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**COUNCIL DIRECTIVE**

**of 8 November 1990**

**on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC**

(90/619/EEC)

(OJ L 330, 29.11.1990, p. 50)

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**COUNCIL DIRECTIVE**

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**on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC**

(90/619/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 57 (2) and 66 thereof,

Having regard to the proposal from the Commission <sup>(1)</sup>,

In cooperation with the European Parliament <sup>(2)</sup>,

Having regard to the opinion of the Economic and Social Committee <sup>(3)</sup>,

Whereas it is necessary to develop the internal market in life assurance and in the operations referred to in First Council Directive 79/267/EEC 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 <sup>(4)</sup>, hereinafter called the 'First Directive' as last amended by the Act of Accession of Spain and Portugal; whereas, in order to achieve that objective, it is desirable to make it easier for assurance undertakings having their head office in the Community to provide services in the Member States, thus making it possible for policy-holders to have recourse not only to assurers established in their own country, but also to assurers which have their head office in the Community and are established in other Member States;

Whereas, under the Treaty, any discrimination with regard to freedom to provide services based on the fact that an undertaking is not established in the Member State in which the services are provided has been prohibited since the end of the transitional period; whereas that prohibition applies to services provided from any establishment in the Community, whether it be the head office of an undertaking or an agency or branch;

Whereas, for practical reasons, it is desirable to define provision of services taking into account both the assurer's establishment and the place where the commitment is to be covered; whereas, therefore, commitment should also be defined; whereas, moreover, it is desirable to distinguish between activities pursued by way of establishment and activities pursued by way of freedom to provide services;

Whereas it is desirable to supplement the First Council Directive in order in particular to clarify the powers and means of supervision vested in the supervisory authorities; whereas it is also desirable to lay down specific provisions regarding the taking-up, pursuit and supervision of activity by way of freedom to provide services;

Whereas policy-holders who, by virtue of the fact that they take the initiative in entering into a commitment in another State and thus place themselves under the protection of the legal system of that other State, do not require special protection in the State of the commitment, should be granted complete freedom to avail themselves of the widest possible market in life assurance and in the operations referred to in the First Directive; whereas other policy-holders should also be afforded adequate protection;

<sup>(1)</sup> OJ No C 38 of 15. 2. 1989, p. 7 and OJ No C 72 of 22. 3. 1990, p. 5.

<sup>(2)</sup> OJ No C 175, 16. 7. 1990, p. 107, and Decision of 24 October 1990 (not yet published in the Official Journal).

<sup>(3)</sup> OJ No C 298, 27. 11. 1989, p. 2.

<sup>(4)</sup> OJ No L 63, 13. 3. 1979, p. 1.

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Whereas in the management of some group pension funds, the multiplicity and complexity of the various schemes and their close connection with social security schemes call for careful study; whereas they should therefore be excluded from the scope of the provisions specific to freedom to provide services contained in this Directive; whereas they will form the subject matter of another Directive;

Whereas the provisions in force in the Member States regarding contract law applicable to the activities referred to in the First Directive continue to differ; whereas the freedom to choose, as the law applicable to the contract, a law other than that of the State of the commitment may be granted in certain cases, in accordance with rules which take into account specific circumstances;

Whereas the First Directive's provisions on transfer of portfolio should be reinforced and supplemented by provisions specifically concerning the transfer to another undertaking of the portfolio of contracts concluded by way of freedom to provide services;

Whereas, in the interests of protecting policy-holders, Member States should, at the present stage of the coordination process, be given the option of limiting the simultaneous pursuit of activity by way of freedom to provide services and activity by way of establishment; whereas no such limitation can be provided for where policy-holders do not require such protection;

Whereas the taking-up and pursuit of activity by way of freedom to provide services should be subject to procedures guaranteeing the assurance undertaking's compliance with provisions regarding financial guarantees, conditions of assurance and premium rates; whereas those procedures may be relaxed where the activity pursued by way of freedom to provide services covers policy-holders who, by virtue of the characteristics of the commitment they propose to enter into, do not require special protection in the State of the commitment;

Whereas for life assurance contracts entered into by way of the free provision of services the policy-holder should be given the opportunity of cancelling the contract within a period of between 14 and 30 days;

Whereas the First Directive adopted the principle of prohibiting the simultaneous pursuit of the activities covered by Directive 73/239/EEC <sup>(1)</sup> (called the First Directive on the coordination of non-life insurance) as last amended by Directive 88/357/EEC <sup>(2)</sup> and those covered by the First Directive; whereas, while it authorized the continued existence of existing composite undertakings, it stated that they may not set up agencies or branches for life assurance; whereas the specific nature of the commitments entered into in the insurance field under the freedom of services regime nevertheless justifies, at least on a transitional basis as from notification of this Directive to Member States, the introduction of a degree of flexibility in the application of the above principle;

Whereas nothing in this Directive would prevent a composite undertaking from dividing itself into two undertakings, one active in the field of life assurance, the other in non-life insurance; whereas in order to allow such division to take place under the best possible conditions, it is desirable to permit Member States, in accordance with Community rules of competition law, to provide for appropriate tax arrangements, in particular with regard to the capital gains such division could entail;

Whereas it is necessary to make provision for special cooperation in the sphere of freedom to provide services between the competent supervisory authorities of the Member States and between those authorities and the Commission; whereas provision should also be made for a system of penalties to apply where the undertaking providing the service fails to comply with the provisions of the Member State in which the service is provided;

<sup>(1)</sup> OJ No L 228, 16. 8. 1973, p. 3.

<sup>(2)</sup> OJ No L 172, 4. 7. 1988, p. 1.

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Whereas the technical reserves, including mathematical reserves, should be subject to the rules of and supervision by the Member State in which the service is provided where the provision of services involves commitments in respect of which the State in which the service is received wishes to provide special protection for policy-holders; whereas, however, if such concern to protect policyholders is unjustified, the technical reserves, including mathematical reserves, should remain subject to the rules of and supervision by the Member State in which the undertaking is established;

Whereas some Member States do not subject life assurance contracts and the other operations covered by the First Directive to any form of indirect taxation, while others apply special taxes; whereas the structure and rate of those taxes vary considerably between the Member States in which they are applied; whereas it is desirable to avoid a situation where those differences lead to distortions of competition between undertakings in the various Member States; whereas, pending further harmonization, the application of the tax arrangements provided for by the Member State in which the commitment is entered into is a means of remedying such mischief; whereas it is for the Member States to establish a method of ensuring that such taxes are collected;

Whereas the First Directive makes express provision for specific rules concerning the authorization of agencies and branches of undertakings whose head offices are outside the Community;

Whereas provision should be made for a flexible procedure to make it possible to assess reciprocity with third countries on a Community basis; whereas the aim of this procedure is not to close the Community's financial markets but rather, as the Community intends to keep its financial markets open to the rest of the world, to improve the liberalization of the global financial markets in other third countries; whereas, to that end, this Directive provides for procedures for negotiating with third countries and, as a last resort, for the possibility of taking measures involving the suspension of new applications for authorization or the restriction of new authorizations;

Whereas it is desirable to take into account, within the meaning of Article 8c of the Treaty, the extent of the effort which needs to be made by certain economies showing differences in development; whereas, therefore, it is desirable to grant certain Member States transitional arrangements for the gradual application of the specific provisions of this Directive relating to freedom to provide services;

Whereas, in view of the differences in the national legislations, it is also appropriate to grant to those Member States which so wish transitional arrangements enabling them to adapt their legislation before applying in their entirety, as regards group insurance contracts linked to a contract of employment or the intervention of a broker, the provisions of this Directive relating to the case where the policy-holder takes the initiative to conclude a contract by way of provision of services;

Whereas it will be particularly important to allow those Member States who so wish a sufficiently long period to be able to adopt the appropriate provisions in order to ensure the professional qualification and independence of insurance brokers; whereas taking into account the growing role such brokers play in advising those buying insurance and facing an increasing range of products as a result of the freedom to provide services, their professional qualification and independence will become essential elements for protection of the consumer,

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HAS ADOPTED THIS DIRECTIVE:

## TITLE I

**General provisions***Article 1*

The object of this Directive is to:

- (a) supplement Directive 79/267/EEC;
- (b) lay down specific provisions relating to freedom to provide services in respect of the activities referred to in the said Directive, such provisions being set forth in Title III of this Directive.

*Article 2*

For the purposes of this Directive:

- (a) 'First Directive': means Directive 79/267/EEC;
- (b) 'undertaking':
  - for the purposes of Titles I and II, means any undertaking which has received official authorization under Article 6 or Article 27 of the First Directive,
  - for the purposes of Titles III and IV, means any undertaking which has received official authorization under Article 6 of the First Directive;
- (c) 'establishment':
 

means the head office, an agency or a branch of an undertaking, having regard to Article 3;
- (d) 'commitment':
 

means a commitment represented by one of the kinds of insurance or operation referred to in Article 1 of the First Directive;
- (e) 'Member State of the commitment':
 

means the Member State where the policy-holder has his habitual residence or, if the policy-holder is a legal person, the Member State where the latter's establishment, to which the contract relates is situated;
- (f) 'Member State of establishment':
 

means the Member State in which the establishment covering the commitment is situated;
- (g) 'Member State of provision of services':
 

means the Member State of the commitment where the commitment is covered by an establishment situated in another Member State;
- (h) 'parent undertaking':
 

means a parent undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC <sup>(1)</sup>;
- (i) 'subsidiary':
 

means a subsidiary undertaking within the meaning of Articles 1 and 2 of Directive 83/349/EEC; any subsidiary undertaking of a subsidiary undertaking shall also be regarded as a subsidiary of the parent undertaking which is at the head of those undertakings.

*Article 3*

For the purposes of the First Directive and of this Directive, any permanent presence of an undertaking in the territory of a Member State shall be treated in the same way as an agency or branch, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a

<sup>(1)</sup> OJ No L 193, 18. 7. 1983, p. 1.

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person who is independent but has permanent authority to act for the undertaking as an agency would.

## TITLE II

**Provisions supplementary to the First Directive***Article 4*

1. The law applicable to contracts relating to the activities referred to in the First Directive shall be the law of the Member State of the commitment. However, where the law of that State so allows, the parties may choose the law of another country.

2. Where the policy-holder is a natural person and has his habitual residence in a Member State other than that of which he is a national, the parties may choose the law of the Member State of which he is a national.

3. Where a State includes several territorial units, each of which has its own rules of law concerning contractual obligations, each unit shall be considered a country for the purposes of identifying the law applicable under this Directive.

A Member State in which various territorial units have their own rules of law concerning contractual obligations shall not be bound to apply the provisions of this Directive to conflicts which arise between the laws of those units.

4. Nothing in this Article shall restrict the application of the rules of the law of the forum in a situation where they are mandatory, irrespective of the law otherwise applicable to the contract.

If the law of a Member State so stipulates, the mandatory rules of the law of the Member State of the commitment may be applied if and in so far as, under the law of that Member State, those rules must be applied whatever the law applicable to the contract.

5. Subject to the preceding paragraphs, the Member States shall apply to the assurance contracts referred to in this Directive their general rules of private international law concerning contractual obligations.

*Article 5*

The following paragraph is added to Article 23 of the First Directive:

‘3. Each Member State shall take all steps necessary to ensure that the authorities responsible for supervising assurance undertakings have the powers and means necessary for supervision of the activities of assurance undertakings established within their territory, including activities engaged in outside that territory, in accordance with the Council Directives governing those activities and for the purpose of ensuring that they are implemented.

Those powers and means must, in particular, enable the supervisory authorities to:

- make detailed inquiries about the undertaking’s situation and the whole of its business, *inter alia* by:
  - gathering information or requiring the submission of documents concerning assurance business,
  - carrying out on-the-spot investigations at the undertaking’s premises,
- take any measures, with regard to the undertaking, which are appropriate and necessary to ensure that the activities of the undertaking remain in conformity with the laws, regulations and administrative provisions with which the undertaking has to comply in each Member State and in particular with the scheme of operations insofar as it remains mandatory, and to prevent or remove any irregularities prejudicial to the interests of policyholders,

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— ensure that measures required by the supervisory authorities are carried out, if need be by enforcement, where appropriate through judicial channels.

Member States may also make provision for the supervisory authorities to obtain any information regarding contracts which is held by intermediaries.'

*Article 6*

1. Article 25 of the First Directive is hereby deleted.

**▼M1****▼B***Article 7*

Article 22 (2) of the First Directive is replaced by the following:

'2. The Italian Republic shall take all steps to ensure that the requirement that undertakings established in its territory cede part of their underwriting to the "Istituto Nazionale di Assicurazioni" is abolished no later than 20 November 1994.'

*Article 8*

1. The heading of Title III of the First Directive is replaced by the following:

'TITLE III A

**Rules applicable to agencies or branches established within the Community and belonging to undertakings whose head offices are outside the Community'**

2. The following heading is placed after Article 32 of the First Directive:

'TITLE III B

**Rules applicable to subsidiaries of parent undertakings governed by the laws of a third country and to acquisitions of holdings by such parent undertakings'**

*Article 9*

The following Articles are added to Title III B of the First Directive:

'*Article 32a*

The competent authorities of the Member States shall inform the Commission:

- (a) of any authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of a third country. The Commission shall inform the Committee referred to in Article 32b (6) accordingly;
- (b) whenever such a parent undertaking acquires a holding in a Community insurance undertaking which would turn the latter into its subsidiary. The Commission shall inform the Committee referred to in Article 32b (6) accordingly.

When authorization is granted to the direct or indirect subsidiary of one or more parent undertakings governed by the law of third countries, the structure of the groupe shall be specified in the notification which the competent authorities shall address to the Commission.

*Article 32b*

1. The Member States shall inform the Commission of any general difficulties encountered by their insurance undertakings in establishing themselves or carrying on their activities in a third country.

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2. Initially no later than six months before the date referred to in the second paragraph of Article 30 of Directive 90/619/EEC <sup>(1)</sup>, and thereafter periodically, the Commission shall draw up a report examining the treatment accorded to Community insurance undertakings in third countries, in the terms referred to in paragraphs 3 and 4, as regards establishment and the carrying on of insurance activities, and the acquisition of holdings in third-country insurance undertakings. The Commission shall submit those reports to the Council, together with any appropriate proposals.

3. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that a third country is not granting Community insurance undertakings effective market access comparable to that granting Community to insurance undertakings effective market access comparable to that granted by the Community to insurance undertakings from that third country, the Commission may submit proposals to the Council for the appropriate mandate for negotiation with a view to obtaining comparable competitive opportunities for Community insurance undertakings. The Council shall decide by a qualified majority.

4. Whenever it appears to the Commission, either on the basis of the reports referred to in paragraph 2 or on the basis of other information, that Community insurance undertakings in a third country are not receiving national treatment offering the same competitive opportunities as are available to domestic insurance undertakings and that the conditions of effective market access are not being fulfilled, the Commission may initiate negotiations in order to remedy the situation.

In the circumstances described in the first subparagraph, it may also be decided at any time, and in addition to initiating negotiations, in accordance with the procedure laid down in Article 32b (6), that the competent authorities of the Member States must limit or suspend their decisions:

- regarding requests pending at the moment of the decision or future requests for authorizations, and
- regarding the acquisition of holdings by direct or indirect parent undertakings governed by the laws of the third country in question.

The duration of the measures referred to may not exceed three months.

Before the end of that three-month period, and in the light of the results of the negotiations, the Council may, acting on a proposal from the Commission, decide by a qualified majority whether the measures shall be continued.

Such limitations or suspension may not apply to the setting up of subsidiaries by insurance undertakings or their subsidiaries duly authorized in the Community, or to the acquisition of holdings in Community insurance undertakings by such undertakings or subsidiaries.

5. Whenever it appears to the Commission that one of the situations described in paragraphs 3 and 4 has arisen, the Member States shall inform it at its request:

- (a) of any request for the authorization of a direct or indirect subsidiary one or more parent undertakings of which are governed by the laws of the third country in question;
- (b) of any plans for such an undertaking to acquire a holding in a Community insurance undertaking such that the latter would become the subsidiary of the former.

This obligation to provide information shall lapse whenever an agreement is reached with the third country referred to in paragraph 3 or 4 when the measures referred to in the second and third subparagraphs of paragraph 4 cease to apply.



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6. The Commission shall be assisted by a committee composed of the representatives of the Member States and chaired by the representative of the Commission.

The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period to be laid down in each act to be adopted by the Council under this paragraph but which may in no case exceed three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission, save where the Council has decided against the said measures by a simple majority.

7. Measures taken under this Article shall comply with the Community's obligations under any international agreements, bilateral or multilateral, governing the taking-up and pursuit of the business of insurance undertakings.

(<sup>1</sup>) OJ No L 330, 29. 11. 1990, p. 50.

## TITLE III

**Provisions relating specifically to the freedom to provide services****▼M1***Article 11*

Any undertaking that intends to carry on business for the first time in one or more Member States under the freedom to provide services shall first inform the competent authorities of the home Member State, indicating the nature of the commitments it proposes to cover.

*Article 14*

1. Within one month of the notification provided for in Article 11, the competent authorities of the home Member State shall communicate to the Member State or Member States within the territory of which the undertaking intends to carry on business by way of the freedom to provide services:

- (a) a certificate attesting that the undertaking has the minimum solvency margin calculated in accordance with Articles 19 and 20 of Directive 79/267/EEC;
- (b) the classes which the undertaking has been authorized to offer;
- (c) the nature of the commitments which the undertaking proposes to cover in the Member State of the provision of services.

At the same time, they shall inform the undertaking concerned accordingly.

2. Where the competent authorities of the home Member State do not communicate the information referred to in paragraph 1 within the period laid down, they shall give the reasons for their refusal to

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the undertaking within that same period. The refusal shall be subject to a right to apply to the courts in the home Member State.

3. The undertaking may start business on the certified date on which it is informed of the communication provided for in the first subparagraph of paragraph 1.

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*Article 15*

1. Each Member State shall prescribe that a policyholder who concludes an individual life-assurance contract ► M1 ◀ shall have a period of between 14 and 30 days from the time when he was informed that the contract had been concluded within which to cancel the contract.

The giving of notice of cancellation by the policy-holder shall have the effect of releasing him from any future obligation arising from the contract.

The other legal effects and the conditions of cancellation shall be determined by the law applicable to the contract as defined in Article 4, notably as regards the arrangements for informing the policy-holder that the contract has been concluded.

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2. The Member States need not apply paragraph 1 to contracts of six months' duration or less, nor where, because of the status of the policy-holder or the circumstances in which the contract is concluded, the policy-holder does not need this special protection. Member States shall specify in their rules where paragraph 1 is not applied.

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*Article 17*

Any change which an undertaking intends to make to the information referred to in Article 11 shall be subject to the procedure provided for in Articles 11 and 14.

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TITLE IV

**Transitional provisions**

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*Article 27*

1. In the case of group assurance contracts entered into by virtue of the insured person's contract of employment or professional activity, any Member State may, until 31 December 1994, limit the commitments for which it is the Member State of provision of

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services to those entered into in accordance with the arrangements referred to in Article 12.

2. Member States may, up to three years at the latest after the date of application laid down in the second paragraph of Article 30, consider that the policy-holder shall be deemed to have taken the initiative only in the case provided for in the first indent of Article 13 (1).

## TITLE V

**Final provisions***Article 28*

The Commission and the competent authorities of the Member States shall collaborate closely with a view to facilitating the supervision of the kinds of insurance and the operations referred to in the First Directive within the Community.

Each Member State shall inform the Commission of any major difficulties to which application of this Directive gives rise, *inter alia* any arising if a Member State becomes aware of an abnormal transfer of business referred to in the first Directive to the detriment of undertakings established in its territory and to the advantage of agencies and branches located just beyond its borders.

The Commission and the competent authorities of the Member States concerned shall examine such difficulties as quickly as possible in order to find an appropriate solution.

Where necessary, the Commission shall submit appropriate proposals to the Council.

*Article 29*

The Commission shall forward to the European Parliament and the Council regular reports, the first on 20 November 1995, on the development of the market in assurance and operations transacted under conditions of freedom to provide services.

*Article 30*

Member States shall amend their national provisions to comply with this Directive within 24 months of the date of its notification <sup>(1)</sup> and shall forthwith inform the Commission thereof.

The provisions amended in accordance with the first paragraph shall be applied within 30 months of the date of notification of this Directive.

*Article 31*

Upon notification of this Directive, Member States shall ensure that the texts of the main laws, regulations or administrative provisions which they adopt in the field covered by this Directive are communicated to the Commission.

*Article 32*

This Directive is addressed to the Member States.

<sup>(1)</sup> This Directive was notified to the Member States on 20 November 1990.

**▼B***ANNEX**A. Statement to be signed by the policy-holder under Article 13 (1), second indent*

'I hereby state that I wish (name of intermediary) to provide me with information on assurance contracts offered by undertakings established in Member States other than (Member State of habitual residence of policy-holder). I understand that such undertakings are subject to the supervisory arrangements of the State in which they are established and not to the supervisory arrangements of (Member State of habitual residence of policy-holder).'

*B. Statement to be signed by the policy-holder under Article 13 (2)*

'I hereby take note that (name of assurer) is established in (Member State of establishment of assurer) and I realize that supervision of that assurer is the responsibility of the supervisory authorities in (Member State of establishment of assurer) and not the responsibility of the authorities in (Member State of habitual residence of policy-holder).'