

Insurance Europe welcomes the opportunity to comment further in writing on the preparatory materials circulated by the European Commission before the first meeting of its expert group on European insurance contract law (EICL), which took place on 18-19 April 2013.

Introduction

Insurance Europe is ready to work with the European Commission and contribute constructively to the EU expert group on EICL, in order to try to identify and/or address any contract law barriers that have a significant impact on cross-border trade. However, there are a number of points Insurance Europe remains concerned about:

- The organisation of the expert group: The absence of sufficient time to liaise with its members will undoubtedly undermine its ability to be constructive.
- The mandate: In order to maximise the best use of the very limited time available for the expert group to perform its mandate, it is imperative that its work does not stray from its mandate.
- The tendency to minimise the importance of other barriers to cross-border trade: Insurance Europe would remind the Commission that any analysis of the contract law obstacles to cross-border trade in insurance products must not disregard the significance of remaining obstacles and business decision making (such as language, culture, tax, regulatory environments, knowledge of the markets, access to actuarial data, claims management, fraud, disclosure, etc.).

Organisation

Although the additional period of two weeks granted to members of the expert group for reflection and, in particular, to permit consultation with Insurance Europe's members is appreciated, concern remains that the organisation of the work of the expert group is challenging. **Short timeframes for preparing joint positions within a federation such as Insurance Europe, with its 34 members (each of which must consult with their own members, who in turn may wish to check with specialist colleagues within their firms), and to prepare properly and constructively without preparatory materials being made available in good time for circulation to, discussion with and input from members, continues to cause difficulty.**

Added to this is the tight scheduling of the meetings of the expert group, falling a mere three weeks apart irrespective of the number of European bank holidays that fall between meetings. The consequence is a real danger that Insurance Europe, as a stakeholder representative of the European insurance industry, is hampered in its efforts to provide constructive support to the work of the Commission's expert group. Taking into account the range of potential issues the EC proposed in its first preparatory material, it will be extremely difficult to provide a suitable level of input to enable the EC's work. One way to address this problem (apart from ensuring timely circulation of preparatory and follow-up material) would be to establish a fairly narrow scope for the expert group. This would make the timescales easier to work with.

Objective and scope of the expert group

With the intention of being constructive, Insurance Europe confirms that it remains supportive of the EC's efforts to examine "whether differences in contract law pose an obstacle to cross-border trade in insurance products" and, if so, to "identify the insurance areas which are likely to be particularly affected by such obstacles" (Article 2 of Commission Decision of 17 January 2013 on setting up the Commission Expert Group on a European insurance contract law).

Care should however be taken to ensure that the work of the expert group, in its very limited schedule, remains focused on its mandate only. Thus, work should not stray beyond examining contract law issues that act as barriers to cross-border insurance or, in respect of pensions, beyond measure 19 of the

White paper on pensions¹. However, other trade barriers must not be ignored, since they can also form obstacles.

Basics of insurance and the impact of the wider environment

Insurance Europe wishes to reiterate, as was highlighted during the first meeting of the expert group, that the basis on which the expert group is progressing its work is not on indicative examples of contract-law obstacles, but rather on examples that relate to general business decisions taken by insurers. All the examples illustrated in the preparatory material for the first meeting of the expert group (held on 18-19 April 2013) merely illustrate the **commercial decisions which insurers must remain free to make**; they form the basis of a free and fully functioning market, and allow for economic growth in the EU. These decisions (whether to offer cover, enter a new market, etc.) are a reflection of the specificities of insurance contracts. In addition, the given examples cannot be seen as evidence of any wider inability to obtain insurance cover cross-border.

Insurance is a private contract whereby an insurer agrees to take on a risk in exchange for a premium. The insurance contract is itself the product and is a reflection of the risk (the anticipated claims frequency and the anticipated claims severity) and the risk appetite of the insurer in question. For some risks, there may be no insurers willing to provide cover because the risks are too big relative to the premium potential policyholders would be willing to pay or the cost of setting up an appropriate infrastructure to manage claims efficiently. For other risks there are many insurers willing to provide cover. Without a proper appreciation of the risks to be assumed by an insurer, an insurer will not be able to price the product accordingly and may therefore inadvertently compromise its solvency and long-term survival. This is not in the interest of consumers.

The insurance contract however is also a function of the wider environment, such as cultural sensitivities and expectations, language, tax laws, differences in the legal environments (other than contract laws), the regulatory environment and supervision, and variations in the prevalence and form of insurance frauds. These factors all have an impact on the product design and the true risk to be assumed by the insurer, and cannot therefore be disregarded in their entirety.

These non-contract law factors represent the true obstacles for insurers considering offering insurance products cross-border. They impact on the business start-up costs, the costs of developing a reliable network of service providers to handle claims or provide support in the add-on services to the insurance contract, and the potential for errors in the risk-assessment when the new market is not properly understood by the insurer.

Parameters of the future work of the expert group

The scope of the work of the expert group must remain within its mandate – to look at contract law obstacles, having regard to relevant existing EU law. In practical terms, this means that issues such as product design (e.g. mandated terms or conditions for specific product types) or consumer protection in general should not be considered. Additionally, care should be taken to ensure that issues considered are *pure* contract law issues and not issues that arise from national differences on wider law (e.g. exclusions of liability which can derive from national laws on mandatory insurances, guarantees, etc.). Finally, focus of the review must be limited to consumer-insurance contracts.

In respect of the areas of contract law that could be considered by the expert group, it may be useful to consider areas of contract law previously harmonised at EC level (e.g. third party liability motor insurance,

¹ Dated 16 February 2012, entitled "An agenda for adequate, safe and sustainable pensions", measure 19.

distance marketing of financial services and pre-contractual information requirements for life insurance products). The purpose would be to assess whether the desired objective of removing contract law obstacles have been achieved.

Insurance Europe acknowledges that the mandate of the expert group explicitly requires consideration of life insurance products with a savings/investment function as set out in measure 19 of the pensions White paper (although objects to any consideration of the *design* of such products).

Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Insurance Europe, which is based in Brussels, represents undertakings that account for around 95% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers generate premium income of almost €1 100bn, employ nearly one million people and invest around €7 700bn in the economy.