

MODEL SUPERVISION OF INSURANCE

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THE underlying principle of German insurance supervision is "substantive state supervision". This means that the supervisory authority does not only grant the licence, but also that all operations of an insurance company are controlled from legal, economic, and financial aspects from the beginning of a company's activities up to the end of its liquidation. This is in contrast to the British supervisory system, for instance, which is largely limited to a mere solvency control. In Germany, it is the duty of the supervisory authority, in addition to solvency control, to safeguard the interests of the insured and to prevent their being unduly placed at a disadvantage as a result of unfair contract conditions, for instance. When the Insurance Supervision Law was introduced, this system was designed according to the supervisory laws already existing in the German language both in Austria and Switzerland, American law having served as a model for the Austrian legislation.

While the French supervisory system is not limited to solvency control, intensity of supervision lags behind that practiced in Germany. In France, for instance, there is no prior authorization of insurance contract conditions. There is a parallel with Germany in that, for instance, French companies are also regularly inspected by officials of the supervisory authority.

This is not customary in Britain. The German supervisory system influenced the Japanese insurance supervisory law which has essentially remained unchanged for about fifty years now. By the way, Germany assisted Turkey and the ASEAN states and recently Hungary to develop an insurance supervisory system.

Insurance supervision in Germany as it is practised today is basically laid down in the Insurance Supervision Law of 1901. In July of that year the insurance supervisory authority assumed its functions in accordance with this law. When at the end of World War II it had to discontinue its activities, regional authorities first performed supervision. Then in July 1951

the federal office for the supervision of insurance and home savings banks came into being; its name was changed in 1973 into Federal Insurance Supervisory Office (*Bundesaufsichtsamt für das Versicherungswesen*). It has always been located in Berlin.

The basic principles of the Insurance Supervision Law of 1901 still apply today despite the numerous amendments made to it in the past. The present version bears the date of 13 October 1983 and was last amended on 19 December 1986.

The underlying principle of the Insurance Supervision Law is "substantive state supervision", namely the system of supervision and licencing for which the existing regulations in the United States, Austria, and Switzerland served as models. Within the framework of substantive state supervision all operations of an insurance company are controlled from legal, economic and financial aspects. It extends to all business practices of the company. It is the duty of the insurance supervisory authority to safeguard the interests of the insured and to see to it that performance of the obligations assumed by the insurance company is permanently ensured. To meet this requirement the supervisory authority was provided by law with certain functions when a company intends to take up business, certain competences for the permanent supervision of business operations of the company and special powers of interference.

The supervisory authority fulfills the tasks assigned to it only in the public interest. Subject to the Insurance Supervision Law are both national and foreign insurance companies which write private insurances. Whether or not a company is supervised is decided by the competent supervisory authority alone and this decision is also binding upon other authorities. Supervision of foreign companies depends whether the company is headquartered in another EC member-state or in a country outside the EC. Moreover, a distinction is made between insurers from EC member states established in Germany and those doing busi-

ness under the freedom of services provision without being established. German joint-stock companies which are exclusively engaged in reinsurance business are subject to limited supervision.

Not subject to supervision are the social security authorities, relief plans without legal entitlement to benefits, certain alliances of chambers of industry and commerce with associations of the industry whose purpose is the spreading of pension obligations, alliances or associations of municipalities formed for the purpose of compensating damages.

Likewise, not supervised are:- insurance companies headquartered in another EC member-state which participate as co-insurers in the insurance of certain risks characterized by their nature and size and located in Germany; transport insurers headquartered in another member state insofar as they carry on the direct business in Germany by virtue of the freedom to provide services within the meaning of the treaty; and foreign insurance companies exclusively carrying on reinsurance business.

The federal office supervises both the private insurance companies undertaking insurance business in Germany and the public insurance companies operating on a competitive basis in more than one province (*Land*). Other public insurers are supervised by the authorities of the provinces (*Länder*) but in certain cases supervision can be transferred to Berlin. On the other hand, the office can pass on supervision of private insurance companies of minor economic importance or of public competitive insurance companies to the competent authorities of the *Länder*.

The Federal Insurance Supervisory Office is an independent and superior authority, yet subordinate to the German ministry of finance in Bonn. It is headed by a president with a vice-president as deputy, responsible for a staff of about 300 at present. Nine-tenths of the office's supervisory expenses are spread among the companies within its jurisdiction; the balance comes from Germany's national budget.

Located at *Ludwigkirchplatz 3*, the office is divided into six parts according to branches. Thus, Division I deals with life assurance, while Division VI includes reinsurance. There is also the central Division Z whose administrative functions include the annual report and monthly publications. These contain in particular its general orders and guidelines as well as important decisions by the courts on insurance matters.

The office is also endowed with an advisory council (*Versicherungsbeirat*) of 60 members appointed by the German president. The function of the council as a whole is to help in the preparation of important decisions, while individual members can participate in an important committee (*Beschlusskammer*).

Insurers from all branches as well as policyholders in many business spheres sit on the *Versicherungsbeirat*. So do members of the liberal professions and civil servants, members of trade unions as well as insurance agents, staff members of insurance companies, and representatives of insurance science.

With the exception of the already mentioned companies which are not subject to supervision, all insurance companies wishing to do business in Germany must previously be authorized by Berlin. This applies to both domestic and foreign companies. As regards foreign companies it does not make any difference whether they will do business through an establishment or under the freedom of services provision without being established, provided their head office is located in an EC member state.

Supervised insurance companies are not permitted to do other than insurance or business immediately related to it. Not permitted is the simultaneous operation of:

- life insurance together with any other classes of insurance
- health insurance together with any other classes of insurance
- credit and suretyship insurances together with any other classes of insurance
- legal protection insurance together with any other classes of insurance.

For the last two the requirements have been eased taking into account the diverging rules of the relevant EC directives of 1987.

For a licence to do insurance business it is necessary for the company to submit an application. The company may operate only those classes for which the licence has been granted and in any case it is subject to certain conditions. Legally, the decision on whether or not to grant a licence is an administrative act. It is possible to appeal from a negative decision. The Federal Administrative Court (*Bundesverwaltungsgericht*) in Berlin can be asked to set aside the decision of the Federal Supervisory Office. The period within which an action must be brought is one month and starts with the service of the complete decision.

Licensing for German companies is the responsibility of the authorities supervising the insurance companies. At a regional level it is the authorities of the *Länder*, otherwise the federal supervisory office. If an application for a licence to take up insurance business is to be refused the special panel (*Beschlusskammer*) inside the federal office will take a decision in a formal procedure. After the company has been granted a licence by the supervisory office it must have itself entered in the commercial register. This is kept at the local court (*Amtsgericht*) of the district where the company has its headquarters.

For foreign companies the following special provisions apply: A decision on the application for a licence for an establishment is taken by the Federal Insurance Supervisory Office in the case of a company headquartered in a member state of the European Community. These companies are legally entitled to a licence if the legal requirements are met. Germany's finance minister decides in the case of companies not headquartered within the EC. The minister



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may grant a licence as soon as the supervisory office after consulting the *Versicherungsbeirat* confirmed that there was no legal reason to refuse. Authorizations for companies from other EC countries permitting them to do business under the freedom of services provision are also granted by the federal office.

Companies wishing to establish their head offices in Germany may be granted a licence only if they take the legal forms of companies limited by shares, mutual insurance societies or public corporations or statutory bodies. Companies limited by shares are established in accordance with general legal provisions, in particular the Company Law (*Aktiengesetz*) of 1965 as amended by the law of 1985.

The status of mutual societies is defined in sections 15 to 53 b of the Insurance Supervision Law. A number of provisions of the Company Law also applies to these societies. Certain provisions governing mutual societies do not apply to societies which are intended to do a very limited amount of business, operate within a very limited area or restrict business to a very small number of persons. The supervisory authority will decide on whether or not a mutual society is a "smaller-sized society". Public insurance companies are governed by the legislation of the individual *Länder*.

The operating plan has to be submitted together with the application for a licence. It must set forth the purpose and the organization

of the company, the area where it intends to set up its operations and in particular must state the facts and data intended to show that the future obligations will be met permanently. It is required to submit as part of the operating plan in particular (section 5 of the Insurance Supervision Law):

- The articles of association which have to comply with the general legal provisions of the country where head-office is located
- The general insurance conditions and the technical business documents as far as they are required for the proposed types of insurance
- Agreements between companies of the type described in sections 291 and 292 of the Company Law — dealing with agreements about the control and transfer of profits
- Agreements concerning the transfer of its functions to any other companies (*Funktionsausgliederungsverträge*).

Foreign companies are subject to special legal requirements. Companies headquartered in an EC member-state must dispose of the legal form authorized in their home countries. Companies elsewhere must submit to Berlin a certificate made out by the competent authority of their home countries proving their legal capacity.

A foreign company must prove that it is authorized to write in its home country the classes of insurance which it intends to write in Germany and what types of risks it actually covers. This proof has to be furnished by a certificate issued by the supervisory authority of the home country. The authority to operate certain classes of insurance in Germany must not exceed the authority granted in the home country.

Companies headquartered in another EC member-state may operate in Germany either under the freedom of establishment provision or without being established there under the freedom of services provision. It shall be considered an establishment any permanent presence of a company in Germany which has permanent authority to act for the company as an agency would. All foreign companies established in Germany must appoint as general manager of the establishment a general representative resident in Germany.

The establishment must be entered in the commercial register. The general representative need not be a German national, but he is required to have command of the German language, to be sufficiently acquainted with German legislation and the economic background in the Federal Republic. In addition, he must dispose of the necessary professional knowledge and the qualifications and the experience required to manage the German establishment of the foreign company.

If the company has been approved in Germany it may write insurance business in this country only through its local establishment. The only exception to this rule are foreign transport insurance companies headquartered in the EC whose establishments in Germany exclusively write transport insurances.

However, all the above conditions are without prejudice to recent developments. Last year German insurance supervision was faced with an opening both to the West and to the East. As from 1 July 1990 freedom of services was established by incorporating the second non-life directive (88/357/EEC) into German law.

Insurers from EC countries wishing to write just large risks without being established in Germany only have to inform the supervisory authority and submit a solvency certificate of the authorities of their relevant home countries. Meanwhile, about 80 insurers have made use of this possibility. The insurers may also write mass risks without being established provided they have been granted a licence by the Federal Insurance Supervisory Office to write insurance under the freedom of services provision.

Equally effective on the selfsame date, the Federal Insurance Supervisory Office took charge of insurance supervision in the territory of the then GDR (DDR) within the framework of the treaty governing the economic, monetary

and social union. By 3 October 1990, the day of reunification, the office had granted licences to do business in eastern Germany to about 350 insurers from the West, among which there were also foreign establishments, using a very simplified authorization procedure. This quickly resulted in strong competition in a previously monopolized market.

At the same time, the special situation of the Germans in the east was taken into account by special conditions favourable to consumers. The office, whose traditional seat is in Berlin and which, therefore, is located right in the centre of the five new *Länder*, has become a very important address for the east Germans to present their problems with insurance.

After all, Germany — unlike Britain — does not have an Insurance Ombudsman, but then this is built into the system here. ■

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