

COMITÉ EUROPÉEN DES ASSURANCES



CEA POLICY REPORT ON

CONSUMER PROTECTION

IN THE EUROPEAN SINGLE MARKET

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Consumer protection **in the European Single Market**

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Consumer protection **in the European Single Market**

In its role of representative of the European insurance industry, it is important to CEA (Comité Européen des Assurances) that the European Single Market functions smoothly. Sustained and efficient consumer protection is indispensable to the aim of increasing customer confidence and thereby providing a solid foundation for the Single Market. Any plan for consumer protection in the Single Market must however provide a justifiable and transparent legal framework both for the consumer and for the supplier.

In this context, consideration should also be given to the fact that any appropriate consumer policy, which actually offers advantages to the policyholder, should not concern the aspect of protection alone. Consumer policy should, at the same time, ensure that consumers are able to fully benefit from the Single Market through a greater variety of products available to them and through the creation of appreciable price advantages.

The European Commission is at present pursuing two main courses of action in order to realize its aim of providing a form of consumer protection for Europe, as a whole, which is compatible with the Single Market. Firstly, it recently presented the proposal for a framework Directive on unfair commercial practices¹. Secondly, in its Action Plan², it expounded a method for the creation of a coherent European contract law which would at the same time result in the achievement of an improvement in consumer protection.

European insurers would like to play their part in this by specifying their ideas on a concept.

¹) COM (2003) 356 final, 18.6.2003

²) COM (2003) 68 final, 12.2.2003

1. Realistic basis for consumer protection measures

Consumer protection must satisfy real needs and be based on realistic premises. It must therefore – before any initiatives are taken - be ascertained which measures are actually necessary, what regulations any legal documents should contain and what should be their effects. It follows, therefore, that measures should be restricted to what is actually necessary.

To ensure this, the following prerequisites must absolutely be met in any initiative:

- Any measures should be restricted to eliminating existing obstacles to the Single Market on the one hand and be oriented towards the real needs of the consumer on the other.
- Prior to any measure being taken, the institutions and groups concerned should be heard fully, at length and allowing for appropriate time limits.
- Any action should be preceded by an appropriate analysis of the cost-benefit ratio³.

2. Fundamental principles

Any plan for consumer protection should be built upon a standard basic framework, which should apply to all sectors without exception.

a) Clear definition of the notion of the consumer

It is necessary to specify a standard notion of what constitutes a consumer, which transcends branch divisions and which can be generally applied to all sectors which have been harmonized and is thus not restricted to specific products or sectors. The definition in Article 2 (a) and (b) of the proposal for a framework Directive on unfair commercial practices⁴ is a good basis for this. The decisive factor is that only natural persons who conclude contracts which do not fall within the scope of their professional or commercial activities are classified as consumers.

The model for this should be as a rule the circumspect and reasonably well-informed consumer who is trying to obtain a certain degree of information on his own and is acting in a self-reliant and responsible way. The supplier should not have too high expectations, but he should be able to assume that his counterpart bears responsibility as well and is a responsible citizen with a self-interest in the protection of his or her own personality, who acts accordingly. However, any abstract definition of consumer perception with reference to the respective target group of a product or service is not feasible due to lack of objective and generally accepted criteria for clear delimitation.

³) This issue is dealt with in detail in the CEA Report on *Prospects for simplifying European insurance* legislation.

⁴) corresponds to Article 2 (b) of the Directive on unfair terms in consumer contracts

b) Appropriate degree of harmonization

In the area of consumer protection, the European insurance industry takes the view that maximum harmonization might be advantageous to different sectors:

- unfair commercial practices
- mandatory provisions/provisions of the general good
- pre-contractual information
- taxation

In this way, essential aspects of consumer protection would be brought to a comparable level on a EU-wide basis and policyholders would have the guarantee and legal security to be adequately protected in any Member State without exception. Thus, the readiness to buy insurance policies on a cross-border basis would increase as well.

However, CEA would like to stress that by advocating – partial – maximum harmonization it does not mean that new rules should be issued or new areas of legislation should be tackled. Rather, it should be stated that the regulations already implemented and the flood of new initiatives aimed at harmonization and integration basically cover all areas necessary for consumer protection and contain the essential provisions. Therefore, new harmonization measures are not required, but any action of the Community should deal with improving and implementing existing regulations or concluding current procedures.

c) Determinability of applicable law

It should be possible both for the consumer and the insurance company to decide rapidly and in an uncomplicated manner which law has to be applied to an insurance contract. With respect to insurance contracts concluded by consumers it is important that consumers have trust in the product so that they will be prepared to conclude cross-border contracts. The existing regulations for insurance companies concerning consumers amount to application of the host country principle. According to current regulations, the consumer hardly has any possibility of choosing applicable law. Where the risk is situated in the same state in which also the policyholder has his or her habitual residence, the law of this state is applicable⁵. For risks relating to immovable goods and to vehicles recorded in an official or officially recognized register any choice of law is practically excluded for domestic cases.

These regulations are very rigid and, for the benefit of free competition as well as in their own interest and for the sake of greater product variety, consumers should have greater flexibility to choose the applicable law. CEA's precise proposals in this regard are set out in CEA's Report on Prospects for Simplifying European Insurance Legislation.

⁵⁾ Although Art. 7 (1) (a) of the 2nd Non-Life Directive provides for a future development clause, many Member States have not made any use of it (e.g. the German legislator).

Ensuring greater freedom to choose applicable law should be accompanied by gradual strengthening of the home country principle, i.e. implementation of the Single Market concept according to which suppliers of products or services are subject to the regulations and the supervision of the Member State in which they are established. For the area of supervision this is already a generally accepted and well-established principle which has led to considerable simplification and considerably promoted the mobility of insurance companies within the EU. **However, once again, application of the home country principle - especially in the consumer area - presupposes that a comparable level of protection is created in all Member States.**

d) Ensuring effective and diligent supervision

An efficient form of supervision is a key factor in order to guarantee that the supplier will adhere to certain principles and ensure that contracts can be fulfilled. In this respect, CEA considers that the applicable regulations on solvency requirements, valuation of assets and technical provisions as well as actual supervision provide maximum protection against the risk of insolvency of insurance companies and for maximum protection of the consumer. CEA emphasizes the necessity to ensure that a functioning and appropriate system is put into operation by means of European legislation and has developed its own thoughts and ideas on the subject in a separate paper.

e) Coherence of regulations

The coherence of regulations is essential to the legal security of the consumer and the supplier. In any case, the number, complexity and divergence of the requirements contained in the different legal texts applicable to insurance contracts cause genuine problems. This is shown, in particular, by the example of the requirements for supplying information to consumers (either during the term of the contract or before conclusion of the contract). Also, policyholders, buried under the immense number of different pieces of information, are unable to fairly assess the insurance product offered to them and make an informed choice.

CEA supports therefore the Commission's intention to improve the *acquis communautaire*. The idea contained in the Action Plan on European contract law of creating a frame of reference which would record common principles and concepts in the area of European contract law, might improve the quality and coherence of the *acquis communautaire*. To ensure the flexibility of this instrument, this frame of reference should, as required by the Council, be non-binding and be adopted, for instance, in the form of a Recommendation.

f) High-quality consumer information

The guaranteed provision of high-quality rather than – in terms of quantity - excessive consumer information is a fundamental requirement to enable markets to function and is the basic principle of consumer protection. However, as stated above, the information requirements imposed on insurance companies by different European legal acts do by no means fulfil this requirement, so that ultimately this may create difficulties both for the consumer and the supplier: the consumer will be swamped with unnecessary information, so that he will be unable to understand what is essential for him. And it may be difficult for the supplier to judge in individual cases, especially in cross-border situations, what information should be made available.

CEA therefore suggests that an evaluation of existing information requirements should be made. The ultimate objective of this exercise should be to draw up a definitive catalogue of information requirements and to create legal security both for suppliers and clients by applying it on a EU-wide basis. Another great advantage would be to lay down a uniform terminology throughout the EU.

For details regarding the methodology and the requirements for this kind of Community project in terms of contents we refer to the separate CEA Report on *Prospects for simplifying European insurance legislation*.

g) Appropriate consumer advice

In order to provide the consumer with help to make decisions, appropriate advice should be given alongside adequate information. The scope of such advice must however be specified by the consumer him- or herself. Detailed legal provisions and obligations to provide advice, on the other hand, take away the consumer's right to form an independent opinion since there is no doubt that there are consumers who will reject advice if it is weighed down with an excess of bureaucracy.

In any case, the requirement that only the supplier should judge when a consumer actually needs a more detailed advisory consultation in order to take an informed decision and that he alone should bear any adverse consequences misses the truth. Indeed this subject becomes a more explosive one if the withholding of pieces of information, an omission therefore, is considered to be a misleading commercial practice⁶.

This situation could be remedied, as already suggested above, by drawing up a definitive summary list of information obligations. Incidentally, the consumer him- or herself should have a responsibility to request more detailed advice or information and the supplier should only be obliged to provide more detailed advisory consultations if a gap in the consumer's information or knowledge is obvious.

6) According to the Unfair Commercial Practices Directive, solely the supplier should judge and bear the consequences of any misjudgment as to whether the average consumer needs a piece of information, according to the circumstances, in order to be able to take an informed transactional decision.

Also, it is vital that consumers are granted adequate time to make their decisions or possibly to reconsider them; exceptions to this rule should only be provided for in special cases, e.g. if the policyholder requires immediate coverage. As an appropriate mechanism for this, there could be an obligation of the supplier to make the information available before conclusion of the contract and to grant the consumer a period of withdrawal. In the interest of both sides the period of withdrawal should be appropriate and should, moreover, uniformly apply in all Member States. For instance, a two weeks' period of withdrawal may seem appropriate.

h) Balanced regulations

The interests of consumers and suppliers must be fairly taken into account and a balance achieved between the rights and obligations of both sides. Over-regulation and the overburdening of one side must be avoided at all costs. Thus it should not, as suggested by the above example, be the exclusive responsibility of the supplier to determine the requirements and information needs of the consumer. A one-sided obligation of this kind, particularly considering the fact that severe penalties might be applied, is disproportionate and does not take into account the model of the reasonably well-informed, reasonably observant and circumspect consumer.

i) Homogeneous application and implementation of European regulations

To create a Single Market with a homogeneous legal area it must be ensured that Member States incorporate in any form European regulations into national law, that equal situations within the EU are treated equally. This is the only way to avoid distortions of competition between Member States due to restrictive national regulations and to create the necessary prerequisites for effective competition, which is an essential guarantee of the realization of consumer interests.

Therefore, in certain fields of consumer protection regulations, such as unfair commercial practices, the maximum harmonization approach could contribute to create a "level playing field" in which Member States would be prohibited from issuing unnecessary and too restrictive regulations. Moreover, this is the only way to prevent any "forum shopping" between national markets.

Moreover, to ensure coherent implementation in Member States, there is also need of increased control of these national implementing provisions by the European Commission. The Commission should increasingly work towards bringing Member State legislation in line with each other and, in doing so, cooperate more closely with Member States. This would be a sphere of action which the Commission should pay more attention to and where it should employ its resources more intensively.

j) Efficient legal protection

It is CEA's view that the creation of systems for the out-of-court settlement of disputes would make it distinctly easier for the consumer to assert his or her rights in a fast, efficient and economical manner and expressly emphasizes its readiness to collaborate in setting up such systems. To this end, the foundations of systems already in existence such as EEJ-NET or FIN-NET should be strengthened and more extensive regulations should be avoided. The two Recommendations of the Commission concerning the principles for institutions which are responsible for the out-of-court settlement of consumers' legal disputes⁷ should lead the way in this.

k) Cooperation and communication between consumers and suppliers

In order for appropriate consumer protection to be a reality, suppliers and consumers must be mutually responsible for informing each other of their respective requirements. To this end, it is necessary to maintain a continuous exchange of views which could possibly be facilitated by the creation of a legal or practical framework to make such cooperation easier would perhaps be a good idea. CEA supports, in this regard, efforts to strengthen the dialogue with consumer associations.

l) Scope for self-regulation

The European Commission has repeatedly emphasized that it wants to strengthen and support efforts aimed at self-regulation. In this context, a variety of different methods, procedures, mechanisms and forms of self-regulation are conceivable. These may range from an institutionalized and highly regulated approach involving formalized effects of the adopted regulation to a loose agreement between individual parties concerned.

CEA basically supports this approach according to which the sectors concerned are to be granted more freedom and to be entrusted with the development and elaboration of relevant questions of detail. However, in order to actually achieve the pursued aim, i.e. to realize the simplification for the sectors concerned, it must be ensured that it is actual self-regulation on an exclusively voluntary basis.

7) Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes (OJ L 115/31 of 17 April 1998); Commission Recommendation of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109/56 of 19 April 2001)

3. Conclusions

From these descriptions, tangible needs and requirements result for European insurance companies in order to meet future demands for efficient consumer protection in the EU:

- Consumer policy should not be understood solely as protection; rather, consumer policy should also contribute to providing policyholders with advantages in terms of prices, supply and quality through the Single Market. This, however, can only be achieved by allowing for the interests of the parties concerned in a well-balanced and fair way in legislation.
 - Evaluation, consolidation, combination, streamlining of existing EU regulations as well as possibly reorganizing and simplifying certain areas should take absolute priority over new regulations.
 - To establish coherence between national implementation rules, increased control on the part of the Commission and enhanced cooperation and coordination between Member States are necessary to ensure high-quality implementation of existing EU rules and their homogeneous application at national level.
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