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Will There be a Single European Community Insurance Market After 1992?

*William E. Pool**

There is a great deal of talk nowadays within each of the twelve Member States of the European Community, and outside too, about 1992. People are saying: "We must be ready for 1992, when the barriers will fall, and the Community's single Internal Market will come about." It all makes splendid headlines for the press, and it has caught the public's imagination. Nothing is new, of course, about the idea of creating a single Common Market among the Member States. Doing so is a fundamental objective of the Treaty of Rome of 1958,¹ which founded the European Economic Community ("EC" or "Community"). Indeed, much has already been done to bring about a single Common Market. As part of this continuing project, the Community, consisting of twelve sovereign Member States with widely different traditions of insurance practice and regulation, intends to create a single insurance market—something the United States has never achieved—by the end of 1992. Can it be done? And what will the consequences be, not only for Europe but also for the rest of the world? This Article provides some of the answers. Before examining recent developments, we will first focus on the objectives of the Community and then briefly glance at the more distant past.

I. OBJECTIVES OF THE COMMUNITY

The aim is to create a common market with the following character-

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¹ Treaty Establishing the European Economic Community, March 25, 1957, 298 U.N.T.S. 3, 11, art. 2 (*entered into force* Jan. 1, 1958).

istics. First, insurance companies situated in any one Member State must be completely free to set up branches in any other Member State. Second, insurance undertakings (*i.e.*, all authorized insurers whatever their legal form) should be able to market the full range of their insurance products throughout the Community, without having to use branches. Issuers would compete on price, the nature of the product, and the service offered in fair and equal conditions. All would be subject to essentially the same key supervisory rules, although separate national authorities would continue to apply these regulations; the main purpose of these rules would be to ensure that the insurance undertakings were always able to meet their financial commitments.

Sufficient control over sales methods and the nature of the products would protect the general public but not stifle innovation. Innovation will probably flourish in this competitive atmosphere. Also, uniform contract law, or more precisely, rules on the choice of law, would both protect the public and eliminate choice of law as an element of competition.

Premium taxation, if any, and other aspects of taxation bearing upon the attractiveness of insurance, would ideally be uniform throughout the market. At the very least, certain arrangements would prevent differences in taxation from disturbing competition. The purchaser of insurance, large or small, would have access to a very wide range of products. The market would be transparent enough for him to make intelligent choices. Brokers and other intermediaries would not only have freedom to operate on equal terms throughout the market but also a positive incentive to seek out the most suitable insurance, wherever it might be in the Community. Sufficient and comparable financial information about all the insurers in the market would aid these brokers in their choices. Finally, of course, no restrictions would hamper the currency movements of any of the parties involved in the transactions.

These are ambitious goals. It was clear from the beginning that a large number of measures, not all in the field of insurance, would be necessary to achieve them.

II. HISTORY AND MECHANISMS OF IMPLEMENTATION

Regarding regulatory provisions, the way forward was through the rights of establishment and of freedom to provide services (Treaty of Rome, Chapters 2 and 3), with which most of the measures we shall examine are directly or indirectly connected. Indeed, in 1961, the Council of the European Communities ("Council") adopted an ambitious pro-

gram² envisioning the realization of successive rapid stages: both freedoms would first be achieved in the field of reinsurance, followed successively by freedom of establishment in direct non-life insurance, freedom of establishment in direct life insurance, freedom of services for direct non-life insurance and, finally, freedom of services for direct life insurance. Although certain events have overtaken this program, it is still valuable as a framework to understand what has actually happened.

In accordance with the program, the first concrete endeavors occurred in reinsurance and retrocession. Directive 64/225/EEC of February 25, 1964³ removed barriers to establishment and provision of services in this field. Since few such barriers existed, and these activities, unlike direct insurance, were subject to little control in the original Six, this removal did little more than confirm an existing position. It may be noted that specialist reinsurers and primarily direct insurance underwriters participate in reinsurance. The specialist reinsurers have not so far been the subject of any subsequent insurance Directives.

A. Two Significant Council Directives and Their Effects

After this, little happened for a long time. Indeed, it is notorious that little attention was paid to services in general, and insurance in particular, in the earlier years of the Community's existence. However, when a move came, it was, as foreseen, concerned with the right of establishment in non-life insurance.

The Council adopted two Directives July 24, 1973. Directive 73/240/EEC⁴ sought to abolish the formal restrictions on freedom of establishment and contained little that was not shown by the *Reyners*⁵ judgment to be superfluous. On the other hand, Directive 73/239/EEC,⁶ (the First Council Directive on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct insurance other than life insurance), represents the

² Programme Général pour la suppression des restrictions à la liberté d'établissement. 5 J.O. COMM. EUR. 36 (1962).

³ Council Directive of April 25, 1964 on the Abolition of Restrictions on Freedom of Establishment and Freedom to Provide Services in Respect of Reinsurance and Retrocession. 7 O.J. EUR. COMM. 878 (1964).

⁴ Council Directive Abolishing Restrictions on Freedom of Establishment in the Business of Direct Insurance Other than Life Insurance 16 O.J. EUR. COMM. (No. L 228) 20 (1973).

⁵ Jean Reyners v. Belgian State, 1974 E. Comm. Ct. J. Rep. —, [1974 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8256 (1974).

⁶ First Council Directive of 24 July 1973 on the Coordination of Laws, Regulations, and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Insurance Other than Life Insurance, 16 O.J. EUR. COMM. (No. L 228) 3 (1973).

foundation upon which most subsequent work has been constructed. Its main provisions cover the following:

- the legal form of insurance undertakings;
- the restriction of their activities to insurance and operations directly arising therefrom (the same undertakings could not, for example, carry on both insurance and banking);
- the requirement that all classes of insurance must be subject to State supervision (not previously the case elsewhere);
- the assignment of responsibility for supervision of technical reserves and of assets representing them to the State where each establishment (head office, branch or agency) of the undertaking is situated (the reserves consisting mainly of unexpired premiums and provisions for claims; the State has to ensure that they are "sufficient");
- the attribution to the State where the head office is situated of sole responsibility for ensuring that the prescribed solvency margin (over and above the technical reserves) and guaranty fund are maintained (their level being fixed in accordance with precise rules laid down in the Directive);
- procedures for creating new undertakings and for setting up branches in other Member States. If the issuer complies with the conditions, authorization cannot be refused. In particular, economic need is not a relevant criterion; an undertaking seeking to set up a branch must produce a certificate of solvency issued by the head office State, which the other State must accept;
- various measures, culminating in withdrawal of authorization, to be taken if things go wrong;
- close cooperation between national supervisory authorities.

In considering the effects of this Directive, we must first recognize that its primary objective of improving access to the separate national markets has been fully achieved. Exercising the right of establishment works smoothly in almost all cases. Collaboration between the supervisory authorities, practiced both at a routine level and through a permanent conference, which holds repeated meetings and sets up subgroups where necessary, ensures that such frictions that do occasionally arise are almost invariably overcome.

On the other hand, strengthening control within the national markets—one of the aims of the Directive—probably increased their separation from each other. Furthermore, this Directive contains some apparent inconsistencies which have led to controversy about what the starting point was when we came to try to create conditions for the easy exercise of the freedom to provide services. Moreover, although the Directive provides a great deal of coordination as to the nature of insurance issuers and their satisfactory running, especially concerning the maintenance of their financial security, it does not bring any harmonization of "material control" (policy conditions, premium rates, wording of forms, etc.).

Three later measures tie up certain loose ends left by the First Non-Life Directive of 1973. These concern respectively: 1) assistance activities (especially tourist assistance);⁷ 2) credit and suretyship insurance;⁸ and 3) legal expenses insurance.⁹ Although important within their specialist fields, these Directives do not change the broad picture.

B. The First Council Directive: Background and Effects

Once the Council adopted the First Non-Life Coordination Directive, work turned upon its counterpart in the field of life assurance,¹⁰ which the Council adopted on March 5, 1979 and was to enter into force on September 15, 1981. However, not all Member States were prompt in completing the often very complicated process of amending their legislation to implement it.

Although this Directive follows the same plan as its predecessor and repeats many of its provisions word for word, certain differences make it a longer and more complicated text. These result in part from the nature of life insurance itself. Whereas non-life insurance is very much similar in all States (policies essentially provide protection against risk—and many do not give rise to claims), life insurance is much less clear-cut; its content and boundaries vary from one State to another. In most of its forms, it is only to a limited extent concerned with risk; claims arise on most policies, and they have characteristics that make them akin to investments.

The Directive recognizes these features by defining as life insurance virtually any activity that any Member State in fact regards as such or that is in practice carried on by life insurance companies. The varied nature of these activities has to be matched by varying solvency margin requirements which consider the investment risk and assume a rather alarming complexity.

Another factor adding to the length of the First Life Coordination

⁷ Council Directive amending, Particularly as Regards Tourist Assistance, the First Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Insurance Other than Life Insurance, 27 O.J. EUR. COMM. (No. L 339) 21 (1984).

⁸ Council Directive Amending, as Regards Credit Insurance and Suretyship Insurance, the First Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Insurance Other than Life Insurance, 30 O.J. EUR. COMM. (No. L 183) 72 (1987).

⁹ Council Directive on the Coordination of Laws, Regulations, and Administrative Provisions Relating to Legal Expenses Insurance, 30 O.J. EUR. COMM. (No. L 185) 77 (1987).

¹⁰ Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to the Taking-up and Pursuit of the Business of Direct Life Assurance, 22 O.J. EUR. COMM. (No. L 63) 1 (1979).

Directive is that it finally addresses the question of the separation of life and non-life insurance, which the First Non-Life Coordination Directive left open. Most Member States already established that the same underwriter could not carry on both non-life and life insurance, because of the danger that life insurance funds, representing perhaps the savings of the man in the street, might be used to support the risks of general insurance operations. In Belgium, Luxembourg and the United Kingdom, however, composite companies carrying on both types of business flourished with the blessing of the authorities.¹¹ In the end, the following compromise was reached: no new composite companies could be formed anywhere in the Community, nor might any new composite branches be established. However, existing issuers could maintain their composites, so long as they observed strict rules that separate management functions and establish separate solvency margins for the two classes. A composite issuer could set up a new branch or agency in another Member State only for its non-life business; for the conduct of life insurance, it would need to create a separate subsidiary company.

Thus, the First Directives (Non-Life and Life, respectively) made it easier for an insurer having its head office in one Member State to open a branch in another Member State, but the branch would have to behave as part of the national, and separately regulated, market in which it was established. The right of establishment gives access to twelve national markets but does not weld them into one.

C. Freedom of Services: A Crucial Policy?

To proceed beyond this point, we must make use of the right of freedom of services. With freedom of services, an insurance undertaking in one Member State can cover the risks of any policyholders in another Member State without making use of an establishment in that second State. Whether it merely gives access to separate national markets, as does the right of establishment, or is instrumental in creating a single Community-wide Internal Market, depends on how the insurer is regulated. In other words, is the insurance issuer providing services subject in the destination State (State where the risk is situated) to supervisory and other controls similar to those which would be imposed upon a branch located there, or is it free to operate under the control of its home State, this being recognized by the destination State as replacing its own controls ("home country control with mutual recognition").

In 1974, the European Court of Justice declared in the *Van Bin-*

¹¹ Greece and Spain, which joined the Community later, also have composite companies.

sbergen judgment¹² that the right to freedom of services was directly applicable as from the end of the transitional period laid down in the Treaty. This transitional period ended on December 31, 1969, but most Member States continued to insist that only insurance issuers that were both established and authorized in their territory could cover risks situated in that same territory. Their reasoning boiled down to this: while the Member States attached importance to the right of freedom of services, they valued the duty of protecting their policyholders more—and they felt that they could fulfill this obligation sufficiently only if insurance issuers were physically present in the insureds' territory. Of course, less respectable protectionist reasons may have been in play as well. For this reason, a comprehensive proposal of the Commission, intended to provide the regulatory framework for the exercise of freedom of services in non-life insurance on the basis of home-country control, remained blocked for many years in the Council, despite innumerable meetings which at least attested to the importance which the Member States attached to it.

The Commission could not accept this situation, and this long period of conflict culminated in the delivery by the European Court of Justice of some important judgments on December 4, 1986.¹³ Three of the judgments, in cases brought against France, Denmark and Ireland, concerned only coinsurance, but the judgment in the German case, 205/84, pertained to virtually all of non-life and life insurance and is, therefore, of fundamental significance. Indeed, it still determines much of our work.

D. Implications of 1992 for Financial Services: The White Paper and the Single European Act

Before we examine this judgment we must turn our attention to other wider developments. In March, 1985, the Council of Ministers asked the Commission to draw up a program to achieve a unified Internal Market by the end of 1992. The Commission responded by producing by June of the same year a detailed and comprehensive White

¹² *Van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E. Comm. Ct. J. Rep. 1299.

¹³ *Commission v. French Republic*, 30 O.J. EUR. COMM. (No. C8) 2 (1987), [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,340 (1986); *Commission v. Denmark*, 30 O.J. EUR. COMM. (No. C8) 2 (1987), [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,341 (1986); *Commission v. Federal Republic of Germany*, 30 O.J. EUR. COMM. (No. C8) 3 (1987), [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,339 (1986); *Commission v. Ireland*, 30 O.J. EUR. COMM. (No. C8) 3 (1987), [1985-1986 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 14,342 (1986).

Paper,¹⁴ setting out not only what had to be done but how and when it might be achieved. Indeed, the timetable for bringing into effect the numerous individual measures necessary to achieve the total result was certainly one of the most important features of the program. Measures concerning financial services in general, and insurance in particular, had a prominent place in this timetable.

After remarking that the liberalization of financial services, linked to that of capital movements, would represent a major step towards Community financial integration and the widening of the Internal Market, the White Paper declared that the integration could be achieved using a minimal coordination of rules (especially on such matters as authorization, financial supervision and reorganization, and winding up) as the basis for mutual recognition by Member States of what each does to safeguard the interests of the public. Such harmonization, it said, particularly regarding the supervision of ongoing activities, should be guided by the principle of "home country control." This means that authorities in the financial institution's Member State of origin supervise the entity's activities. In addition, some uniformity between Member States would be present in surveillance standards, though—as the White Paper said—the need to reach agreement on this must not be allowed further to delay the necessary and overdue decisions.

The governments of the Member States responded to the White Paper not only with enthusiastic words but also with political action. They agreed upon the text of the Single European Act,¹⁵ which both amends and adds to the Treaty of Rome. The Member States ratified the Single European Act, and it entered into force on July 1, 1987. It is already producing effects in insurance.

The Single European Act officially enshrines the commitment of the Community to achieve the single Internal Market by the end of 1992 (note, by the way, that it is by the end of 1992 — perhaps we should really be talking about "completing the Internal Market by 1993"). It does not, however, provide that anything shall happen automatically by that date. On the contrary, it accepts that a large number of individual measures, each with its own date of application, have to be taken to reach the objective.

Nevertheless, the Act improves the decision-making process. For most of the measures required to bring about the Internal Market, unanimous agreement of all the Member States is no longer necessary. In-

¹⁴ *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310 final (June 14, 1985).

¹⁵ *Single European Act*, 30 O.J. EUR. COMM. (No. L 169) 1 (1987).

stead, there is a system of qualified majority voting. Member States have votes related to their size: for example, the Federal Republic of Germany has ten votes, and Luxembourg has two. Where qualified majority voting applies, a measure must have roughly three-quarters of the available votes. In the past, proposals concerning insurance regulation required the unanimous support of all the Member States. One single State could block forever a proposal that all the others wanted. This power no longer exists, and its elimination has already made an enormous difference.

One other feature of the Single European Act deserves mention. The Act recognizes that not all the Member States start from the same level of economic development, and that some may need more time than others to reach the goals that are set for all. The acceptance by all that special temporary arrangements may be necessary for some does much to facilitate agreement.

E. The Court of Justice's Ruling on Insurance

It is against this background that we can appreciate the Court's decision on December 4, 1986, in case 205/84. Briefly, the Court held that a requirement of establishment, in the context of the free cross-frontier provision of services, is the very negation of this Treaty-given freedom and is therefore contrary to Community law. However, insurance is generally a sensitive area; the need to protect the policyholder or insured person is such that, in the present state of Community Law, the State in which insurance services are being provided (that is, where the risk to be covered is situated) may impose on the insurer an authorization requirement. This authorization may include a promise to respect a large part of that State's supervisory rules, including the following: 1) the constitution of technical reserves; 2) the representation of those reserves by appropriate assets; 3) the localization of those assets; and 4) the general and special policy conditions (and hence the nature and extent of the cover and the types of contract which may be sold). However, again, this need for protection is not the same in every case, and in some cases, it may not be needed at all. Where this is so, there is no need for the authorization requirement and all that goes with it.

Admittedly, this judgment represented something of a setback, if not to the concepts of the White Paper program, at least to the schedule annexed to it. Clearly, much more harmonization of insurance supervisory law than originally envisioned would now be necessary for the Member States to achieve an Internal Market based on home country

control with mutual recognition of the States' consumer protection measures.

F. The Council and Commission Respond: The Second Non-Life Insurance Coordination Directive

However, the Court handed down this judgment when the new spirit which was shortly to find expression in the Single European Act was making itself felt everywhere. The representatives of the Member States and the Commission were determined to hammer out a directive on cross-frontier services that would respect the Court's reasoning and would work in practice. The result is the Second Non-Life Insurance Coordination Directive, adopted on June 22, 1988, which will come into force in July 1990.¹⁶ This Directive was adopted by qualified majority voting.

The directive provides two separate regimes. For "large risks," the State in which the insurer is established ("home country control") regulates. For "mass risks" (the smaller policyholders), the State in which the risk is situated may, subject to certain conditions, apply the authorization requirement and associated controls which the Court had envisioned.

From January 1, 1993, onwards, "large risks" will be the following:

- 1) transport risks (without thresholds);
- 2) credit and suretyship risks (without thresholds, but subject to the policyholder's carrying on a commercial activity);
- 3) fire and general property damage, general civil liability and pecuniary loss, to the extent that the policyholder or the group of companies of which the policyholder is a member fulfills two out of three following conditions:
 - a) 250 employees,
 - b) turnover of 12.8 million ECU (European Currency Unit),
 - c) balance sheet total of 6.2 million ECU.

During a transitional period running from the summer of 1990 to December 31, 1992, these thresholds will be roughly doubled. Furthermore, a much more extended transition, with various progressive stages is provided for Spain, Portugal, Greece and Ireland. For the last three countries, indeed, it is only on January 1, 1999, that application of the thresholds applied by the other States since January 1, 1993, is reached.

Two other features of the Second Non-Life Directive merit attention. The first is the provision for the choice of contract law. Ten years

¹⁶ *Second Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance other than Life Assurance and Laying Down Provisions to Facilitate the Effective Exercise of Freedom to Provide Services and Amending Directive 73/239/EEC*, 31 O.J. EUR. COMM. (No. L 172) 1 (1988).

ago, the prevailing wisdom was that freedom of services could not work unless the insurer was able to insist that the contract law of his own home State should apply. Nowadays, nobody maintains that view. Article 7 of the Directive contains a graduated system for granting the amount of choice that the policyholder's circumstances require. The aim is that a policyholder should never find himself in a situation where a contract law with which he has no connection is applied. The policyholder's circumstances count, and never those of the insurer. In other words, the insurer's country of establishment is *never* regarded as a criterion for deciding what law shall be applied. The choice, if any, is always made by reference to the policyholder's residence or the location of the risks he is insuring.

The second feature addresses the issue of premium taxes. After enormous argument, it was agreed that each Member State where a risk is situated shall have the right to charge its own premium taxes on the insurance contract and use its own means to collect the tax, regardless of whether the insurer covering the risk is situated in the same State or another one. Thus no harmonization exists, but there is equality of treatment within each Member State between "services" and "establishment" business.

This Second Non-Life Directive is a major breakthrough, because it establishes the Community-wide Internal Market in non-life insurance for which we have long been striving. Admittedly, it only does so for the so-called large risks, but these are precisely those cases in which cross-frontier freedom of services would, for purely commercial reasons, have supposedly the greatest scope. One important consequence is that industrial and commercial concerns having risks scattered throughout the Community will now be able to insure them under a single contract, if they wish, without having to resort to complicated and expensive fronting operations.

The Directive provides a fine example of home country control with mutual recognition of standards, as envisioned in the White Paper, but only for large risks. Destination State control continues to apply to mass risks, with the consequence that nobody expects more than a minute quantity of cross-frontier services business in mass risks to be carried out.

G. Commission Commitment to Freedom of Services and Harmonization

It must be stressed, however, that the Commission remains fully committed to securing full freedom of services, based on home country control, for mass risks as well. The Commission intends, as soon as pos-

sible, to bring forward proposals for the necessary measures to secure the harmonization which will allow home country control to be applied to these risks. This harmonization would be required in two main areas. The first is that of technical reserves, including not only the question of the nature and valuation of the reserves (where the most difficult point is undoubtedly equalization reserves, since there is agreement neither on when they are needed nor on how they should be calculated), but also on the nature, spread and valuation for supervisory purposes of the assets representing those reserves. Here, the admissibility of claims against reinsurers is perhaps the single most difficult point. The other area in which the Court held that destination State control was permissible pending further harmonization is that of controls on general and special policy conditions. Progress here will be difficult because of the widely diverging attitudes.

It is difficult to determine how long this further harmonization for mass risks will take. Considerable consultation will be necessary before the Commission can make a proposal. The aim is to have measures adopted before 1992, but the date of application might be sometime later, and transitional periods may run well beyond that date for certain Member States.

One measure of further harmonization, originally seen as a necessary adjunct to the main Second Non-Life Insurance Directive, should be reexamined in light of the latest developments. This is a proposal for a Directive on insurance contracts. It was conceived against the background that full freedom of services would be possible only if complete freedom of choice of contract law existed. Most people have abandoned this view. The text of the Second Directive now contains detailed choice of law provisions which greatly reduce the possibility of a policyholder finding himself engaged in a contract subject to a law with which he is unfamiliar and on which he cannot readily get advice. In the light of this, the Commission will have to decide whether to maintain the proposal in its present form, to modify it or even to withdraw it.

Compulsory motor insurance is excluded from the provisions of the Second Non-Life Directive which deal specifically with freedom of services, because this field contains special problems. A separate proposal to remedy this omission has been put forward recently.

Several developments have taken place in the area of life insurance. The most important of the Court judgments of December 4, 1986 (205/84) applies also to life business. As already mentioned, the Court held that, where protecting the policyholder or insured person is in the public interest, the State where the risk is situated—in life insurance, the State

where the policyholder or insured person is resident—may impose an authorization requirement on an insurer wishing to engage in cross-frontier business. Obviously, a great deal of life insurance falls in the area where such protection is indeed justified.

It follows that, to create a common market in life insurance, the Commission must consider two types of action. One can be engaged quite quickly, while the other will take more time.

First, we must try to identify cases where the protection of the State of residence is not justified. An example might be the policyholder who, on his own initiative, seeks life insurance outside his own country. Another recent Community measure is relevant to this scenario. In June 1988, the Council of Ministers adopted a Directive to free all capital movements within the Community by July 1, 1990.¹⁷ This liberalization will give the residents of all Member States the freedom to open bank accounts anywhere throughout the Community (Spain, Portugal, Greece and Ireland benefit from a transitional regime lasting up to the end of 1992, and possible for a further three years in the case of Portugal and Greece if judged necessary at the time). In these circumstances, it is doubtful that Member States presently preventing their residents from taking out life insurance in other States will any longer have effective administrative means to do so. Thus, one remedy is to recognize and regularize this situation. Such a change would at least be a beginning to creating a common market in life insurance, because most people who wanted to would be able to buy whatever products were available throughout the Community. A proposal for a Directive on these lines was made in December 1988. Another possibility is group or collective insurance. It may be possible to identify cases here where either the need for protection is not great, because the policyholder can be presumed to know what he is doing, or whatever controls may still be felt necessary can be of a flexible nature.

These are some of the actions that may be taken in the short term. However, at the second stage, to achieve a genuinely competitive market for mass risks in the life sector, engaging in detailed harmonization of the technical base on which life insurance is transacted may be necessary. Such an operation is likely to be long and complex.

The following two measures are not restricted to particular classes but have to do with insurance as a whole. The first is a proposal for a Directive on the Annual Accounts and Consolidated Accounts of Insurance Undertakings. It is a lengthy, technical text which seeks to adapt to

¹⁷ Council Directive for the Implementation of Article 67 of the Treaty, 31 O.J. EUR. COMM. (No. L 178) 5 (1988).

the needs of the insurance industry the provisions of the already-adopted Fourth Directive on Company Accounts and Seventh Directive on Consolidated Accounts. The proposal considers the different needs of non-life insurance, life insurance and reinsurance—activities which specialist undertakings may carry out, or in which a single enterprise may simultaneously engage. Despite its technical difficulty, the Council is expected to work hard at this proposal and to try to adopt it in a short period, perhaps two years from the first discussions to the last. It is therefore all the more disappointing that the European Parliament has only recently delivered its Opinion, which must be done before the Council can reach any decision.

The Accounts Directive is important not just in plugging the one remaining gap in the general scheme of applying the Fourth and Seventh Company Law Directives to all kinds of undertakings. It will also play a particular role in achieving a common market in insurance. It will enable information on the financial situation of insurance undertakings established in any part of the Community to be available in a standard comprehensive form to prospective buyers of insurance and, above all, their professional advisers, wherever in the Community they may be situated. Without this level of financial information, we cannot expect the Internal Market in insurance, depending as it does so much on financial confidence, to develop its full potential.

Another proposal on which the Opinion of the European Parliament is still awaited concerns the compulsory winding-up of insurance undertakings. The purpose of the proposal is to establish the rules which will apply when the withdrawal of authorization, as a result of administrative irregularities or because of the insolvency of the undertaking, leads to a compulsory closing down. By giving all insurance creditors the right to equal treatment in such circumstances, the directive eliminates one of the fears which a resident of one Member State might have when concluding a contract with an undertaking with its head office in another Member State. The Directive thereby facilitates the operation of direct insurance in the great Internal Market.

The Directive rests on the twofold principle of the unity of the procedure and the universality of its effects. In the case of insolvency, the protection of direct insurance policyholders and of other insurance issuers, which have reinsured risks with the undertaking closing shop, is guaranteed insofar as is possible by the creation of separate asset funds corresponding to the technical reserves.

It is apparent that a Community-wide Internal Market in insurance will not be achieved by a single dramatic leap in 1992. Rather, it will

happen gradually. The target of 1992 has mobilized political will and has helped in obtaining the practical means by which the necessary measures can be adopted. It has aroused public expectations, and both politicians and civil servants know they will be called to account if those expectations are not met. The climate of debate has changed, and things once thought virtually impossible are now discussed as short-term objectives. But we still have to move by separate steps. Even if some parts of the program suffer delay, we believe we can achieve the essentials by 1992. Certainly the Commission's aim is to ensure that all the essential legislation has been tabled in good time to be adopted by then.

All the foregoing has related to insurance undertakings which, whatever their legal form, are considered under the EC Treaty to have the rights of nationals of a Member State. Let us now look at those provisions that apply to insurance undertakings with head offices outside the Community which wish to set up branches or agencies in Member States. The First Non-Life Insurance Coordination Directive of 1973 and the First Life Insurance Coordination Directive of 1979 both contain sections devoted to this subject. Briefly, Member States may (not must) admit the establishment of such branches; they must apply an authorization procedure that, in general terms, is as strict or stricter than that applied to undertakings based in the Member States.

Since the Community cannot exercise any control over the solvency margin maintained at the head office of such companies with respect to the totality of their operations, a solvency margin must be maintained with respect to each of the branches within the Community. Similarly, a guarantee fund must be maintained in each Member State concerned and be represented in part by assets deposited as a security. There is, however, a possibility of combining the solvency margins and guarantee funds required by two or more Member States and making only one State responsible for their supervision.

Article 29 of the First Non-Life Directive opens the door to a quite different possibility. It states that, "The Community may, by means of agreements concluded pursuant to the Treaty with one or more third countries, agree to the application of provisions different to those provided for in this Title for the purpose of ensuring, under conditions of reciprocity, adequate protection for insured persons in the Member States." Switzerland had expressed an interest in entering into such an agreement, and the Commission was therefore authorized to negotiate a text with the authorities of that country. This procedure was completed,

and proposals¹⁸ were presented to the Council which would give effect to the proposed agreement in all Member States, provided of course that Switzerland ratifies it. The effect would be that the insurance undertakings of the Member States could avail themselves within Switzerland of possibilities of establishment similar to those that they enjoy within the Community, while Swiss insurers would have similar rights in each of the Member States. The main advantage for Swiss insurers, which are already well represented in most Member States, would be that they would no longer need to maintain a separate solvency margin within the Community; a single solvency margin relating to the whole activities of the insurer and supervised by the Swiss authorities would suffice.

The Agreement with Switzerland has still not been adopted, for reasons which have to do mainly with the recent rapid developments in the Community. Since the Agreement would in effect incorporate many of the essential features of the First Non-Life Insurance Coordination Directive in an international treaty, amending the First Directive with respect to those features without Switzerland's consent would be impossible, unless the rather drastic steps were taken of denouncing the Agreement itself. Worse, although qualified majority voting could amend the Directive itself, a single Member State could still block effective change, because denunciation of the Agreement would call for unanimity.

Ways are being sought to remedy these difficulties, and it is now possible to feel optimistic about ultimate success. However, if the Agreement is ultimately adopted in 1989, it will have been no less than fifteen years after negotiations began. Not surprisingly, there is a general reluctance to contemplate further arrangements of this or similar nature, at least until things have settled down on the Community side after the present period of rapid change.

The branches or agencies within a given Member State may only cover risks in other Member States if those States unilaterally so agree. No automatic right exists under Community Law. Article 59, second paragraph, of the EC Treaty provides that the Council may confer such a right, acting on a proposal from the Commission; however, in the negotiations leading to the adoption of the Second Non-Life Insurance Coordination Directive, it was apparent that a period of consolidation within the Community will be necessary before such a proposal will have a chance of success.

¹⁸ *Proposal for a Council Decision on the Conclusion of the Agreement Between the Swiss Confederation and the EEC on Direct Insurance Other than Life Assurance; Proposal for a Council Directive on the Implementation of the Agreement*, 26 O.J. EUR. COMM. (No. C 154) 33 (1983).

The possibility for insurers established in countries outside the Community to cover risks situated in a Member State by direct provision of services from their home base depends upon the decision of that State alone, and not upon Community law.