Insurance sector: freedom to provide services and general good

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OBJECTIVE: submission of a draft interpretative communication from the Commission on freedom to provide services and the general good in the insurance sector. SUBSTANCE: the draft communication constitutes a consultation document which, in the light of the comments received, will be converted into a Commission interpretative communication, reflecting its position on the subject. It may be recalled that the Third Council Directives on insurance (92/49/EEC and 92/96/EEC) completed the establishment of the single market in the insurance sector: -introduction of a single system for the authorisation and financial supervision of the insurance undertaking by the Member State in which it has its head office (the home Member State); -authorisation issued by the home Member State enables the insurance undertaking to carry on its insurance business anywhere in the Community, either under the rules on establishment (i.e. by opening agencies or branches in all the Member States) or under the rules on freedom to provide services. Where it carries on business in another Member State, the insurance undertaking must comply with the conditions in which, for reasons of the general good, such business must be conducted in the host Member State. The Commission considers that there is continuing uncertainty surrounding the interpretation of the basic concepts of freedom to provide services and the general good, which could undermine the workings of the machinery set up by the Third Directives on the coordination of insurance and deter certain insurance undertakings from exercising the freedoms created by the single market. The Commission therefore puts forward, in this document, a legal analysis of the concept of 'the general good' specifically applicable to the insurance sector in order to clarify the situation. The Commission considers, in particular, that since the entry into force of the Third Directives on insurance, the conformity with Community law of a national measure restricting any of the activities referred to in the annex to the First Directives has had to be evaluated in the light of the requirements of the concept of the general good, whether the activities are performed by a branch or under the freedom to provide services. As regards the conditions in which the general-good rules of the host country may be imposed, the Commission makes the following distinction in its analysis: 1) discriminatory restrictions: such restrictions may only be justified on the grounds referred to in Article 56 of the EC Treaty, namely public policy, public security or public health (economic reasons are not among those permitted). In these cases, there is no need to invoke the general good; 2) non-discriminatory restrictions: in order to be legitimately enforceable against a Community insurance undertaking, any non-discriminatory national measure restricting an insurance activity covered by mutual recognition provisions must fulfil the following conditions: -it must be justified by the general good, -it must be necessary and proportionate, -it must not duplicate rules already applicable to the undertaking in the home Member State. At all events, if a dispute arises, it is up to the Member State which is imposing the restriction to prove that the measure meets these conditions. Under the case law of the Court of Justice, the fields covered by the general good notably include professional rules intended to protect the recipient of the services, the protection of workers and consumers, the prevention of fraud, social order, the cohesion of the tax system, road safety, the proper administration of justice, the protection of creditors, etc. Even where a national restrictive measure is recognised as being for the general good, the host Member State must respect certain principles such as non-discrimination, non-duplication, necessity and proportionality. According to European case law, the concept of the general good constitutes an exception to the rules of freedom of movement, and it must therefore be interpreted restrictively. The draft communication also analyses several examples of national rules compliance with which could be required by the host State on the grounds of their compatibility with the general good: prior notification of policy conditions, the language of the insurance policy, uniform compulsory no-claims bonus systems, professional codes of conduct, clauses imposing mandatory levels of excess in insurance policies, etc.