the market and Insurance Europe fails to see the purpose of this statement to the remainder of the discussion paper, which focuses on whether contract law issues exist for the motor insurance sector. Insurance Europe requests that this statement not be included in the final report.

## 2. Cross-border Motor Insurance in the EU

Insurance Europe would like to take this opportunity to address some statements made in the discussion paper.

### ■ Freedom of Establishment (FOE)

With respect to the "most important firms in motor insurance" offering services on an FOE basis being based in BE, IE, LV and UK (p 2), Insurance Europe suggests that the phrasing "most important" is misleading. Rather, it should be noted that, generally, the "larger" motor insurance undertakings that offer services on an FOE basis tend to be based in these areas. As discussed above, insurers must weigh numerous factors when assessing whether to establish themselves in another member state, including the building up of local knowledge and experience of local risks. In view of these factors, insurers must have confidence in being able to price their products accurately and therefore remain competitive in the foreign market. Consider this, the decision *not* to enter another market on an FOE basis should not automatically be viewed as placing them in a "less important" category.

### ■ Free Provision of Services (FPS)

Concerning the example of total premiums written under FPS between Ireland and the UK (p 2), it should be noted that – rather than a result of commonalities in insurance contract law – this example concerns the vast similarities in political, legal (ie common law), customary, linguistic and economic structure between these two countries.

### ■ No Pan-European products

It should be highlighted that the Retail Insurance Market Study, MARKT/2008/18/H, listed a number of factors that either encourage or discourage cross-border trade in general. These

factors – which are separate from insurance contract law issues but are extremely relevant to the current consideration of cross-border provision of insurance – include (pp 30-31, 3.8-3.11):

- absence of a local presence in the policyholder’s country of residence;
- cultural and linguistic factors;
- consumer preference to deal with local/familiar insurer;
- language and, for some member states, currency; and
- costs of ensuring compliance with local legislation.

It should further be pointed out that the above study notes that, according to the IPSOS INRA Consumer Satisfaction Survey Report of May 2007, consumers “*were mostly satisfied with domestic insurance offerings and also that the latent demand for cross-border trade in insurance was likely to be low – this will naturally constrain the scale of the market opportunity for insurers*” (p 29, 3.3). This underlines the need to giving proper consideration to factual evidence during consideration of the current work of the expert group.

Regarding a uniform pan-European policy, there appears to be no obvious benefit arising from such a policy for victims of cross-border motor vehicle accidents as the aforementioned Green Card system already works to ensure compensation for victims of uninsured or unidentified motor vehicles from other countries that are signatories to the system. Likewise, the Green Card system also provides assistance, through the national insurance bureaux, to enable victims of cross-border accidents to raise a claim for compensation against insured and identified vehicles. In accordance with the 5<sup>th</sup> Codified EU Motor Insurance Directive these bureaux are present in every member state and are generally financed through mandatory financial contributions by the local motor insurance industry.

Moreover, there appears to be some misunderstanding in the discussion paper between “product portability” and “pan-European cover”. A uniform pan-European cover is likely to result in higher costs for consumers due to the need of insurers to introduce products covering multiple jurisdictions under a single policy. Product portability, on the other hand, can be done via simple extensions of a policy to cover another region for a *temporary* period of time, thus indicating no need for a pan-European product. This is already a common practice occurring within the European-wide motor insurance industry.

Finally, the idea of a uniform pan-European policy could be too difficult to introduce for certain member states. For example, it could present problems for those member states with a more “mature” legislation that contains higher liability amounts or more heads of damage (eg some member states require cover for non-material damage, while others have no national law regarding this type of harm).

Insurance Europe underlines, as is acknowledged in discussion paper VII (at pg 3, para. 2b), that cross-border motor insurance provision may be very sensitive to the specific member states in question due to factors other than contract law differences such as the wider legal framework (refer to introductory remarks above), language, culture and so on. There is currently no evidence that a uniform pan-European policy would substantially increase the cross-border provision of motor insurance, in large part due to difficulties in achieving economies of scale from cross-border provision. This is because separate: business processes, calculations of risk and underwriting, product designs, market surveillance, marketing, sales, legal departments and claims settlement systems are required for each country, to reflect matters such as the differences in the wider legal framework and the need for networks of third party service providers.

Further, Insurance Europe agrees with the possible reasons listed in para. 2d for an absence

of a uniform pan-European policy, particularly the lack of available statistical data necessary for actuarial models and the complexity of ensuring a satisfactory cross-border claims management for policyholders, although these are of course not factors exclusive to the cross-border provision of motor insurance but affects most types of insurance.

With respect to reference to the Gender Directive on page 4, footnote 13, Insurance Europe finds this reference irrelevant to the subject at hand. This EU legislation is not a contract law issue and should thus not be referred to in either this discussion paper or the final report.

Page 4 additionally states that a pan-European product could be difficult to price competitively, using the example that an MTPL product marketed across the EU would require “unlimited cover” in order to conform to the highest common denominator. However, pricing of direct cross-border motor insurance is difficult to do in *any case* unless actuarial data about the local risks in the particular market or jurisdiction is acquired. On this basis, insurers make the decision to enter a market based on the available statistical risk data rather than pure compulsory MTPL coverage amounts (including even “unlimited” cover requirements). In other words, it is not just the coverage amount that dictates the likely risk, but rather, *the collected data on the cost of the risk for the member state jurisdiction*. This negates the suggestion that the compulsory amounts themselves constitute a contract law barrier.

### 3. Current EU Legislation: Motor Insurance Directive 2009/103/EC

The MID does not regulate issues of civil liability and the calculation of compensation awards, which have purposefully been left to the discretion of the individual EU countries. The MID further does not regulate “comprehensive cover” (e.g. for physical injury of the driver, material damage to the driver’s vehicle, vehicle theft, etc.). There are good reasons for this, including that as this is cover to protect the owner of the vehicle, as opposed to third parties such as victims, this should remain a matter of freedom to contract – both for the insurer and the policyholder.

It is moreover important to consider that the MID provides numerous requirements for the handling and payment of claims and thus this is an area already harmonised under the Directive. For example, the MID stipulates at Article 22, that interest is payable upon the amount of compensation offered by the insurance undertaking where the offer is not made within a three-month time limit. While some countries may have variations of this requirement, the time limit and consequences for failure to offer is overall already regulated at EU level, therefore differences in this area between member states are likely to be minimal.

It should be underlined, as is acknowledged in discussion paper VII (at para. 3), that the MID currently affords drivers the ability to take out cross-border insurance cover. It is therefore fair to assume that where insurers have an appetite to offer such policies, any such demand can be satisfied. Insurance Europe is not currently aware that such demand is not being met in the market.

### 4. Possible Contract-Law Related Obstacles to Cross-border Motor Insurance

#### a) Coverage amounts

As previously mentioned in Insurance Europe’s response to Discussion Paper V on Liability Insurance, the extent of cover offered by insurers *is largely based on the national legislation where the risk is located*, as well as the local risk specificities, and, hence, the factors that lead to the expected cost of that risk such as:

- average medical care costs associated with personal injuries;
- amount of damages likely to be awarded in a national court;
- cost of motor vehicle repair and maintenance;

- cost of spare parts;
- legal expenses relating to liability claims disputes filed in national courts etc;
- the fraud landscape particular to a jurisdiction.

The above factors underpin the configuration of member state minimum amounts, as such amounts must consider the costs arising from motor liability risks as well as the insurance market capacity available for covering those risks. These factors can vary between member states and regions within member states, demonstrating that contract law differences are not a major factor influencing the coverage amounts.

In addition to the above, there are other regional factors that can further explain the difference in claims costs for insurers, which directly impact the premium calculated. These country-specific factors include:

- traffic conditions and vehicle density (often significantly higher in urban areas);
- Speed limits, alcohol testing, when drivers licences get renewed or the driving age
- economic development (higher development corresponds with higher amount of claims);
- landscape (claims index can be higher in more difficult terrain, whereas flat countries may have more consumers travelling by bicycle); and
- consumer habits (ie road safety and driving culture, including the frequency and severity of drunk driving incidents).
- Different distribution channels – ie: comparison websites (prevalent in the UK); brokers or directly from the insurer;
- Underwriting aids, e.g. the use of telematics.

Not only do the above factors vary from country to country, but they can even vary from *region to region within a single country*. Thus, the scope of a compulsory insurance amount should be sufficient to address all the above factors. For a consumer wishing to extend his cover to another member state or region, the above factors will also influence the premiums an insurer may need to set for expanding the scope of the current MTPL policy.

#### **b) Bonus-malus systems**

Insurers can offer discounts based on criteria such as claims history, length of time the driver has held a driver's license, length of time the driver has held MTPL insurance and other criteria. Indeed, the use of bonus-malus systems can help increase competition in the market, but these systems not only vary from member state to member state, but also from insurer to insurer within a single member state. The manner of applying bonus-malus to the premium for a future year of MTPL cover varies between insurance companies (even within the same geographical market) and between the different markets, even in those countries where bonus-malus systems may be deemed mandatory by national law.

In the judgment of the European Court of Justice for Cases C-346/02 and C-347/02, the Court found that *"while the bonus-malus systems introduced in both France and Luxembourg have effects on changes in the amount of premiums, they nevertheless do not result in the direct setting of premium rates by the State, since insurance companies remain free to set the amount of the basic premium. Neither the French nor the Luxembourg bonus-malus scheme can therefore be equated with a system of approving premium rates that is contrary to the principle of freedom to set rates"*. This judgment would thus suggest that such systems do not present insurance contract law obstacles.

In addition to the above, the majority of Insurance Europe's members confirm that their

national markets have a *voluntary, market led* bonus-malus system. The use of these systems by insurers is, in these countries, a commercial matter and subject to the insurer's own criteria while offering products within a highly competitive market. Members also confirm that even in markets where it is offered on a voluntary basis, not all insurers necessarily do so. The imposition of *mandatory* bonus-malus systems is not widespread across the EU and thus is not a major obstacle to cross-border insurance products or consumer freedom of movement. It is the exception, rather than the norm, that bonus-malus systems are mandatory legal requirements within the internal market.

### **c) Other specific (mandatory) national rules**

Insurance Europe is most concerned that this section tends to cite issues that are well outside the scope of insurance contract law and, rather, focus on requirements placed upon insurers in general (eg regulatory requirements). For example, claims liquidation is an issue of claims handling and management rather than the design of the contract itself and should not be discussed in either this discussion paper or the final report. Additionally, the use of basic contracts may additionally fall under legal registration requirements and not actual contract law, therefore this subject should also be removed from the scope of this paper.

In general, motor insurers have flexibility in designing their insurance contracts and the freedom to contract with consumers ensures competition within the market, and product development and innovation to meet changing consumer needs and demands. As motor vehicle drivers can generally be insured under their original MTPL policy for a temporary period of time while in another member state, the form of the motor insurance contract appears irrelevant.

Moreover, considering the variety of factors influencing claims costs and consumer needs, the different requirements for insurance contracts appear to reflect the national culture and expectations of consumers. It should further be noted that *vehicle registration requirements* can also influence insurance requirements, as some member states list proof of motor insurance as a precondition to satisfactory registration.

With respect to contract forms, renewals or other similar requirements, the costs of adapting motor insurance contracts to suit these requirements do not appear to be major obstacles for insurers wanting to invest in a foreign market. These differences are not considered significant barriers as they are unlikely to affect business behaviour or decisions. Rather, other more important factors play a role; including the need to build up a network of third party service providers (including reputable mechanics' garages) to support the insurers' endeavours to fulfil the claims management process and add-on services offered by insurers, such a towing services. With respect to third party services, it takes considerable time and investment to build up a *reliable network* of service providers that can ensure a suitably high level of customer care, particularly in a market where the language and types of services may differ from the insurer's home member state. For example, in the UK, motor claims management requires networks of relationships with local repairers, part and paint suppliers, credit hire firms and local solicitors. This in itself can be challenging for insurers lacking these connections in the foreign jurisdiction.

In respect of the specific examples illustrated in discussion paper VII, Insurance Europe questions whether they constitute examples of contract law differences, including the obligation to offer "basic contracts" in Italy for ease of consumer comparison rather than actual product offering, rules on contents and layout of websites – also in Italy. Likewise, care must be taken to distinguish between national "laws" and "practices" on claims management.

In respect of renewal requirements, Insurance Europe understands that this does not, of itself, act as an obstacle to the cross-border provision of motor insurance. Insurers wishing to enter another market are likely to work around such differences.





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