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**Responsibilities of the home and host Member States,
in particular as regards the handling of complaints**

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On 18 January 2006 the European Parliament decided to set up a Committee on Enquiry into the crisis that affected the Equitable Life Assurance Society.

Full information on the work of the Committee of Enquiry can be obtained via its website at the following address:

http://www.europarl.europa.eu/comparl/tempcom/equi/default_en.htm

The Commission is following closely the discussions and hearings at the Committee of Enquiry.

The Committee of Enquiry is pursuing its work and it is not intended that there should be any discussion in the EIOPC on the Equitable Life case.

However, questions have been raised in the Committee of Enquiry concerning the functioning of the insurance single market regime. In particular, it has been suggested on a number of occasions that the principles underlying the insurance single market, namely the single licence and home country control, may deprive the host Member State, i.e. the Member State where a branch is situated or into which cross-frontier services are provided, of any say or influence over how such business is conducted on its territory.

To challenge this inaccurate interpretation of the insurance directives, the Commission representative took the floor at the meeting of the Committee of Enquiry on 29 May and promised to table a short paper dealing with the respective rights and obligations of the home and host Member States under the insurance directives. That paper has been sent to the Parliament and is annexed to this note.

Another related source of concern to the Committee of Enquiry has been the handling of complaints, where there have apparently been cases of the host Member State directing complainants to the home Member State and the home Member State directing the same complainants back to the host Member State. The Members of the Committee of Enquiry are clearly disturbed that citizens may be sent back and forth in this way and be unable to have their case properly examined.

Members of the EIOPC are invited to discuss these issues and to respond to the following questions:

- 1. Do members of the EIOPC agree with the interpretation of the insurance directives set out in the annexed note, in particular as regards the division of responsibilities between the home and host Member States?**
- 2. What are the views of the members of the EIOPC as regards responsibility for the handling of complaints and for advising complainants on the correct procedures to follow?**

- 3. Have members of the EIOPC encountered problems in the handling of complaints, in particular as regards contacts and co-operation between the home and host State competent authorities?**
- 4. Are there any other home-host issues that members of the EIOPC would wish to raise?**

The Life Assurance Directives

Respective roles of the home and host authorities

Background

In the course of the proceedings of the European Parliament Committee of Enquiry into the Equitable Life Assurance Society, questions have been raised concerning the role of and the powers available to the home and host Member States respectively. The home State is understood as the State where the insurer has its head office, while the host State is any other Member State where the insurer has a branch or into which it provides cross-frontier services¹. The purpose of this note is to explain the situation under the current Community insurance legislation. This note relates specifically to life assurance, but similar provisions apply, *mutatis mutandis*, to non-life insurance.

Life Assurance Directives

A number of insurance directives² have been adopted and implemented with the aim of creating a single market for insurance. The intention is to give insurers a wider market in which to operate and to give consumers a broader choice of competing insurers and insurance products which they can call on with confidence that all insurers are subject to comparable high-level minimum standards. The three generations of life assurance directives (1979, 1990 and 1992) have now been merged in the Recast Life Directive 2002/83/EC³ of 5 November 2002 (hereinafter "the Directive"). As a result the first, second and third life assurance Directives were repealed.

Philosophy of home country control based on the single licence principle

The single life assurance market, as embodied in the Directive, is based on the harmonisation of essential national provisions and mutual recognition. The basic philosophy of home country control based on a single licence enabling Community insurers to establish branches or provide services throughout the single market is set out clearly in Recital 7 of the Directive: "the approach adopted consists in bringing about such harmonisation as is essential, necessary and sufficient to achieve the mutual recognition of authorisations and prudential control systems, thereby making it possible to grant a single authorisation valid throughout the Community and apply the principle of supervision by the home Member State". This authorisation, granted by the supervisory authorities of the home Member State, is valid for the whole of the Community and the insurer does not have to request additional authorisations from the authorities of the other Member States in which it wishes to do business. This principle applies equally whether

¹ In fact the Life Directives do not use the term "host Member State" but refer to the "Member State of the branch" and "the Member State of the provision of services". Member State of the branch is the State in which the branch covering the life assurance commitment is situated. Similarly, Member State of the provision of services is the Member State of the commitment, if the commitment is covered by an assurance undertaking or branch situated in another Member State. The Member State of commitment is the Member State where the policyholder has his/her habitual residence.

² See http://ec.europa.eu/internal_market/insurance/index_en.htm

³ OJ L 345, 19.12.2002, p. 1.

an insurer exercises its right of establishment by setting up a branch or agency or makes use of its freedom to provide services.

Minimum harmonisation

The Directive did not seek or achieve full harmonisation. It lays down minimum rules that Member States will supplement with their own national rules. These will necessarily differ. However, by adopting the Directive, the co-legislators, the European Parliament and the Council, showed that they were satisfied that they had found the right level of minimum harmonisation for the safe and proper functioning of the single market balancing the interests of insurers and of policyholders.

Home Member State: financial and prudential supervision

The Directive lays down detailed minimum rules to ensure the financial health of insurers and their ability to meet their commitments. These relate to the establishment of technical provisions (Article 20), the categories of authorised assets for the coverage of technical provisions (Article 23), rules for investment diversification (Article 24), matching rules (Article 26 and Annex II) and the solvency margin and guarantee fund (Articles 27 to 30).

Article 10(1) of the Directive stipulates that "the financial supervision of an assurance undertaking, including that of the business it carries on either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State". Article 10(2) states that "financial supervision shall include verification, with respect to the assurance undertaking's entire business, of its state of solvency, the establishment of technical provisions, including mathematical provisions, and of the assets covering them, in accordance with the rules laid down or practices followed in the home Member State pursuant to the provisions adopted at Community level". Financial supervision is an exclusive competence conferred on the home Member State with which the host State may not interfere.

According to Article 11, the home State authorities may carry out on-site inspections of a branch in order to ensure the financial supervision. The authorities of the State of the branch may participate in that verification.

In addition to financial supervision, the home Member State is also responsible for other prudential supervision matters (e.g. monitoring qualifying holdings and checking that managers are fit and proper, etc.).

However, in addition, the home Member State also has a more general responsibility for supervising the activities of the insurers it authorises. To this end, the home Member State must provide its competent authorities with the powers and means necessary for the supervision of the business carried on by its insurers within the Community. According to Article 13(3)(b), the home State authorities must be able to "take any measures....that are appropriate and necessary to ensure that the undertaking's business continues to comply with the laws, regulations and administrative provisions with which the undertaking must comply in each Member State".

Host State responsibilities

Given the limited harmonisation in certain areas (such as contract law), the EU co-legislators (Council and Parliament) decided that the host State should retain some supervisory powers in the context of insurance-specific legislation.⁴ Accordingly, certain host State rules must be complied with and the host Member State does have a say in how business is conducted on its territory. But what exactly are these laws and regulations with which the insurer must comply in the Member States where it has a branch or into which it provides cross-frontier services? And how is it informed of them?

When a Community insurer establishes a branch in, or provides services into, another Member State, that host Member State may require that its conduct of business rules that are justified by the general good should be respected. These rules must be notified to the competent authorities of the insurer's home State (see Article 40(4)), so that the home authority can inform the insurer accordingly. In addition the host Member State may ask for ex post and non-systematic notification of the policy conditions used by an insurer in its territory "for the purpose of verifying compliance with national provisions concerning assurance contracts" (Article 45).

According to Recital 46 of the Directive it is for the Member State of the commitment, i.e. the country where the policyholder has his/her habitual residence, to "ensure that there is nothing to prevent the marketing within its territory of the insurance products offered for sale in the Community as long as they do not conflict with the legal provisions protecting the general good in force in the Member State in which the risk is situated, and in so far as the general good is not safeguarded by the rules of the home Member State, provided that such provisions must be applied without discrimination to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued".

The concept of the general good in Community law is a complex one, but case law of the European Court of Justice provides important guidance (and is the basis of the wording of Recital 46 quoted above). To help further with interpretation, the Commission issued in 2000 an Interpretative Communication on freedom to provide services and the general good in the insurance sector. This Communication can be consulted on the website referred to in footnote 2.

The right of Member States to apply their rules justified by the general good also in relation to undertakings operating in their territory through a branch or under the free provision of services is referred to in several places in the Directive. An example is advertising, where it is stipulated (Article 47) that insurers can advertise their products in the host country, "subject to any rules governing the form and content of such advertising adopted in the interest of the general good".

The general good rule applies to matters that are not exhaustively dealt with in the Directive. Many basic questions are specifically treated in the Directive to ensure the protection of all policyholders, whether in the home country or in other Member States where the insurer has a branch or provides cross-frontier services.

⁴ It should be kept in mind that insurers doing business in another Member State must operate in that country within its general applicable legal framework (taxation, criminal law, etc.).

Need for cooperation

The host Member State can thus require that certain of its rules be respected and the host Member State is necessarily best placed to know and interpret its own general good rules. However, the ultimate responsibility for making sure that the insurer respects those rules lies (in accordance with Article 13(3)(b) and Article 46(3)) with the home State authority that issues the insurer's authorisation. This home/host split of responsibilities and expertise requires a good exchange of information and effective co-operation between the relevant supervisors.

The Directive itself requires such co-operation between the Member State' supervisory authorities (see Recital 48 and Article 62) and these authorities have a long tradition of working together⁵. In 1997 they adopted a detailed Protocol⁶ (the Siena Protocol) relating to the collaboration of the supervisory authorities for the application of the Directives on life assurance and non-life insurance.

Law applicable to life assurance contracts:

Article 32 lays down the basic rule that the law applicable to life assurance contracts must be that of the country of the commitment, i.e. the country where the policyholder has his/her habitual residence. The law of another country may be chosen by the parties only if this is permitted by the law of the country of the commitment. The general aim is to ensure that the policyholder's contract is governed by a contract law with which he is familiar.

Policyholder information

The Directive also lays down minimum information that must be provided to the policyholder before the contract is concluded and throughout the term of the contract (see Article 36 and Annex III(A) and III(B)). This information must be provided in a clear and accurate manner, in writing and in an official language of the Member State where the policyholder has his/her habitual residence. The use of another language is allowed only if the policyholder so requests and the local law permits such use. Article 36(3) allows the Member State of the commitment to require the provision of additional information if this is necessary for a proper understanding of the essential elements of the contract. Apart from information on the insurer and the insurance contract, Annex III (A) also requires that information be provided to the policyholder concerning "the arrangements for handling complaints". Article 36(4) states clearly that it is the responsibility of the Member State of the commitment (the State where the policyholder is resident) to lay down the detailed rules for the implementation of this article on information for policyholders.

⁵ The Conference of Supervisory Authorities of the Member States of the European Union has now been replaced by the Committee of European Insurance and Occupational Pensions Supervisors (CEIOPS).

⁶ See <http://www.ceiops.org>

Insurance undertakings not complying with legal provisions

The Directive lays down the procedure to be followed when things go wrong. According to Article 46, where a host Member State establishes that an assurance undertaking with a branch or carrying on business under the freedom to provide services in its territory is not complying with the legal provisions applicable to it in that State, it should in the first instance call on the undertaking to correct its behaviour. If that fails the host authority must contact the home authority to seek a solution. However, in emergency situations, the host State may without prior consultation of the home State authorities, take all necessary measures to prevent or penalise infringements, including prohibiting the undertaking in question from concluding new contracts within its territory. Moreover, the co-operation procedure foreseen in Article 46 does not affect the powers of the host State to take measures against, for example, criminal offences committed within its territory. Again the proper working of the system requires smooth co-operation between the home and host authorities.

What happens when policyholders are dissatisfied and feel that they have a legitimate subject of complaint? Given the important role given to the Member State of the commitment in the management of policyholder information, including information on the arrangements for handling complaints, and given the right accorded to the host State to require the application of its conduct of business rules justified by the general good, the Commission considers that the Member State of the commitment is obliged to assume a certain responsibility for the reception and processing of complaints and the guidance of complainants. If the complaint relates to a matter (financial supervision) which is clearly the responsibility of the home State authority, it can easily be passed on to that authority.

In any case, it must be emphasised once again that the proper functioning of the insurance single market introduced by the Directive requires good co-operation and the establishment of a good working relationship between the home and host authorities.

Summary

To summarise, the home Member State is responsible for financial supervision. But it also bears a more general responsibility for the conduct of the insurers it authorises and is ultimately responsible for ensuring compliance by the insurer with the provisions relating to the general good existing in the various host Member States in which it carries on its business. The Member State where a branch is established or into which cross-frontier services are provided also has a role to play, particularly as regards checking compliance with local provisions applicable to insurance contracts which aim to protect the general good. It is not deprived of all means of monitoring the insurance business carried out by insurers from other Member States and can require the application of its own conduct of business rules justified by the general good.

The Directive can only work smoothly if there is good co-operation between home and host State authorities. It is not a satisfactory situation where aggrieved policyholders are referred by the host State authority to the home State authority and are then sent back by the home to the host authority, and thus find themselves unable to have their case examined by either. Despite the good level of co-operation that exists between the competent authorities of the Member States, as demonstrated in the Siena Protocol and the work of CEIOPS, problems can arise and it is important to make sure that Member States interpret the Directive in the same way. The Commission plans to seek further discussions with the Member States on this matter in the appropriate fora.