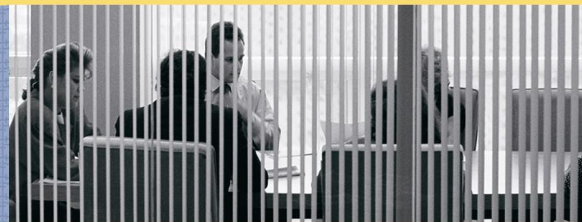


EU INSURANCE BRIEFING



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EU Retail Financial Services: Commission acts on three important insurance issues

Summary

On 20 November 2007, the European Commission adopted a package of initiatives for the Single Market. These include retail financial services, as set out in a Commission “Staff Working Document”.

This Briefing concentrates on three topics relevant to the insurance sector and on which the Commission intends to act:

- whether to proceed with a “28th regime”;
- how to restrict the scope of general good; and
- restricting fiscal representative requirements.

We also suggest steps which the insurance sector may take to present its views.

The full text of the Commission’s Staff Working Document is available at:

http://ec.europa.eu/citizens_agenda/docs/sec_2007_1520_en.pdf

Background

The Staff Working Document accompanies a Commission Communication on “A Single Market for 21st century Europe” and

comments in relation to financial services that the Single Market has resulted in,

“Lower prices for goods and services in many cases, thanks to the opening up of national markets and the resultant increase in competition. 67% of European citizens perceive increased competition in areas such as transportation, telecommunications, banking and insurance services as a good thing.”

With specific regard to free movement of services,

“Today, the services sector accounts for 70% of GDP, 68% of employment and 96% of the new jobs created, but only 20% of intra-EU trade. This discrepancy reflects not only the fact that services often have an intrinsically local character, but also the many barriers and obstacles still hindering the free movement of services within the EU.”

With regard to free movement of capital,

“Free movement of capital is also an essential condition for the cross-border activities of financial services companies. The financial services sector includes three areas which are essential to the functioning of the economy: banking, insurance and securities [...] The aim is to help remove remaining barriers so that financial services can be provided and capital can circulate freely throughout the EU at the lowest possible cost, resulting in high levels of financial stability, consumer benefits and consumer protection.”

Building on the Commission’s 2005 White Paper on Financial Services, sector inquiries into banking and insurance and its Green Paper (and public hearing) in 2007, the Staff Working Document has now identified three

areas of interest to insurance markets where further work is proposed "...to improve the competitiveness and efficiency of the European retail financial services market". The three areas are reviewed below.

"28th regime"

The Staff Working Document refers to the "28th regime"¹ under the general heading of "Improving customer choice and mobility".

The Commission does not specify whether this optional regime would apply to insurance, pensions or banking products – or all of them. Nevertheless, the Commission announces that,

"The practicability of the so-called concept of 28th regime [...] should be assessed to see whether this approach could be successfully applied in some specific areas of retail financial services".

The private sector, in particular the European Financial Services Roundtable, has contributed in detail to discussion on the 28th regime. The Commission's response has been lukewarm to date. Market reactions are also mixed, in that some operators have already invested heavily in ensuring that their cross-border products comply fully with host State rules, in particular general good. Other operators perceive the 28th regime as a "kick start" to re-launch cross-border sales. The debate could become heated with the Commission also having to take into account continued Member State reluctance to yield on the sensitive question of local consumer protection regimes (which might in turn constitute barriers to cross-border provision of services).

Supporters of a 28th regime product therefore need to continue to argue their case before the EU institutions and national authorities.

General good

¹ i.e. a harmonised regulatory and contractual framework at the EU level which is an additional option to the rules of the 27 Member States - hence, 28th regime.

The Commission first considered the scope of general good in the insurance sector over ten years ago, resulting in publication in February 2000 of its "Interpretative Communication on freedom of services and the concept of the general good in the insurance sector"². The Staff Working Document now comments,

"It will be important to examine whether the national general good rules currently in force in the Member States comply with the criteria set by the European Court of Justice and the Commission's Interpretative Communication from 2000. An inventory of national general good requirements will be carried out. Cases of abusive or excessive enforcement of such rules should be challenged, after initial discussions with Member States."

From our discussions with the Commission, it is clear that review of general good is as thorny an issue as it was ten years ago and that Member States (following a recent EIOPC³ meeting) remain reluctant to provide a clear and proportionate statement of those provisions which constitute general good. As was the case in the 1990s, the Commission is likely to face extensive replies from the 27 Member States.

The Commission is interested in receiving input from the insurance sector. Input must, however, be comprehensive and detailed: by way of example, it is not sufficient to complain generally about "gold-plating"; the Commission needs a detailed explanation of the legislative and regulatory provisions and administrative practices that constitute the unjustified restriction on cross-border provision of services or establishment.

Market operators therefore need to:

- identify general good obstacles;

² OJEC, C 43 of 16 February 2000, page 5.

³ European Insurance and Occupational Pensions Committee, which is composed of representatives of Member States and chaired by the Commission.

- show why cross-border providers are put in a less favourable position compared with domestic operators; and
- submit their comments to the Commission as a first step towards enforcement action by the Commission against recalcitrant Member States.

Fiscal representatives

The Staff Working Document states that,

“It will also be useful to examine whether there is still a justification for the current requirement to appoint a fiscal representative prior to carrying out insurance business in another Member State. A general review of the administrative arrangements in place for the collection of premium taxes will be initiated.”

In the light of the recent judgement of the European Court in *Commission vs. Belgium* (C-522/04)⁴, it is not surprising that this longstanding administrative burden should now be under scrutiny. In this case, which concerned a requirement under Belgian law that foreign insurers with no establishment in Belgium appoint a representative residing in Belgium who personally assumes responsibility towards the State for paying insurance premium tax (“IPT”), interest and fines, the Court held that,

“...by requiring [...] foreign insurers who have no place of business in Belgium to obtain authorisation, before providing their services in Belgium, for a representative residing in Belgium, who must personally assume, in writing, responsibility towards the State for paying the annual tax on insurance contracts, interest and fines which may be due in respect of contracts relating to risks situated in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under [EC Treaty and EEA Agreement] Articles [guaranteeing the free movement of workers/EU citizens, freedom to provide services and freedom of establishment] and under [...] Article 5(1) of Directive 2002/83 [Life Assurance Directive application of the above freedoms].”

⁴ Case C-522/04 of 5 July 2007.

This is encouraging not only in relation to IPT, but also regarding fiscal representative requirements for other taxes.

Specifically:

- In its 2000 Interpretative Communication, the Commission adopted a conservative position: where IPT is payable, Member States are justified in requiring appointment of a fiscal representative. However,

“...the practical arrangements for applying this measure must comply with the requirements laid down in the case law of the Court of Justice, and in particular the requirements of proportionality and necessity, in order that such measures do not constitute a restriction that is incompatible with the conduct of insurance business under the freedom to provide services within its territory.”
- Between 1976 and 2003 (including, in particular, after publication of the above Communication), Member States adopted Directives concerning mutual assistance in exchange of information between tax authorities⁵ and in recovery of taxes⁶ (the “Mutual Assistance Directives”), which include IPT and taxes on income and capital within their scope⁷. As a result, national tax authorities now have a Community instrument to assist investigation and recovery of a broad range of taxes on a cross-border basis (in addition to any bilateral procedures contemplated by treaties for the avoidance of double taxation).

⁵ Council Directive 77/799/EEC of 19 December 1977, OJEC L 336, page 15, as amended, in particular by Council Directive 2003/93/EC of 7 October 2003, OJEC L 264, page 23. Note that information exchange provisions may not apply in Member States which provide for full insurance secrecy.

⁶ Council Directive 76/308/EEC of 15 March 1976, OJEC L 73 of 19 March 1976, page 18, as amended, in particular by Council Directive 2001/44/EC, OJEC L 175 of 28 June 2001, page 17.

⁷but not succession/death duties.

- For the non-life sector, fiscal representative requirements are limited to IPT. However, for the life sector, the range of requirements has expanded over the years: thus, IPT itself usually requires appointment of a fiscal representative (though this can be waived if the life class in question is exempt); a representative may also be required under income tax rules (e.g. for tax on gains on surrenders from the policy) and in the event of death (for succession duty purposes).

This means that, if every Member State had a separate fiscal requirement for insurance premium, income and succession provisions, a life insurer established in Member State A carrying on business in all 26 other Member States could theoretically need up to 78 different fiscal representative appointments.

This is a deliberately provocative (and costly) scenario, but illustrates the potential for fiscal representative requirements to make a mockery of a Single Market in insurance. Furthermore, practice in Member States varies widely: evidence already exists in the market of the payment of IPT direct to tax authorities without the need for appointment of a representative.

- With the above in mind, the Court's judgment against Belgium is innovative in that the Court noted that: (i) the Belgian Revenue could investigate and hold the policyholder liable for IPT directly; and (ii) the Mutual Assistance Directives enable the Belgian Revenue to seek assistance from the Revenue authorities of other Member States in order to recover tax. The Court concluded that imposing a fiscal representative who is, furthermore, personally liable for the IPT was clearly disproportionate and unjustifiable. Consequently, the judgement implies

that the 2001 and 2003 amendments to the Mutual Assistance Directives render fiscal representatives unnecessary for the taxes in question – IPT, and taxes on income and capital (which are broadly defined).

- Our informal discussions with the Commission indicate a willingness to identify those Member State provisions regarding fiscal representatives – not only for IPT, but also for income and capital taxes – which are challengeable in the light of the Court's judgement. We have already discussed specific examples with the Commission.

The Commission's latest initiatives provide an opportunity for life and non life insurers to present their views on the 28th regime, general good and fiscal representatives.

We welcome discussion with our clients and others interested in these topics, in particular for the purposes of preparing submissions to the Commission, setting out views, experience of cross-border obstacles, recommended policy changes, etc.

Thus, for example, with regard to general good, the 2000 Interpretative Communication was preceded by a consultation process in which we participated. Now, nearly ten years later, there is a further opportunity to influence the debate.

Similarly, fiscal representative requirements are a costly and time-consuming administrative burden for many insurers. The Commission's announcement that it is reviewing this matter is an invitation to the sector to come forward with examples of offending provisions and to press for their repeal.

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