



MARKT/2061/01-ES  
Orig. EN

**SISTEMAS DE GARANTÍA PARA LOS TOMADORES DE SEGUROS  
EN CASO DE LIQUIDACIÓN DE UNA EMPRESA DE SEGUROS**

### ***Preguntas a los miembros del Comité de Seguros***

***Se ruega a los miembros que expresen sus opiniones sobre las siguientes cuestiones:***

- 1. ¿Consideran los miembros que la actual falta de armonización para los sistemas de garantía de seguros representa un problema?***
- 2. ¿Cuál de las cuatro opciones que figuran en el documento irlandés sería la más apropiada para la Comunidad?***
- 3. ¿Debería la Comisión crear un grupo de trabajo para empezar a actuar sobre este asunto?***

1. La delegación irlandesa ha elaborado el documento adjunto que describe los problemas creados por la falta de armonización y coordinación comunitarias en los sistemas de garantía que protegen a los tomadores de seguros cuando se liquida una empresa de seguros. El documento también presenta las posibles opciones que pueden aplicarse a nivel comunitario, describiendo sus ventajas y desventajas correspondientes.
2. Los servicios de la Comisión comparten totalmente la preocupación expresada por la delegación irlandesa. Por supuesto, como consecuencia de la actual falta de armonización en la legislación comunitaria en lo relativo a los sistemas de garantía de seguros, la protección con que puede contar un tomador de seguro puede variar mucho dependiendo de dónde se liquida la empresa de seguros. Estas diferencias pueden llevar a confusión en la mente del consumidor, que a menudo ignora su situación particular.
3. Para intentar describir las diversas situaciones de los tomadores de seguros en lo relativo a la cobertura con que cuentan con arreglo a los sistemas de garantía de seguros, se presenta un ejemplo más adelante. Para simplificar, el ejemplo se limita a tres tipos distintos de situaciones posibles:
  - Estado miembro donde no existe ningún sistema de garantía. (Estado miembro del primer tipo).
  - Estado miembro en el que el sistema de garantía incluye a todas las empresas autorizadas en ese Estado, así como a sus sucursales establecidas en otros Estados miembros y a las operaciones realizadas en régimen de libre prestación de servicios. (Estado miembro del segundo tipo).
  - Estado miembro en el que el sistema de garantía incluye a todas las empresas de seguros (pero no a sus sucursales establecidas en otros Estados miembros) así como a las sucursales establecidas en su territorio. (Estado miembro del tercer tipo).

#### Un tomador de seguro residente en un Estado miembro del primer tipo,

- no estaría cubierto si comprara un producto de seguros a un asegurador de un Estado miembro del primer tipo (a través de una sucursal o de forma transfronteriza) o a una sucursal de un Estado miembro del tercer tipo establecida en su Estado miembro de residencia,
- pero estaría cubierto si comprara un producto de seguros a un asegurador de un Estado miembro del segundo tipo (a través de una sucursal o de forma transfronteriza) o a un asegurador de un Estado miembro del tercer tipo (de forma transfronteriza).

#### Un tomador de seguro residente en un Estado miembro del segundo tipo,

- no estaría cubierto si comprara un producto de seguros a un asegurador de un Estado miembro del primer tipo (a través de una sucursal o de forma transfronteriza) o a una sucursal de un Estado miembro del tercer tipo establecida en su Estado miembro de residencia,
- pero estaría cubierto si comprara un producto de seguros a un asegurador de un Estado miembro del segundo tipo (a través de una sucursal o de forma transfronteriza) o a un asegurador de un Estado miembro del tercer tipo (de forma transfronteriza).

#### Un tomador de seguro residente en un Estado miembro del tercer tipo

- no estaría cubierto si comprara un producto de seguros a un asegurador de un Estado miembro del primer tipo (de forma transfronteriza),
- pero estaría cubierto si comprara un producto de seguros a una sucursal de un Estado miembro del primer tipo establecida en su Estado miembro de residencia o a un asegurador de un Estado miembro del segundo tipo (a través de una sucursal<sup>1</sup> o de forma transfronteriza).

4. Por otra parte, dependiendo de la legislación nacional de cada Estado miembro, la cobertura del sistema puede depender de si la reclamación de pago del seguro procede de una operación de vida o no de vida o de si el tomador del seguro es un profesional. Algunos sistemas no de vida cubren solamente las reclamaciones de pago pendientes, otros también incluyen las pérdidas de primas. Obviamente, el nivel de garantía varía muchísimo dependiendo del Estado miembro específico en cuestión. La forma de financiación también varía.
5. Hay que señalar que esta falta de armonización a nivel comunitario en lo relativo a los fondos de garantía no existe en otras áreas de los servicios financieros. En los sectores bancario y de valores se adoptaron Directivas específicas en 1994<sup>2</sup> y 1997<sup>3</sup>, respectivamente.

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<sup>1</sup> Si la sucursal entra en el ámbito del sistema de garantía del Estado miembro del tercer tipo, el tomador de seguro estaría doblemente cubierto.

<sup>2</sup> Directiva 94/19/CE relativa a los sistemas de garantía de depósitos (DO L135, 31.5.1994).

<sup>3</sup> Directiva 97/9/CE relativa a los sistemas de indemnización de los inversores (DO L84, 26.3.1997).

6. La adopción de una Directiva sobre la reorganización y liquidación de empresas de seguros ha reforzado, evidentemente, la protección de los acreedores de seguros en el caso de liquidación mediante un sistema alternativo de privilegios generales o especiales. Esta directiva mejora la situación de los acreedores de seguros cuando, tras la liquidación de la empresa de seguros, no hay fondos suficientes para pagar los siniestros. Sin embargo, cuando la empresa de seguros no tiene suficientes provisiones técnicas o cuando las demandas superprivilegiadas (impuestos, seguridad social, sueldos, derechos reales) representan un porcentaje importante de los procedimientos de liquidación disponibles, el dinero restante puede resultar insuficiente para pagar a todos los acreedores. En este caso, sólo un sistema de garantías puede cubrir las pérdidas de todos los tomadores de seguros.
7. En el documento irlandés adjunto a esta nota figuran varias opciones relativas a una posible acción comunitaria sobre los fondos de garantía de seguros. Estas opciones están ordenadas por grado ascendente de armonización. También se indican sus ventajas e inconvenientes. Estas opciones son:
- Opción 1: no hacer nada
  - Opción 2: establecer unos principios generales (lo que incluye dos alternativas: el modelo 1 "Principios comunitarios" y el modelo 2 "Principios nacionales")
  - Opción 3: prescribir unas condiciones mínimas de garantía a los tomadores de seguros
  - Opción 4: Sistema armonizado de protección de los tomadores de seguros de la UE
8. ***Preguntas a los miembros del Comité de Seguros***

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**NOTE PREPARED BY THE IRISH DELEGATION**

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# SOME THOUGHTS ON AN EU FRAMEWORK FOR POLICYHOLDER PROTECTION WHEN A CROSS-BORDER INSURER FAILS

## *Background*

The framework provided by the EU insurance directives permits an insurance company, once authorised in a Member State, to write business throughout the European Economic Area. The common prudential standards set out in the Directives are designed to ensure, in so far as possible, that companies are always in a position to meet claims. Various measures – including notification of other Supervisors – are prescribed when a company experiences financial difficulties.

If an insurance company is wound up, the 3<sup>rd</sup> Insurance Framework Directives prescribe that:

*commitments arising out of contracts underwritten through a branch or under the freedom to provide services shall be met in the same way as those arising out of that undertaking's other insurance contracts, without distinction as to nationality as far as the persons insured and the beneficiaries are concerned.*

The Insurance Winding Up Directive<sup>1</sup>, which is due to be transposed into Member States legislation by 20 April 2003, provides that, in the event of the winding-up of an insurance undertaking, policyholders must be assigned a degree of priority as creditors.

The Directives do not lay down a common framework for dealing with policyholder claims in the event of failure of an insurance undertaking. The situation of a policyholder in a host Member State in such circumstances is determined by:

1. The extent of the assets available for distribution to creditors
2. The degree of priority which the law of the home Member State assigns to policyholders as creditors
3. The existence of permanent or ad-hoc arrangements for compensation of policyholders<sup>2</sup> and the extent to which these extend to all EEA policyholders

The recent failure of an EU insurance undertaking<sup>3</sup> with significant cross-border business has highlighted the difficulties that can arise in relation to policyholders outside the home Member State.

The lack of a common framework for dealing with policyholder claims could lead to measures being taken by individual Member States to protect their policyholders which could damage the single European market in insurance.

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<sup>1</sup> Directive 2001/17/EC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.

<sup>2</sup> Member States are authorised under the 3<sup>rd</sup> Non-Life Framework Directive (Article 45(2)) to require undertakings carrying on business in their territories to join/participate in any scheme designed to guarantee the payment of insurance claims to insured persons and injured third parties.

<sup>3</sup> Independent Insurance Company Limited (IICL).

This issue was last examined by the Insurance Committee at its meeting on 22 November 2000, based on a Commission paper (MARKT/2107/00). The paper – which in turn was based on responses from Member States to a questionnaire – indicated that most Member States did not have a policyholder guarantee scheme and that there were wide disparities between the schemes operated by the remaining 6 Member States<sup>4</sup> [an extract from the Commission paper is annexed to this document].

## ***The Options***

There are 4 broad options:

1. Do Nothing
2. Lay down general principles only
3. Prescribe minimum policyholder guarantees to apply when an undertaking fails (minimum harmonisation)
4. Harmonise the policyholder guarantees that Member States must provide (full harmonisation)

### **1. Do Nothing**

This would involve leaving matters as they are, with no EU-level action.

FOR

1. Important that policyholders recognise that the EU insurance regulatory system does not guarantee that there will be no failures
2. Any guarantee system could encourage irresponsible behaviour on the part of insurance undertakings and those seeking insurance
3. The small number of instances of failure of undertakings with significant cross-border operations does not justify the effort involved in reaching EU-level agreement
4. Undertakings based in Member States with superior systems of policyholder protection can use this fact as a selling point, thus encouraging pressure on other Member States to improve their systems

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<sup>4</sup> Though not covered in the questionnaire or Commission paper, the degree of effective policyholder protection is fundamentally linked to the issue of whether a Member State, in practice, is willing to allow an insurance undertaking to fail. A number of Member States have an explicit or implicit ‘no failures’ policy, with national legislation providing mechanisms for official intervention to ensure that an undertaking in difficulty can meet any claims against it from policyholders.

## AGAINST

1. Policyholders – especially personal policyholders – assume that State supervision of insurance undertakings is effectively a guarantee that their claims will be met
2. Doing nothing involves tolerating situations of discrimination between policyholders which are incompatible with the spirit, and possibly the letter, of EU law
3. Doing nothing may encourage Member States to introduce additional ‘common good’ measures which would make it more difficult for insurers from other Member States to operate on their markets
4. Leaving policyholder protection up to each Member States is contrary to the trend towards home-country consumer protection (notably in the E-Commerce Directive)

## 2. Lay down General Principles

### *MODEL 1: ‘Communautaire’ Principles*

This would involve agreement at EU level on general principles such as:

- Member States must ensure that the same level of compensation is available to all EEA policyholders of a failed insurer under their supervision
- (possibly) Member States must ensure that the principle of preferential treatment for policyholders contained in the Winding Up Directive is made effective in all circumstances of failure of an insurer<sup>5</sup>
- (possibly) Each insurance policy must include a statement of the provisions that apply if an insurance undertaking fails<sup>6</sup>

## FOR

1. Would eliminate the most objectionable practices from the perspective of the single market
2. Minimum legislative change involved (a Declaration or Protocol might suffice)
3. Would not increase the danger of irresponsible behaviour on the part of insurers or those seeking insurance

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<sup>5</sup> The present legal arrangements in at least one Member State are such that the obligatory preferential treatment for policyholders provided for in the Winding-Up Directive will probably never apply in practice. This is because the arrangements in that Member State for dealing with the policyholders and other creditors of a failed insurer do not formally constitute a ‘winding-up’, even though the claims from policyholders will not be met in full.

<sup>6</sup> In the interests of consumer transparency, it might be desirable to lay down this as a requirement in relation to any option adopted at EU level

## AGAINST

1. Would not encourage policyholders (or intermediaries) to confidently seek cover outside of their home Member State
2. Policyholders would need to consider the individual provisions in each Member State that would apply when an insurer failed
3. Would probably be criticised as an inadequate response by bodies representing consumers
4. Where guarantee funds were financed by levies on policies, would involve an unfair price advantage for undertakings based in Member States without such funds

## *MODEL 2: 'National' principles*

This would involve agreement at EU level on general principles such as:

- It is the responsibility of each Member State to make any arrangements it considers appropriate for the protection of its citizens/permanent residents in the event of failure of an insurance undertaking
- (possibly) The same level of protection must be provided irrespective of the 'home' Member State of the undertaking
- (possibly) Member States must ensure that the principle of preferential treatment for policyholders contained in the Winding Up Directive is made effective in all circumstances of failure of an insurer
- (possibly) Each insurance policy must include a statement of the provisions that apply if an insurance undertaking fails

## FOR

1. Would allow each Member State to decide on the form of policyholder protection most appropriate to its national circumstances
2. Would be easy for policyholders to understand
3. Follows the principle of subsidiarity
4. Minimum legislative change involved (a Declaration or Protocol might suffice)
5. Can be applied equally (including funding mechanism) to all undertakings operating on the national market (thus providing certainty to the policyholder that the same compensation applies irrespective of the 'home' Member State)

## AGAINST

1. Would tend to contribute to the fragmentation of the single insurance market
2. Would impose a heavy compliance burden on companies operating cross-border

3. Where there was significant penetration of cross-border insurers in a Member State, could impose a considerable policyholder protection burden on that State
4. As the policyholder protection scheme would probably be based mainly on the circumstances of domestic undertakings, this could act as a de facto discouragement to others to enter the market
5. Could encourage supervisory authorities to adopt a less rigorous approach to undertakings under their supervision operating primarily on a cross-border basis

### **3. Prescribe Minimum Policyholder Guarantees**

This would involve agreement at EU level on minimum levels of payment of claims that Member States would be obliged to guarantee in the event of the failure of an undertaking under their supervision. The agreement would need to cover:

- The classes of claims that would be covered<sup>7</sup>
- The percentage of individual claims<sup>8</sup> that would be covered
- The time-scale within which guaranteed claims would have to be paid
- (possibly) Funding mechanism/s

FOR

1. Would provide an agreed minimum of policyholder protection throughout the EU
2. Would encourage policyholders to consider taking out cover with undertakings based in other Member States
3. Would contribute to the better achievement of the single European market in insurance
4. Would encourage a prudent approach to supervision by Member State authorities
5. Need not exclude more extensive policyholder protection measures in individual Member States<sup>9</sup>
6. Should be easier to reach agreement on than a fully harmonised system

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<sup>7</sup> E.g.  
Non-Life: 3<sup>rd</sup> party motor insurance, which is compulsory throughout the EU; possibly policies that are compulsory under national law; possibly personal policyholders; possibly claims by individuals against a corporate policyholder.  
Life: matured claims on individual protection policies

<sup>8</sup> The focus on this note is on claimants. It would also be possible to include refund of premium under such a scheme (including premiums paid on foot of investment-type life assurance policies).

<sup>9</sup> Including a continuation of existing practices in certain Member States that effectively guarantee that insurance undertakings are not allowed to fail.

## AGAINST

1. Difficult to reach agreement on
2. Could encourage irresponsible behaviour on the part of insurers and those seeking insurance
3. Would impose an additional burden on insurance undertakings (and policyholders if funded through a premium tax)
4. Lack of full harmonisation would mean that the policyholder desiring certainty would need to check the situation applying in the home Member State of the undertaking

## **4. Harmonised EU Policyholder Protection Scheme**

This would involve a fully harmonised system of policyholder protection. The elements of the system would cover the same areas outlined above (including funding).

## FOR

1. Would provide a standardised guarantee and full certainty to policyholders throughout the EU wherever they and their insurer were located
2. Would encourage policyholders to consider taking out cover with undertakings based in other Member States
3. Would contribute significantly to the better achievement of the single European market in insurance
4. Would be in line with the trend towards home-country consumer rules (e.g. in the context of the E-Commerce Directive)

## AGAINST

1. Very difficult to reach agreement on
2. Could encourage irresponsible behaviour on the part of insurers and those seeking insurance
3. Would impose an additional burden on insurance undertakings (and policyholders if funded through a premium tax)
4. Arguably contrary to the Subsidiarity principle

## *Choosing between Options*

The approach of Member States to the options outlined above will probably be influenced by factors such as:

- History of insurance failures in the domestic market
- Existence and nature of a national guarantee scheme<sup>10</sup>
- Extent of the involvement of EEA insurers operating on a branch or services basis in the domestic market
- Degree to which individuals are dependent on private insurance (as opposed to State provision) for key services (e.g. health, disability support, pensions)

As there have been very few examples of failure of EEA insurers operating on a cross-border basis, most Member States will not have been obliged to deal with the practical issues that arise when such an insurer is wound up. This may result in limited enthusiasm for significant change – especially among the majority of Member States who do not at present have a national policyholder protection scheme.

On the other hand, failure to act seems certain to diminish consumer enthusiasm for the single market in insurance. It is also likely to force Member States who have been affected by failure of a cross-border insurer to take action which could restrict the activities in their market of non-domestic insurers. This suggests that ‘**Do Nothing**’ (**Option 1**) should not be considered a valid option.

**Laying down General Principles (Option 2)** would offer the clear advantage of agreement at EU level on where responsibility lies for policyholder protection in the event of failure of a cross-border insurer: with the ‘home’ or ‘host’ Member State. A consensus in favour of ‘home’ rather than ‘host’ country responsibility would be more compatible with the principles underlying the single insurance market. A consensus in favour of ‘host’ country responsibility would probably be more readily acceptable to policyholders, who tend to look to national authorities in exceptional situations such as failure of an insurer.

**Prescribing Minimum EU Policyholder Guarantees (Option 3)** would be a clear advance in terms of an integrated, consumer-friendly European insurance market. By confining EU legislative action to minimum guarantees and otherwise leaving details to Member States, it should be easier (but still challenging) to reach agreement.

A fully **Harmonised Policyholder Protection Scheme (Option 4)** would be the ideal in terms of the single insurance market; but full harmonisation would carry a price in terms of difficulty in reaching agreement.

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<sup>10</sup>

Including the guarantee implicit in an effective ‘no failures’ policy.

## ***One Way Forward***

The following is a development of the option of prescribing minimum EU policyholder guarantees (Option 3).

### **Basic Ideas**

1. The home (supervising) Member State of a failed insurer would be responsible for arranging the minimum level of policyholder protection agreed on at EU level
2. The minimum guaranteed levels would be the same throughout the EEA
3. Member States could, if they wished, exceed the minimum levels; if they chose to do so, the extra benefits would be available to all EEA policyholders of the failed undertaking
4. The manner of delivering the minimum agreed level of policyholder protection would be left to the discretion of Member States<sup>11</sup>, including the funding mechanism

### **Guaranteed Levels**

#### *Non-Life*

1. 100% payment of claims arising from insurance that is compulsory under EU law (at present, 3<sup>rd</sup> party motor vehicle insurance)
2. 100% payment of claims arising from insurance that is compulsory under the laws of the host Member State
3. A percentage (to be decided) refund of un-expired premium in respect of the preceding two categories
4. A percentage (to be decided) of claims from personal<sup>12</sup> policyholders insured in non-commercial classes<sup>13</sup>
5. A percentage (to be decided) of personal claims against commercial policyholders<sup>14</sup>

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<sup>11</sup> This would include the manner in which the policyholder protection scheme would interact with the policyholders' entitlements as creditors in the winding-up process. It would allow Member States to deliver guaranteed payments through the body charged with winding up the undertaking or through a separate body. It would also allow Member States with an effective 'no failures' policy to continue with this policy.

<sup>12</sup> The scope of 'personal policyholder' would need to be defined, particularly in the 'grey area' of sole traders and partnerships.

<sup>13</sup> This would exclude e.g. marine, aviation, railway, goods in transit, suretyship.

<sup>14</sup> This would cover e.g. claims from employees injured at work. It could be restricted to cases where the commercial policyholder was unable to pay the claim e.g. due to insolvency.

### *Life*

1. 100% payment of claims arising from insurance that is compulsory under the laws of a Member State
2. A percentage (to be decided) refund of un-expired premium in respect of the preceding category
3. A percentage (to be decided) of claims from personal policyholders with protection-type policies
4. A percentage (to be decided) of premiums<sup>15</sup> paid in respect of investment/savings-type products

### *Time Limits*

The Member State would be obliged to ensure that guaranteed payments were made within a specified time-limit – for example, 12 months from the date on which the company ceased to be able to meet its obligations to policyholders.

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<sup>15</sup> Possibly subject to a maximum amount.

**EXTRACT FROM COMMISSION DOCUMENT MARKT/2107/00 “INSURANCE COMPANIES IN DIFFICULTY AND INTERVENTION BY THE SUPERVISORY AUTHORITIES – REPLY TO QUESTIONNAIRE”**

**Question 5a – Existence of a guarantee scheme**

Of the sixteen countries considered, ten did not have a dedicated guarantee scheme to compensate policyholders in the event of their insurer's insolvency (A, B, D, DK, I, IS, L, NL, P and S). However, B, D, I and L indicated that the motor vehicle guarantee scheme, which compensated victims of accidents caused by an unidentified or uninsured vehicle, also intervened in the event of insolvency.

In the same connection, FIN has set up a guarantee scheme for mandatory life and non-life insurance.

The same applies to France, which in addition recently established a guarantee scheme covering individuals (i.e. life insurance and personal injury).

IRL and NO have a guarantee scheme which covers non-life insurance only.

Only E and UK have a guarantee scheme (or, in the case of Spain, equivalent arrangements) which covers both life and non-life insurance.

The following analysis is restricted to those countries which have set up specific guarantee schemes in addition to the motor vehicle guarantee scheme (E, F, IRL, NO, FIN and UK):

- Most of the guarantee schemes reviewed cover individuals only, to the exclusion of firms (and as such do not cover reinsurance and large exposures);
- Only the bodies set up in E and F cover all policyholders, irrespective of their place of residence or risk location; in particular, the guarantee schemes of the other countries do not cover policies sold abroad under the law of the host country;
- The financing mechanism for guarantee schemes consists of a posteriori financing as required in the form of a levy on annual premiums restricted to 1% or 2% (IRL, NO and UK) or of a priori financing in the form of a regular annual contribution (E and F). The guarantee scheme in IS is a special case: companies set up a dedicated reserve to finance the guarantee scheme if necessary, with payments being made only a posteriori as required. It would have also been useful to know whether the levies or contributions are mandatory for foreign insurers operating locally by way of freedom of establishment or freedom to provide services.

**Question 5b – Intervention of the guarantee scheme (where appropriate)**

The replies indicate that, where guarantee schemes exist, they have had to intervene at least once in the recent past (except in France, where the life insurance guarantee scheme was set up only very recently).