Position Paper

EICL - Insurance Europe's response to Discussion Paper III

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Summary

Insurance Europe welcomes the opportunity to comment in writing on Discussion Paper III, forming the basis of discussions during the third meeting of the expert group on European insurance contract law (EICL) (held on 25-26 June 2013), and the relevant section of the final report that will represent the work-output of the expert group by the end of 2013.

Introduction

Insurance Europe reiterates its continuing wish to assist the European Commission in its work of the expert group - set up to establish whether contract law obstacles exist that hinder the cross-border provision of insurance and, if so, establish in what areas of insurance such obstacles are most prevalent.

Insurance Europe has previously noted its concerns arising from the organisation of the expert group, the approval processes and the publication of on-going working materials arising from its work. Previous concerns over the scope of the work of the expert group have resurfaced in the light of the Commission's desire to compile a comparative analysis of national contract laws – covering the areas of contract law considered in Discussion Paper III and the forthcoming Discussion Paper IV.

Lastly, Insurance Europe remains to receive evidence that differences in contract law represent a major obstacle to cross-border insurance provision. In discussions with our member associations, it is clear that differences in contract law do not feature as an object of complaint by insurers to cross-border provision of insurance. Care should be taken to avoid drawing conclusions that could have a negative, practical effect on insurance provision based merely on theoretical or abstract problems or situations. The practical and commercial reality must be considered in the work of the expert group. Several of the listed topics of contract law are theoretic/abstract problems that are not replicated in the commercial realities and experiences of insurers as is apparent from our responses below. Policy must not be developed based on a faulty basis or without a strong evidence base for a need to address obstacles. Otherwise there is a risk of negatively impacting insurance provision within the internal market without a clear cause or purpose.

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Overarching comments

Organisation

Insurance Europe remains **concerned that the timeframe set aside to conduct this detailed exercise is insufficient and risks jeopardising the outcome of the work** of the expert group. In particular, there is a real risk that the input the European Commission seeks, and the timeframes permitted to collate and develop responses, jeopardise the ability of the European insurance industry, through Insurance Europe, to be as constructive as is desired by the industry.

By way of example, we set out below the work-patterns to date:

Meeting	Discussion Paper (DP)	Length in pages	Number of questions	Number of working days afforded for consideration of DP before meeting of expert group
17-18 April	DPI	19	22	4
15-16 May	DPII	20	20	8
25-26 June	DPIII	29	82	8
17-18 July	DPIV	29	54	8

As is clear from the above, the volume of preparatory documentation within tight timeframes makes it extremely difficult to respond in substance and risks causing real difficulties when circulated, in due course, in conjunction also with draft sections of the final report. The focus of the work should, after all, be on the report; despite this, no sections have yet (as at 11 July) been made available to the expert group for consideration, despite the end-of-year deadline for finalising the entire report.

Scope of work

Secondly, Insurance Europe is **concerned to see that several issues already being discussed within the European institutions are referred to within the material for the work of the expert group**. In particular, *pre-contractual and contractual provision of information* and *advice* in relation to the purchase of insurance products should not be addressed within this group, in the light of the continuing work of the European institutions on topics such as "packaged retail investment products" (PRIPs) and the revised insurance mediation directive (IMD2). The complex issues that arise in relation to these topics, the cross-over of issues and the protection of stakeholders affected by these initiatives are better considered and dealt with outside this expert group.

Further, it is unclear the objective or mandate of the Commission in tagging on an additional, substantial task to the work of the expert group - the comparative table of contract laws in member states. Insurance Europe questions the mandate for this, and doubts the objective quality and consistency of such work which ultimately, again, will need to be reviewed and considered. This is a further task not envisaged in the original time-table of the work of the expert group or mandate and adds further pressure within an extremely tight timetable.

Lack of evidence

Thirdly, **it remains unclear whether there is any evidence to suggest that a cross-border insurance market**, particularly in respect of mass risks, **would develop** if differences in contract law were overcome. It also remains uncertain, for lack of evidence, whether there would be sufficient demand to overcome and warrant the inevitable business costs associated with the supply of cross-border insurance products. Therefore, there is as yet no evidence that consumers, businesses or insurers would benefit substantially from any attempt to address differences in national contract law provisions which may be identified by this expert group as causing obstacles to the supply of cross-border insurance.

The mere fact that there is less insurance provision cross-border under freedom of services provisions (FOS) than, say, freedom of establishment (FOE) does not mean that a market should or would be created by removing possible contract law obstacles. Several factors affect insurers' decision to offer insurance cross-border. These include important factors such as 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds, the tax environment and supervisory environment.

Likewise, there is no certainty that consumers would willingly take up cross-border products even if particular contract law obstacles identified by the expert group were removed and insurers were offering cross-border insurance provision on a broad scale. Several factors come into play for consumers considering their preferred service provider, including knowledge and expertise, reputation, pricing levels, service levels and so on of the insurance provider.

Additionally, the mere fact that there is a difference in national contract laws does not mean that contract law differences pose a problem and deters insurers from offering their products cross-border or makes it more difficult for them. Many important factors affect the decision to offer, or refrain from offering, insurance services cross-border (see above). **Differences in contract laws represent only a minor aspect of the totality of obstacles considered and weighed up by insurers when considering whether to offer cross-border insurance within the internal market.**

Discussion Paper III, Section	Insurance Europe response
1.	**Definition of insurance contract**
	The diverse definitions of 'insurance contract' do not appear to create any impediments to cross-border provision of insurance services in **non-life insurance**. Insurers appear able to overcome such differences where they choose to provide their services cross–border. The decision is ultimately a commercial decision based on the viability of market-entry and the market in question. Similarly, the lack of uniformity in definitions of 'insurance contract' does not appear to be an obstacle to the development of new insurance products, even where these encompass add-on services. Insurers will be mainly concerned about the breadth of factors that have a greater impact on cross-border provision of services, including factors such as 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds (particularly in respect of motor insurance), the tax environment (particularly in respect of private pension products) and the supervisory environment. Consumers are unlikely to be concerned about the differences in definition of 'insurance contract' between member states. The more likely concerns of customers are understanding the product, the scope of cover, the price payable for cover and the excess applicable to their contracts, . What may prevent customers accessing cross-border insurance services include language barriers, different cultures and different sales rules. More sophisticated customers, such as large commercial organisations may wish to save money by exploring more complex methods of obtaining cover. They will do so with professional advice, such as through the assistance of a broker, and are unlikely to be prevented from choosing solutions by different perceptions of insurance contracts. When considering national differences impacting the availability of private insurance contracts on a cross-border basis, the scope for product development and design by insurers should be safeguarded in the interest of maintaining a competitive and innovative insurance industry, in the interest of both customers (be they consumers or businesses) and insurers. Product design must remain within the remit of the commercial freedom of insurers.

2.	**Elements of the insurance contract**
	2.1 Insurable interest Legal requirements for insurable interest are useful defences against moral hazard that help to differentiate contracts of insurance from gambling transactions. Whatever a local legal regime may say, most reputable insurers will want an insured to have some form of economic interest in the subject matter insured. They will not therefore adapt their insurance products to provide insurance to insureds who do not have insurable interests, even if this is legally feasible in some Member States. Most non-life insurance contracts are contracts of indemnity, which means that the insured cannot recover more than they have actually lost. This reinforces the principle of insurable interest. Even if an insured is not required to have insurable interest when the contract is concluded, they cannot benefit financially from it, as without insurable interest they do not lose anything if the subject matter insured is damaged or destroyed. In this light, a requirement for insurable interest is a consumer protection measure, as it helps prevent customers being sold worthless insurances under which they cannot pursue legitimate claims. Differences between member states on 'insurable interest' are not a big issue for **non-life insurance** providers, and do not prevent the cross-border provision of non-life insurance. A requirement for insurable interest raises the same issues for the insurance of large risks as for mass risks. Any attempt to define 'insurable interest' risks stifling product development and innovation to the detriment of insurance customers. **2.2 Risk** In respect of indemnity and benefit policies, where the concept of 'risk' is a pre-requisite, there does not appear to be big variations of the concept of 'risk' across member states. This may differ in respect of the life-insurance market. Rules on the meaning of "risk" do not pose any problems for the provision of cross-border insurance. **2. 3 Payment of insurance money (i.e. claims payments)** In respect of **non-life insurance**, differences in the definition of insurers' obligation to pay claims do not appear to require adaptations to the contract when offered cross-border and neither do such differences create an obstacle to cross-border provision. From the insurer's perspective, the more important considerations (rather than the definition) are the practical aspects of the contract, such as claims handling and language of customers, and the differences in compensation awards resulting from differences in national tort law and court rulings. These are the main factors that lead insurers to offer services cross-border via branches rather than on the basis of freedom of services provision (FOS). **2.4 Payment of premium** Insurance Europe is not aware that this is an issue for insurers.
3.	**Pre-contractual information**
	The impact of different pre-contractual information requirements between member states can be one of the main obstacles to developing and providing a cross-border insurance product for insurers wishing to sell **investment-linked life insurance products** cross-border. In respect of **non-life insurance** however, differences in pre-contractual information requirements have less of an impact on its cross-border provision. There are differences, not only between member states but also between classes of insurance. For example, pre-contractual information requirements differ between non-life insurance products and life insurance products. In general, obligations relating to pre-contractual information tend to be greater for B2C than

for B2B contracts and for mass risks rather than large risks. This is because pre-contractual information requirements tend to be more onerous for personal lines than for commercial insurance. However, some member states have onerous pre-contractual requirements for all insurance policies. In most instances, pre-contractual requirements are mandatory and cannot be derogated from.

Insurance Europe is currently participating actively in efforts made by the European Parliament, which currently seeks to develop a key information document (KID) for packaged retail investment products (PRIPs). Insurance Europe fully supports a high level of consumer protection and recognises the importance of improving consumer information. Nevertheless, the right balance needs to be struck between consumers having *better* and *more relevant* information over simply being provided with *more* information.

In the light of the on-going work at EU level on PRIPs, but also on the insurance mediation directive (IMD2) and proposals for amendments to the Markets in Financial Instruments Directive (MiFID II), we would like to caution against this expert group developing any work on pre-contractual information.

4. Customer's disclosure duties & duties after contract-conclusion

4.1 Pre-contract

It appears that there may have been a convergence across the internal market on customers' pre-contractual duties of disclosure. It may be that there therefore is an opportunity for the development of a pan-European approach to duties of disclosure of the costumer and the related remedies.

Understanding differences in disclosure duties of the customer in different markets tend to result in added costs which ultimately are borne by customers. This is particularly the case in relation to insurers' understanding of the sanctions that follow a breach of the duties of disclosure by the customer.

Variations in the duties of customers depend also on the class of insurance in question, due to limitations on what may or may not be asked by an insurer; life and health insurance being examples of insurance where there are specific requirements and limitations applicable by the host-country (i.e. the country where the customer resides).

Competition within a specific market for insurance will ultimately guide the extent to which contracts are adapted.

4.2 During the contract

In respect of mass risks, there may be some uncertainty arising from a lack of clarity of the obligations of disclosure of the costumer during the contract and the consequences flowing from breaches thereof.

It does appear however to be an issue of more relevance to mass risks than large risks. In the case of large risks, solutions tend to be developed by insurers and contained within the contract, and large risk insureds will tend to rely on their broker's support and expertise in resolving any fall-out from possible breaches of such obligations.

4.3 Aggravation of the risk

Contract provisions relating to the customer's duties, and subsequent consequences, brings into play the freedom to contract and should not be addressed in any potential pan-European contract. The impact of factors that aggravate the risk insured and their impact on other contract-terms (including consequences) must remain a commercial decision of the insurer, just as its impact on pricing is a commercial decision. It is worth noting that a reduction of risk may also occur, to the benefit of the customer.

In general, differences relating to aggravation of risk do not create an obstacle to cross-border insurance but will have an impact on pricing.

5.	**Conclusion and form of contract**
	5.1 Offer and acceptance The legal effect and consequences of 'offer' and 'acceptance' of an insurance contract originate in general contract law and should therefore, for insurance contracts, not be dealt with in isolation from the body of general contract law. Any attempt to address 'offer' and 'acceptance' of insurance contracts in isolation would likely result in a lowering of the national consumer protection provisions contained in general contract law. Further, in common law jurisdictions the law relating to 'offer' and 'acceptance' are developed by the courts in case law over years and tend to respond to emerging market developments and the changing consumer purchasing patterns. This aspect of contract law should therefore not be addressed at EU level at the risk of diminishing the responsiveness of the law to the insurance market and consumer needs. In any event, the rules on 'offer' and 'acceptance' do not create obstacles to the cross-border provision of insurance. Other more important factors cause obstacles to cross-border provision of insurance, such as 'knowing your customer', understanding the true risk proposed for cover, language, culture (including expectations of the local policyholder), the form and prevalence of frauds (particularly in respect of motor insurance), the tax environment (particularly in respect of private pension products) and the supervisory environment. **5.2 Form of contract** The form of an insurance contract will vary between member states; however, it does not appear to be an aspect of the insurance contract which creates an obstacle to cross-border provision of insurance. Form of contract is an aspect of insurance contract law that features only very late in the process of considering whether to enter a new market cross-border. Ultimately, contract law is considered only once the commercial decisions on the viability of entering a new market, the market's viability and the existing competitive environment has been considered. Different requirements as to the form of a contract may add costs to a cross-border insurance product where the rules of the host-country are more comprehensive (or demanding) than the country where the insurer is offering its services from, for instance on local language requirements. Likewise, requirements as to form of a contract may have different evidentiary implications, but it does not appear to be a factor that obstructs the cross-border provision of insurance. **5.3 Standard terms and conditions** Care should be taken to avoid removing insurers' discretion to develop and design products in the interests of consumers, as any standard form of terms and conditions risks stifling innovation by the industry to respond to new market demands. The development of any standard terms and conditions could seriously impact the responsiveness of the industry to consumer needs and demands due to the likely lower permissibility in product design, but also due to possible legal uncertainty because developments in market needs and demands may quickly be moving beyond any standard terms and conditions. Market developments are increasingly occurring at a fast pace – 'speed of development' being a feature that is inherently missing from the legislative process both at national level and European level.
6.	**Right of withdrawal and withdrawal period**
	The right of withdrawal and the relevant period permissible is an aspect of insurance contract law that features only very late in the process of considering whether to enter a new market cross-border. Ultimately, contract law is considered only once the commercial decisions on the viability of entering a new market, the market's viability and the existing competitive

	environment has been considered. Contract law aspects such as these will only then be considered along with any other national or local regulatory requirements. The impact of the right of withdrawal has an impact on **investment-linked long-term life insurance products** due to differences in treatment of changes in investment value between date of inception and withdrawal. Differences in rights of withdrawal and the applicable periods do not however obstruct the cross-border provision of insurance.
7.	**Waiting periods**
	Contract law governing 'waiting periods' appears to be of most relevance in the context of health insurance and protection products (such as income protection), and does not appear to feature as an issue in respect of non-life insurance. In the context of **health insurance** however, care should be taken not to harmonise any provisions on waiting periods for health insurance as that could stifle the provision of private health insurance. The rules governing waiting periods in this type of insurance will, to a large extent, be influenced by national systems for health-provision, i.e. not only whether it is mandatory or voluntary. Voluntary health insurance may however be supplementary, complementary, duplicate or substitute to any state scheme. Even if 'waiting periods' was classed as an obstacle to cross-border provision of health insurance, for these reasons, it is inadvisable to seek to address waiting periods on a pan-European basis. Doing so would risk undermining current systems of health insurance to the detriment of consumers and negatively impact the provision of certain private health insurance offerings within the internal market. It would also reduce consumer choice. Some consumers prefer a product with a waiting period because they are willing to accept the risk of an accident happening in the short term in return for the benefit of cheaper premiums arising from agreeing to a waiting period for cover.
8.	**Multiple insurance**
	Although very complex issues arise in cases where there is multiple cover for the same risk, most costumers (be they consumers or businesses) would seek to avoid being in that situation as, at best, it would mean double-payment of premium to cover one risk and, at worst, could cause uncertainty as to whether cover is excluded as a result of double-insurance. Although instances of multiple insurance cause practical difficulties of apportionment between insurers and the possible activation of exclusion clauses, it is not an aspect of contract law that causes an obstacle to the cross-border provision of insurance.