

EICL - Response to Discussion Paper VI

Our reference:	SMC-LEG-13-112	Date:	22 October 2013
Referring to:	Discussion Paper VI	EU expert group on European insurance contract law	
Contact person:	Malene Bye Rasmussen, Policy Advisor, Single Market & Social Affairs, Frederik Vandenberghe, Policy Advisor, Pensions, Frida Flores Bergman, Policy Advisor, Public Affairs,	E-mail:	rasmussen@insurancееurope.eu vandenberghe@insurancееurope.eu bergman@insurancееurope.eu
Pages:	9	Transparency Register ID	33213703459-54

Summary

Insurance Europe welcomes the opportunity to comment in writing on Discussion Paper VI, forming the basis of discussions during the sixth meeting of the expert group on European insurance contract law (EICL) (held on 7-8 October 2013), and the relevant section of the final report that will represent the work-output of the expert group by the end of 2013.

Insurance Europe repeats these genuine concerns in the spirit of collaboration and a desire for active participation in the work of the expert group. Insurance Europe would very much appreciate if the Commission would consider the impact some procedural rules may have on the quality and credibility of the final report of the expert group, the purpose of which is to advise the Commission on the mandated question.

Overarching comments

■ Procedures

Insurance Europe's members wish to participate as actively and constructively in the work of the expert group as possible. To this end, Insurance Europe believes that procedural rules should allow members of the expert group, including representative organisations, to provide constructive substantive input to the work of the expert group. This is currently difficult due to the tight timeframes being set for comments and the changing rules and procedures. For instance, the Commission mentioned during the last meeting of the expert group on 7-8 October the possibility of introducing a web-based tool for members of the expert group to insert their comments on draft sections of the final report. Such web-based tool should however ensure that sufficient time is given for input and that it does not cause unnecessary administrative and technical burdens to the members of the expert group.

Insurance Europe is also of the view that important discussions within the expert group, such as on the scope of the mandate of its work and the various versions of procedural guidelines, should be permitted and that the weight of contributions which representative members make should be clarified. In this regard, the last meeting of the expert group illustrated the difficulties that arise from continuing uncertainty over rules of

procedure when four representative organisations' views were seemingly not sufficient to qualify as a "majority" or "consensual" view and a vote was proposed by the Commission to settle the discussion.

■ Organisation

Insurance Europe wishes to contribute as much and as constructively as possible to the work of the expert group. The organisation of the work of the expert group should however enable members of the expert group to do so, to **avoid 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. Most recently, at the sixth meeting of the expert group, the Commission proposed to adopt two draft sections of the report with, respectively, only two and four working days' warning. Such timeframes are inadequate if the substantive and constructive contributions of the insurance industry, through its European federation, are truly desired; at a minimum, two weeks for consideration of initial draft sections and one week for revisions of sections would be a reasonable request.

It would be very helpful if the brief agenda of items circulated in advance of meetings – and which is very much appreciated – could indicate the order in which these items are to be discussed by the expert group and their anticipated occurrence. This approach would ensure there is no time-wasting for experts who attend only for discrete aspects of the meeting.

■ Scope of work

Insurance Europe is **concerned to see issues raised in the discussion papers and in discussions within the expert group that are not matters of contract law but reflect differences in national regimes, legal, regulatory and taxation regimes, diverse national general best practice rules and cultural practices that are specific to each jurisdiction**. Insurance Europe has in previous responses to Discussion Papers noted that aspects raised were not within the mandate of the expert group as they did not amount to contract law issues. During the September meeting, the issue of the scope of the work of the expert group arose – in the context of liability insurance for lawyers – with a wider implication for the work of the expert group. Insurance Europe would like to repeat its request that the Commission permit discussion on the scope of the work of the expert group within the expert group in order to ensure that non-contract law issues are not mistakenly included in the scope of the work of the expert group. At that meeting, issues such as risk evaluation, pricing and product design risk being included as contract law issues – which Insurance Europe strongly disagrees with as they arise from, and must remain within, insurers' freedom to contract.

■ Lack of evidence

Thirdly, **it remains unclear whether there is any evidence to suggest that a cross-border insurance market would develop** if differences in contract law were removed. No evidence has been provided to suggest that there would be any demand for these products that would warrant the resulting business costs associated with the supply of cross-border insurance products. Further, no evidence has been presented to show that consumers, businesses or insurers would benefit substantially from any attempt to address differences in national contract law provisions.

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 legal, regulatory, supervisory and taxation environments. **In respect of life and pensions products, the main obstacles to cross-border provision are social and tax law; contract law differences are only a minor factor.**

Likewise, there is no certainty that consumers would willingly take up cross-border products. 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.

Discussion Paper VI, Insurance Europe response

I Life insurance product types

According to Insurance Europe, the scope of the Directive – in particular the classification used by the Commission – is incomplete, both with regards to the products included and with regards to the definitions.

For example, it is unclear whether the following products should be considered:

- life insurance with a guaranteed interest rate and without profit sharing,
- mixed life insurance where a fixed sum is being paid in case of “life” or in case of “death”,
- life insurance where a fixed sum is being paid only in case of “life”,
- life insurance where the benefit is being paid out by means of annuities but where there is no link with retirement,
- pension products where the benefit is paid either fully or partially as a lump sum.

Insurance Europe disagrees with the classification proposed in the discussion paper. As a solution, Insurance Europe suggests using a classification based on the Insurance Europe annual report on the European life insurance market¹:

- Traditional life insurance policies, as the term is used in the discussion paper, have a different meaning in many European countries. However, it should be acknowledged that in only very few countries the term “traditional life insurance policies” – a generally used term - is used to define pure protection policies as is the aim of the Commission. Therefore, Insurance Europe suggests replacing “traditional life insurance policies” by **“life protection contracts”** (contracts protecting the beneficiary in the event of the death of the insured).
- “Life insurance with investment functions”, as the term is used in the discussion paper, seems to only focus on products subject to fluctuations of the underlying investment values and products with profit sharing. However, as indicated above, more products exist at European level, some of which are neither pure protection products nor have an investment component for example “deferred capital insurance”. Insurance Europe suggests using the term **“life savings contract”** (contracts providing the payment of a lump sum and/or annuity if the insured survives the term of the contract or if the insured dies before the contract matures). This classification includes either products where the beneficiary bears fully or partially the investment risk as well as products where the insurer bears the investment risk. It therefore covers all life insurance contracts that do not fall under the definition of “life protection contracts”. With regards to pension products, we would suggest not only including annuity contracts under this classification, but also pension products paying out a lump sum. Pensions are a type of “life savings contract” with a maturity at retirement age and which can be converted (either automatically or through a new contract with the same or another provider) into an annuity but which can also be paid out as a lump sum. As such, pensions have an accumulation phase (building up savings) and a decumulation phase (payment of annuities or a lump sum).

¹ http://www.insuranceeurope.eu/uploads/Modules/Publications/life-2011_final.xls

It is important to keep in mind, however, that this is a rather general classification, which may have to be amended depending on, for example, the scope of possible follow-up initiatives on life insurance.

Furthermore, it should be acknowledged that similar arguments raised by the Commission in its discussion paper apply to life insurance products as were raised for health insurance products. Life insurance products are closely linked to national social security systems and national tax systems and their purpose is also to supplement these systems. This is especially true for pension products. It needs to be acknowledged that social and taxation laws, together with national culture and other factors, are the main barriers for the provision of cross border life insurance products.

Furthermore, insurers design their life insurance products and continuously adapt these products to meet client demands and needs. Therefore, Insurance Europe wishes to stress that no initiatives under consideration should interfere with product design. Any direct or indirect product regulation could prevent innovation and flexibility, which would be to the detriment of consumers. It would also be inconsistent with the freedom of product design established by Article 21 paragraph 1 of Directive 2009/138/EC (Solvency II).

Finally, Insurance Europe would like to note that the reference to Insurance Europe's "Insurance Key Fact Booklet" in the text on page 2 - footnote 11- of the discussion paper does not reflect Insurance Europe's views on the life insurance market. The key fact booklet aims at providing high level explanations of the insurance market. However, Insurance Europe also collects and publishes data on other types of contracts as, for example, included in its annual update of the European life insurance market.²

Insurance Europe also notes the information that is referring to the Insurance Key Fact booklet footnote 19 is reflected incorrect. For example, life insurance accounted for 59% of the market instead of 69% and deals with 2011 data instead of 2010.

1. Traditional life insurance

As indicated above, the term "traditional life insurance" has a different meaning between European countries. In particular, only few countries use the term "traditional life insurance policies" as used by the Commission. Therefore, Insurance Europe suggests replacing "traditional life insurance policies" by "life protection contracts" which covers contracts protecting the beneficiary in the event of the death of the insured.

2. Life insurance with investment functions

As indicated above, life insurance with investment functions seems to only focus on products that are subject to fluctuations of the underlying investment values and products with profit sharing. However, as indicated above, more products exist at European level, some of which are neither pure protection products nor have an investment component for example "deferred capital insurance". Insurance Europe suggests using the term "life savings contract" which means contracts providing the payment of a lump sum and/or annuity if the insured survives the term of the contract or if the insured dies before the contract matures. Such classification includes both products where the beneficiary bears fully or partially the investment risk and those where the insurer bears the investment risk. It therefore covers all life insurance contracts that do not fall under the definition of "life protection contracts".

² http://www.insuranceeurope.eu/uploads/Modules/Publications/life-2011_final.xls

3.	Life insurance which could serve as a pension
	<p>Over the past six years, Insurance Europe has moved away from the definition of pension products that was included in the 2007 report. In Insurance Europe's opinion, the discussion paper aims to focus on individual, third pillar pension products, therefore we suggest the following definition as we suggested to the Commission in the DG SANCO consultation on consumer protection for third pillar pension products³: <i>"individual pension products are defined as any type of long-term savings products subscribed to by consumers on a private, voluntary and individual, as opposed to occupational, basis with the primary goal of providing an income in retirement."</i></p> <p>Furthermore, we would suggest clarifying that the scope should not be limited to annuities but should also include pension products paying out a lump sum. Pensions are a type of "life savings contract" with a maturity at retirement age and which can be converted (either automatically or through a new contract with the same or another provider) into an annuity but which can also be paid out as a lump sum. As such, pensions have an accumulation phase (building up savings) and a decumulation phase (payment of annuities or a lump sum).</p> <p>With regards to barriers to cross border pension provisions, it is important to highlight that pension products contain different characteristics from normal life savings contracts or investment products. This was also acknowledged by DG SANCO in its recent consultation. In general, supplementary pension products (second and third pillar) have the aim to lower the burden on the state in its pension provision. The design of the pension product is therefore closely related to the local social and tax law, and differs between European countries due to differences in national pension systems and culture.</p> <p>Therefore, the ability to offer cross border pension products is not limited mainly due to contract law differences but rather by the impact that social and tax law has on the product design. The appeal of a pension product is closely linked to the social law and fiscal advantages in a given member state, therefore actuarial provisions and interest rates are, prudentially, specific to each country.</p>
II	Key insurance contract law areas for life insurance
	<p>Currently, insurers can sell their products across Europe based on the freedom of establishment and freedom of services principle. Insurers design their life insurance products and constantly adapt these products to clients' demands and needs. The decision to enter a market will not depend on contract law barriers but rather their appetite to enter in that market. Furthermore, Insurers have clearly indicated that what matters to them when deciding whether to offer their services cross-border are 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. Also from a consumer perspective several factors come into play when considering their preferred service provider, including knowledge and expertise, reputation, brand awareness, pricing levels, service levels and so on of the insurance provider.</p> <p>Finally, Insurance Europe would emphasise that different markets make use of different statistics. Products offered in northern Europe might therefore not be particularly attractive for those in southern Europe. Making use of European-wide statistics can result in adverse</p>

selection for certain products in certain markets forcing insurers to stop offering these products in their markets.

1. Definition of life insurance contract

There are implications for cross-border trade which arise from differing definitions of life insurance. However, the problem is not the definitions of the products themselves, but rather in how they interact with tax law and therefore result in products designed for particular countries. For example the different definitions of a life insurance contract can have as a result that tax benefits would not be applied to certain foreign products. However, this does not prevent foreign insurers from developing their own life insurance products around the local tax laws and selling these on the local market.

Insurance Europe would also like to point to the different definitions and characteristics across Europe of pension products in national legislation. The definitions are tailored to social and tax law and while there is no evidence that pension products would be deemed to be as attractive in the host markets as they are in the home market, it is equally important that any legislation at European level on pensions does not exclude any products that are characterised as pension products in national law. This would be to the detriment of the consumers.

2. Insurable interest

In general, insurable interest is immensely complex – even within one member state – and also touches on law of succession and property. These differences may, in certain circumstances, require a careful adaptation of insurance contracts but do not seem, by themselves, likely to prevent an insurer from entering another market.

In particular, specific rules that regulate the situations when life insurance is taken on the life of a third party do not appear to be barriers for cross border provision of these products. Written consent does not change the product characteristics in a manner that it would be impossible to offer these products cross border. Only rules with regards to the contract acceptance change. It is also questionable that insurers would need to change their business strategy based on situations where additional information as consent for the acceptance of a policy would be required but on a full legal, technical and market review to assess viability.

It is also worth noting that the representation of the UK approach to insurable interest is not entirely accurate. While English law establishes clear parameters for insurable interest in theory, in practice insurers have offered life insurance products for individuals in accordance with changes in family patterns, outside of what is allowed in the Life Assurance Act (1774). These contracts – for example for couples who are not married – are theoretically void, but would be upheld.

3. Pre-contractual information

Providing adequate information to consumers is an important part of improving consumers' understanding of insurance products. Providing information in a clear, relevant and timely manner allows consumers to compare the key features, including the benefits and risks, of different products, and helps them to select the right product for their needs. However, for this information to be useful, it has to be tailored to the products offered and the consumers' demands in the respective national markets. Given the wide fragmentation in pension products offered across Europe, EU initiatives in this regard should avoid consumers receiving excessive, duplicative, unnecessary and thus confusing information. Therefore, this should not be considered as an item related to contract law.

Insurance Europe would like to stress that there are currently on-going debates within the European institutions on pre-contractual information disclosure requirements with an aim to increase consumer protection and which would also result in convergence of the requirements,

such as the proposed Key Information Document (KID) for PRIPS, which is still being developed and discussed at EU level. In addition, DG SANCO recently conducted a consultation on consumer protection for third pillar retirement products, and EIOPA on creating a single market for Personal Pension Products including references to pre-contractual information disclosure requirements. Insurance Europe is concerned that the present concurrent and uncoordinated EU work on PRIPs — the outcome of which is still unclear — and other initiatives (e.g. Solvency II, DG SANCO, EIOPA) are creating a tangible risk of overload and overlap of information requirements to the detriment of consumers.

Finally, Insurance Europe highlights that all transparency efforts are likely to fail where appropriate measures on financial education and literacy are not introduced to enable consumers to understand financial information. Insurers also take this aspect – which is very diversified at a European level – into account when developing their information disclosure documents.

4. Right of withdrawal

Life insurance products are typically characterised by long term duration. For products with a long duration these withdrawal rights (not to confuse with surrender options) would be insignificant. Therefore, these would not pose a barrier to cross border provision of these products in case there would be evidence of interest in cross border consumer interest. It should also be acknowledged that a lot of these rules on withdrawal rights are the result of EU legislation, for example Article 6 of Directive 2002/65/EC concerning the distance marketing of consumer financial services. Where this is not the case, they are often inconsistent within member states, withdrawal rights often reflect product characteristics and in some cases also the historical context.

Furthermore, short term life insurance would only be “life protection products” and for these, its need for accurate and up to date statistics – before accepting a short term policy – would make cross border provision of these products unrealistic.

In Insurance Europe’s opinion this would not have implications for consumers as these withdrawal rights are included in the pre-contractual information disclosure documents and in the policy contract. It should also be noted that preventing the beginning of the period of withdrawal is seen as a sanction, arising from a failure to meet pre contractual information requirements.

5. Disclosure duties of the customer before and after the conclusion of the contract

Insurance Europe believes that policy acceptance regulation is overwhelmingly a matter of social and tax law. Issues of contract law are very unlikely to affect a consumers’ choice of product.

Further, Insurance Europe would like to highlight three inaccurate statements, in particular :

- It is incorrect to state that insurers would compensate for gaps in their knowledge by merely adjusting prices or recalculating the actuarial basis on which products are based⁴. As Insurance Europe repeatedly submits in its responses to the EC’s discussion papers for the expert group, insurers tend to avoid entering markets (whether they be product lines or geographical locations) where they do not have a proper understanding of the risks (i.e. where there is a lack of actuarial data upon which to price a product) because this may compromise, amongst others, their

⁴ Expert Group on European Insurance Contract Law, Discussion Paper 6: Life Insurance, section 5.1, p.16

solvency and reputation;

- Second, although some consumers may benefit from scope of cover varying between member states and thus their ability to insure themselves against risks that they might not otherwise do in their home state, the impact of adverse selection, ultimately to the detriment of consumers, should not be under-estimated. Adverse selection is where higher risk individuals are more likely to take out insurance. One of the objectives of underwriting is to avoid this by identifying relevant risk factors and setting premiums to correctly reflect the risks⁵.
- Moreover, section 5.1 fails to take into account the health status and differences between member states. Specifically, it states that 'for instance a person with a genetic disease may have a higher chance of getting a life insurance policy in Belgium, compared to Bulgaria'. While this is true, this statement does not acknowledge the distribution of risk in those markets and the way insurers price products. Mortality in Finland and Greece for example, are very different with different lifestyles, diets, medical systems, economies and occupational risks. No change in contract law is going to open up the Finnish market to Greek products.

6. Payment of insurance money

Insurance Europe does not consider the timing of benefits payments as a barrier for the cross border provision of life insurance products. Seeing the general long term duration of life insurance contracts, such differences between member states would be immaterial assuming there is a clear demand for the provision of these products at a European level.

With regards to pensions, it is important to note that a pension product consists of two parts: an accumulation and a decumulation phase. The product design in the accumulation phase will be based on the consumers' culture and needs in correlation with member states' pension systems, including their tax laws. For example, products that allow for a tax deduction in Belgium do not necessarily allow for a tax deduction in the Netherlands. As such, the attractiveness of the product would be less or non-existing for a Dutch person interested in saving for its pension by means of the Belgian pension product; while a Dutch pension product that allows for tax deduction could be more appealing. Therefore, Insurance Europe stresses – as correctly indicated by the Commission in the discussion paper – that rules about the form of payment of benefits can also be laid down in other branches of law rather than contract law ie tax law.

Further, with regards to the decumulation phase, differences between countries are strongly related to social and tax law.

7. Payment of premiums

Insurance Europe does not consider the timing of the premium payment as a barrier for the cross border provision of life insurance products. Seeing the general long term duration of life insurance contracts, differences between member states, as included in the discussion paper, are immaterial. Therefore, products could be offered cross-border taking into account the existing national systems in every country should there be a demand for such a product.

Furthermore, Insurance Europe would like to note that premium payments are also linked with tax law. For example, the maximum life-time or annual tax deductible premium for a pension product.

⁵ Please refer to Insurance Europe's publications "How Insurance works" -

<http://www.insuranceeurope.eu/uploads/Modules/Publications/how-insurance-works.pdf>

8.	Assignment of beneficiaries
	<p>According to Insurance Europe, the legal consequences and effects of the execution of the right to assign a beneficiary are very closely related to other areas of law, for example succession and tax law. The assignment of beneficiaries is also immaterial to the decision to offer insurance products cross-border, and would only need small adaptations to an insurer's business. In case there is demand for cross-border products, these issues would be relatively easy to overcome and are therefore unlikely to constitute an obstacle to the cross border provision of services.</p>
9.	Termination of the contract
	<p>'Grounds for termination' is an aspect of social law and should not be confused with contract law. Surrender options are an aspect of product design and tax law, not a contract law issue.</p> <p>It is correct that rules and possibilities of termination of life insurance contracts as well as the amount to be paid in case of surrender have an influence on the features of the product. Harmonisation of these issues would lead to a convergence in, and uniformity of, product features to the detriment of consumers' choice and needs. It is more favourable to leave it up to national legislation how to permit termination of contracts and how to calculate (minimum) surrender values to ensure these are appropriate to the respective national environment. If not, insurance contract law could be in contradiction with national supervisory law which seeks to create a competitive insurance market. In general, termination rights are a freedom of contract issue, and therefore terms involving cancellation/termination rights are subject to Unfair Contract Terms legislation. This will often offer the consumer a right to a refund, depending on how this law is interpreted in the relevant member state.</p> <p>In relation to the policyholder's rights in case of termination, there are likely to be differences between member states as to who the policyholder is defined as – for example in the case of life insurance for inheritance tax planning purposes, the successor may be the "policyholder". Again, this demonstrates the greater significance of tax law in cross-border trade of life insurance.</p>
III	Other areas
	Insurance Europe believes that the other areas do not present contract law barriers.

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, monolins, 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 more than €1 100bn, employ almost one million people and invest almost €8 400bn in the economy.

www.insuranceeurope.eu