Chapter 3: EU- and German Insurance Law

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[1] References to anti-trust law see below to E.

A. Introduction and Legal Basis

Like the European commercial law generally, the European insurance law is also substantially characterized by the rights of freedom of service, freedom of establishment, freedom of capital movement and the ban of restraint to competition in Art. 43, 49, 56, 81 et seq. ECT. These rights of freedom which directly apply and the reformation of the anti-trust law[2] in 2003 which introduced a system of legal exceptions are frequently viewed as a change towards a new legal order of international law.[3] For insurance law, the changes to the European law are also very trend-setting. The changes not only apply to the anti-trust law of insurance[4], but also to the law of deregulation and the other fields of law covered here. The deregulation by the so-called third generation of insurance directives in 1992[5] was primarily focused on freedom of service and freedom of establishment under article 43, 49 ECT. Subsequent developments also relate to these basic rights of freedom, but do not focus on them, since consumer protection and the law of unfair competition have become the primary concern. The law of insurance mediation[6] is primarily based on the Insurance Mediation Directive and therefore on the promotion of the domestic market. The new law of consumer information according to § 7 VVG and the VVG-InfoV[7] is actually not part of the European Insurance Law, because the German legislator voluntarily used the Distance Marketing of Financial Services Directive for orientation.[8] However, here the connection to European Law is different from the other aspects covered within this text.

Despite numerous innovations, the agrarian insurance systems are recognized as privileges under Community Law. The agrarian insurance systems differ from the basic structure of European economic constitutional law and therefore additional explanation will be offered in the final segment of this section.

B. Freedom of Establishment and Freedom of Service

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[2] Regulation 1/2003 from 12/16/2003, Official Journal 2003, L 1/1.

[3] *Jones/Surfin,* EC Competition Law, 2nd ed. (2004), p. 89; *Mestmäcker/Schweitzer,* p. 54 et seqq. § 2 margin 30 et seqq.; *Müller-Graff* , EuR 2002 additional issue 1, p. 7, 16 passim.

[4] Thereto see below and Immenga/Mestmäcker/*Veelken* Kommentar zum Europäischen Kartellrecht, 4th ed. (2007), p. 1113 et seqq.; Hirsch/Montag/Säcker/*Herrmann* volume 1, p. 1050 et seqq.

[5] 3rd Non-Life Insurance Directive 92/49 EEC from 6/18/1992 Official Journal L 228; and 3rd Life Directive 92/96 EEC from 11/10/1992 Official Journal L 360/1.

[6] EU Directive 2002/95 EG Official Journal from 01/15/2003 no. L 9/10; imprinted in *Herrmann/Wambach* Erster Nürnberger Versicherungstag (2003), p. 145 et seqq.

[7] Separate Regulation Concerning Information Duties in Connection with Insurance Agreements.

[8] Draft of the Cabinet 16/3945, p. 59, 61; cf. also *Wandt/Ganster,* VersR 2008, 1034; *Wandt/Ganster,* VersR 2008, p. 425.

I. Internationalism

The basic rights of freedom and cartel bans are only affected if the restrictions have the potential to impair trade between the member states. The European Law does not affect cases with only national impacts. The criterion of internationalism is widely interpreted.[9] As far as horizontal or vertical restraints of trade are concerned, the announcement of 2004 / C 101/07[10] indicate that a reserve of triviality applies only in cases where impacts on the market are expected to exceed approximately 5% to 10%.[11]

The announcement regarding trivialities applies as a rule, but is not a fixed upper or lower limit (no. 3). Smaller percentage values are possible, particularly if the restraint on competition is very severe or if the enterprises involved are very important to the market.[12] This will be true, even though the enterprise market shares are low. The European integration of the insurance industry[13] has already been observed so that the criterion of internationalism is also regularly met, when the agreement applies only to regionally operating co-insurances pools[14]. Therefore, the previously complaint of legal uncertainty, scarcely exists anymore.[15]

II. From the host country to the home country principle

For a long time, the European insurance industry was characterized by contrasting national systems. On the one hand, competition of insurance prevailed in Great Britain, where the supervisory authority which monitored capital equipment of companies was only entitled to supervise abuse.[16] On the other hand, in Germany and France, the authorities that approved the business plan of an insurance company had the power to scrutinize all insurance tariffs and conditions and to authorize them for all insurance offerors in the market according to general standards. The effect being that competition was prevented[17] and the national markets were isolated from international competition concerning mass business.

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[9] *Adel,* ZVersWiss 1994, p. 77, 87; Beckmann/Matuschke-Beckmann/*Präve,* § 10, margin 39.
[10] Published under http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0081:0096:DE:PDF lastly viewed on 22/7/2008 formerly Official Journal C 29/3; thereto *Dreher*, FS Immenga (2004), p. 98 et seqq.
[11] Commission Notice on agreements of minor importance Official Journal 2001, C 368/13; in more detail *Dreher*, FS Immenga (2004), p. 98 et seqq.
[12] Commission Official Journal 1988, L 65/19, 38 – "Eurofix Bauco/Hilti"
[13] Review in *Lechner,* Der Londoner Markt im Umbruch SIGMA published Swiss Re 3/2002.
[14] Too extensive therefore the example in Loewenheim/Meessen/Riesenkampff/*Hörst*, Kommentar zum europäischen und deutschen Kartellrecht (2005), GVO-VersW, margin 10.
[15] Cf. Beckmann/Matuschke-Beckmann/*Präve,* § 10, margin 39; *Hoffmann,* Verbraucherschutz im deutschen Privatversicherungsrecht nach dem Wegfall der Vorabkontrolle Allgemeiner Versicherungsbedingungen, Diss. Düsseldorf 1998, p. 79.
[16] Cf. only *Birds,* Modern Insurance Law, p. 20 et sqq.; *Huebner* Rahmenbedingungen des Wettbewerbs, p. 23, 73; *Herrmann,* British Insurance Law DVA-Skript (2005).
[17] *Hollenders,* p. 325, passim.

This state was substantially changed in 1987 by the famous Fire Insurance judgment of the European Court of Justice[18] and again in 1992 by the so-called 'third generation' of the Insurance Mediation Directives.[19] With the Fire Insurance judgment, the European Court of Justice established that the European Anti-Trust law does not contain implied exceptions for insurances like the controlled systems of national states.[20] In order to bring about extensive deregulation, a new system of supervision was established with the Third Insurance Mediation Directive, after it had passed preliminary stages.[21] It was transformed into German law by the new VAG (German Insurance Supervision Act) in 1994.[22]

The 'home country principle' which was already developed by the *Schwarz-paper* in 1970[23] for the first time, meant that compliance with the supervisory regulations of the host country or more precisely the land, the risk was mapped, or the supervisory regulations of the land were not necessary anymore. Instead, compliance with the law of the home country was sufficient. Not until the Co-Insurance Directive of 1978[24], was the new concept realised and its interpretation became intensely controversial. In the long run, it was decided that host country control should apply. The danger of distorting competition was to be prevented by the coordinating supervision and private law.
However, unlimited home country control was limited to industrial insurances and so-called 'passive life insurance' in the first instance. Eventually, host country control of mass-insurance was left to the third generation of directives.
Primarily two standardizations were brought about by the Third Insurance Directives:

- Preventative authority supervision for insurance tariffs and general conditions of insurance was abolished (i.e. national laws governing supervision could no longer regulate that tariffs and general conditions of insurance had to be approved by the supervisory authority); and
- The minimum requirements were standardized for the financial supervision (i.e. accounting was standardized; the criteria required for solvency and investment were made clear and uniform).

For the remainder, relatively strict obligations of information towards the supervisory authority and the policy holder were implied for insurance companies. Above all, general conditions of insurance must be submitted to the customer prior to conclusion of the contract. Thus, market control with respect to conditions of competition should be facilitated, which is extremely relevant to deregulation.
In the meantime, all 'third generation' regulations mentioned here have been transposed into national law by all member states and have been applied to all classes of insurance. Even in

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[18] Court of Justice Reports (ECR) 1987, p. 405 = VersR 1987, p. 169 – association of non-life insurer.
[19] 3rd Non-Life Insurance Directive 92/49 EEC from 6/18/1992 Official Journal L 228; and 3rd Life Directive 92/96 EEC from 11/10/1992 Official Journal L 360/1.
[20] Cf. only § 102 (1) of the GWB as amended on 2/20/1990, BGBl. I, p. 235.
[21] See again 3rd Non-Life Insurance Directive 92/49 EEC from 6/18/1992, Official Journal L 228; and 3rd Life Directive 92/96 EEC from 11/10/1992, Official Journal L 360/1; in detail *Herrmann* ZEuP 1999, p. 666 et seq. with further references.
[22] From 7/21/1994, BGBl. I, p. 1630.
[23] Imprinted in ZVersWiss, 1972, p. 101 et seqq.
[24] Directive 78/473/EEC from 5/30/1978 Official Journal L 1151/15 from 6/7/1978.

Germany, the transposition was completed on time for the deadline of 24th June 1994.[25] It must be emphasized that under EC-Directive, the regulations governing financial supervision, product information and the completion of an insurance contract were viewed as providing sufficient consumer protection even though they are inapplicable to mass risks and therefore private customers typically involved in mass risks. The host country principle applies, and it refrains from imposing public supervision regarding authorization by the host country. This is due to the fact that financial supervision is basically standardized and for the remainder competition should provide sufficient consumer protection.[26]

C. Consumer protection and the Law of Unfair Competition

The purposes for deregulating the preventative supervision of general conditions of insurance by the supervision authorities of member states in the Directives of the 'third generation' were to enable freedom of contract and the control effect which competition had upon it. In addition to this, judicial supervision of general conditions of insurance was taken into account and to a large extent was regarded as capable of substituting for preventative supervision.

I. Limitation of Official Controls of General Conditions of Insurance

In fact, judicial supervision of general conditions of insurance does not intervene until the clauses are applied. Therefore, it serves as a sovereign ex-post control. However, this does not exclude the concurrent effect of preventive control. The abolition of state preventive controls is dealt with first.

Following the creation of the Directive on unfair terms in consumer contracts[27], it had to be assumed that all member states would establish subsequent judicial supervision of the general conditions of insurance that would accord with the minimum requirements of this directive. Regarding deregulation, ex-post control seemed to be sufficient, so that the obligation of submitting both the general conditions of insurance and the business plan for authorization under § 5 sec. 3 no. 1-4 VAG, could be cancelled. Preventive control based on the obligation to submit the general conditions of insurance and the business plan in advance was regarded as inconsistent with the liberalization of the insurance markets.

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[25] VAG (German Insurance Supervision Act) from 6/24/1994, BGBl. I, p. 1377.

[26] See the opinions of the recitals being published in the prefix of directives. Recital 18 of the 3rd non-life insurance directive from 6/18/1992: "The harmonization of insurance contract law is not a prior condition for the achievement of the internal market in insurance; therefore, the opportunity afforded to the Member States of imposing the application of their law to insurance contracts covering risks situated within their territories is likely to provide adequate safeguards for policyholders who require special protection."

[27] Unfair Contract Terms Directive 93/13/EEC from 4/5/1993, NJW 1993, p. 1838; transposed by German national law from 7/19/1996, BGBl. I, p. 1013.

On the other hand, the imbalance of information between the parties at the time of contract conclusion due to the complexity of insurance products and because the contract was mostly characterized by the general conditions of insurance, was not disregarded. According to public law, it was regarded as obligatory that conditions are not merely implied in the contract with a possibility of being noticed but instead they must be submitted to the customer prior to his declaration of intention, so that they can be considered by the customer for the conclusion of the contract.[28] Due to the customer's fortified state of information and knowledge, the legitimization of the general conditions of insurance is said to be substantially improved by freedom of contract and by competition on the liberalized insurance markets.

However, according to the prevailing opinions on German law[29], the power of the *BaFin* to supervise deficiencies under § 81 sec. 2 VAG has remained. In addition to this, there is also supervision by the authority of competition under Art. 10 lit c. GVO number 358/2003 insurances.[30] Since questions of supervising cartels will be dealt with separately, the following part will be limited to issues relating to § 81 sec. 2 VAG.

Without a doubt, the supervision of deficiencies also applies to general conditions of insurance as they are unequally disadvantageous to the customer. Unlike prior to deregulation, under German law, supervision is no longer carried out during the procedure of granting permission under § 5 VAG, but is permanently carried out by the *BaFin*. Since the novella of the VAG in 1994[31] it cannot be denied that the supervisory law in Germany also protects against abuses of competition.[32] Therefore, there is a state of competition regarding supervisory competence between the *BaFin* and the Competition Directorate under Art. 10 lit. b GVO 2003. This issue will be addressed later. According to Art. 10 lit. b GVO, the supervision of revocation largely prevails if injustices result from the consequences of cartelizing. If the supervision results from the clause itself due to competitive inescapability, there are deficiencies under § 81 sec. 1 VAG.

II. Consumer Information and VVG-InfoV

The deregulation directives of the 'third generation'[33] created the requirement for insurance companies, to submit the consumer's information to each customer prior to conclusion of the insurance contract. Initially, this requirement was transposed into German public law with § 10a VAG in connection with appendix D. The duty to inform consumers was finally incorporated into private law by the Directive 2002/65/EC governing the distance marketing of consumer financial services from 9/23/2002[34] and the VVG-InfoV[35].[36] At this time the possibility arose to interpret the duties to inform as being systematically connected to the rule of transparency under § 307 sec. 1 p. 2 BGB and with the duty to provide advice in

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[28] For the German Law see § 10a VAG old version.
[29] *H. Müller*, 155, p. 159 et seqq.; *H. Müller*, VW 1993, p. 548 et seqq.; *Römer*, p. 20; Müller/Golz/Washausen-Richter/Trommeshäuser/*Präve*, p. 201, 206.
[30] Official Journal 2003, L 53/8.
[31] From 4/26/1994, BGBl. I, p. 918.
[32] Thereto Hirsch/Montag/Säcker/*Herrmann*, GVO-Versicherungen 1050, p. 1082 et seq.
[33] 3rd Non-Life Insurance Directive 92/49 EEC from 6/18/1992 Official Journal L 228; and 3rd Life Directive 92/96 EEC from 11/10/1992, Official Journal L 360/1.
[34] Official Journal from 10/9/2002, L 271.
[35] BGBl. I 2007, p. 3004.
[36] In detail *Präve*, VersR 2008, p. 151 et seq.

accordance with the Intermediary Directive from 2003[37]. Specifically, it became possible to lower the required comprehensibility of general conditions of insurance to the horizon of a consumer who had been advised, instead of establishing excessive criteria to ensure the accountability by legal laypersons. However, this cannot be demonstrated prior to the chapter concerning insurance mediation.

III. Legal Adjustments and Necessity of Harmonization

The Third Directives concerning deregulation of domestic markets of insurances have not only established direct rules regarding the home country principle, but also affect the member states indirectly by limiting their ability to enact rules that conflict with the objectives of the directives. In the past one and a half decades, a considerable number of legal adjustments and necessities of harmonization have already come up.

1. Warning duties concerning duties of disclosure

The Commission's draft of the new Insurance Contract Law had suggested waiving performance of insurance companies only in cases where the policyholder's breach of obligations is grossly negligent. Furthermore, it was not intended to be a complete waiver but instead would provide for a proportional reduction.[38] Besides this, the government draft regarding duties to inform and duties to provide explanations to the customer required that separate information in extended written form (*Textform*, defined as including not only the written form but also other means of communication such as fax or e-mail) was submitted to the policyholder in advance.[39] Against this regulation which is now legally binding under § 28 sec. 4 it has been argued in terms of legal policy that it is a breach of the so-called maximum effect[40] of the Directive' provision concerning consumer information.[41] Basically in the same respect the Commission's recommendation concerning § 19 sec. 1 p. 1 and sec. 6 was discussed. According to this provision, on one hand the insurance company is required to phrase questions about risk factors regarded as relevant which have to be answered by the policyholder (pre-contractual duties of disclosure). On the other hand the insurance company also has to warn about the legal consequence resulting from breaches of the policyholder's duty of disclosure[42] in extended written form (*Textform*, defined as including not only the

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[37] Directive 2002/92/EC from 12/9/2002 Official Journal from 1/15/2003, L 9/10.
[38] Interim report of the Commission concerning the reform of the German Insurance Contract Law from 5/30/2002, no. 6.1.2.2 p. 45 et seq.
[39] *E. Lorenz,* § 30 (government draft of the German Insurance Contract Act 2006) with explanation, p. 209; also already *E. Lorenz,* § 30 sec. 4 (Commission draft of the German Insurance Contract Act), p. 439.
[40] According to the maximum effect of a directive, national regulations must not be more rigid than the regulations of the directive; thereto elementary European Court of Justice, 3/5/2002 Rs. C-386/00, VersR 2002, p. 1011 – „Axa Royal Belge SA/Georges Ochoa et al".
[41] 3rd Non-Life Insurance Directive 92/49 EEC from 6/18/1992 Official Journal L 228; and 3rd Life Directive 92/96 EEC from 11/10/1992, Official Journal L 360/1; cf. *Langheid,* NJW 2003, p. 399; *Herrmann,* VersR 2003, p. 1333, 1337 et seq.; in a similar context also *Präve,* VW 2002, p. 1836, 1838; *Bürkle,* EuZW 2006, p. 685.
[42] Insurer's rights: Rescission in case of intension or gross negligence under § 19 sec. 2 and 3 or retrospective inclusion of risk with increase of premium in case of gross negligence according to sec. 4 (exception in sec. 6).

written form but also other means of communication such as fax or e-mail). One critique has been that the information required exceeds the consumer's information needs, and is incompatible with the maximum effect on deregulation by the 'Third Generation' of Directives on Insurance.[43]

According to another opinion, the Directives on deregulation do not fundamentally affect private insurance law.[44] Therefore consumer's information was initially allocated to public law, regulated under the new § 10a VAG.[45] In essence the duties to inform are said to be considered in connection with supervision of deficiencies, since the supervisory authority is entitled to control compliance with regulations. Indeed, it had already been pointed out that the *BAV* (Federal Insurance Commission) was also entitled to interfere under § 81 sec. 1 p. 4 VAG by legally supervising for breaches of obligations under private law. Therefore, allocation to the public law was not regarded as compulsory[46]. Due to the VVG-InfoV which transferred the duty to inform consumers to private law[47], a systemic incoherence regarding duties to inform and duties to warn under the VVG no longer exists.

Limits on the scope of consumer protection must be taken into account, if the directive is based on consideration of conflicting interests between parties in legal relationships. The result would be additional burdens on insurance companies which would disturb the balance intended by the European Law.[48] On the other hand supplementary rules are permitted provided they correspond with the objectives of the European Law and are necessary for its effective transposition. According to the view held here, such supplementary rules must balance the interests of consumer protection and the competitive opening of domestic markets.

Indeed the German legislator of the VVG 2008 did not deviate from the compulsory rules insurance companies for posing questions and giving notification about legal consequences detrimental to the policyholder. But the real development has found its remedies, thereby guarding against violation of European Law arising from these additional (warning) duties imposed on insurers. In practice, simplifications have been made by the use of EDP forms and warning texts have been developed for questions concerning the policyholder's pre-contractual duties of disclosure according to § 19 VVG and also for the insurer's warnings concerning the legal consequences that may arise in case the policyholder is in breach of his disclosure duties. These developments prevent that additional burdens are established which exceed consumer information to a large extent. Therefore, the opinion that there are violations of the Third Generation Insurance Directives has been almost totally abandoned.

However, it must be considered that in terms of obligations to give notice under § 19 sec. 5 and § 28 sec. 4, the requirements for insurers regarding information about the diverse legal consequences in cases of negligent and grossly negligent breach of duty by the

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[43] Cf. *Herrmann*, VersR 2003, p. 1333, 1338 et seq.
[44] Cf. only *Renger*, VersR 1994, p. 753, 756; *E. Lorenz*, VersR 1995, p. 616, 617.
[45] *Reiff*, ZVersWiss, 2001 451, 463 et seq.
[46] *Hoffmann*, 166 et seq.
[47] Thereto *Präve*, VersR 2008, p. 151 et seq.
[48] Cf. already the preliminary ruling procedure of the LG Hannover EuZW, 1992, p. 546, where the European Court of Justice (corpus 1992 I 4897, 4912) does not address the issue of maximum effect; however cf. *Einsele*, NJW 1996, p. 2681, 2688 et seq. with further references.

policyholder may not be too strict. Since by no means should the compulsory notification and warning lead to the "policyholder's nose being rubbed in the assumption that he can behave slightly negligent without any consequences."[49] For example, it is sufficient to formulate that "in case of a reckless violation of the duty to disclose risks" under § 19 sec. 1, respectively and "in case of severe faults of disclosure" under § 28 sec. 1 adaption of the contract to the new situation and to a large extent waiver of performance may occur, i.e. the insurer may only be required to pay a proportion of the insurance benefit claimed. To this end, the weakening of the duties to inform is owed the maximum effect of Art. 31 of the Third Life and Non-Life Insurance Directives.

2. Transparency Controls with Premium Adjustment Clauses

Prior to deregulation, the BGH (Federal Court of Justice) decided that the transparency principle of § 307 sec. 1 p. 2 BGB (§ 9 ABGB former version) is also applicable to premium adjustment clauses.[50] This should be the case even if the premiums are subject to the official supervision which was governed under earlier laws. Concerning szenarios where the Directive on Unfair Terms in Consumer Contracts[51] and its transformation of 1994[52] applies, this jurisdiction is still considered authoritative[53] - however, without special reference to insurance contract law – even though the control of premium adjustment clauses does not belong to the price control, but instead concerns price formation clauses.[54] Regarding price adjustment clauses which take automatically effect, this opinion is somewhat contrary to § 307 sec. 3 p. 1 BGB, where according to the prevailing opinion price controls and controls of the balance between performance and counter-performance are interdicted. If price adjustment clauses which provide for performance to be specified by one of the parties (as stipulated under § 163 sec. 1 and § 172 VVG old version) are also scrutinized to be reasonable in content, it results in a price control. In this respect, § 307 sec. 3 p. 1 BGB does not apply since it is a legal provision and as far as the general conditions of insurance do not provide for any deviation. If the general conditions of insurance were not adjusted to the new VVG in good time, i.e. until 1/1/2009 (Art. 1 sec. 3 p. 1 EGGVG), there is a deviation from law and judicial review will apply. Indeed, the jurisdiction only controls balance between performance and counterperformance in case of intransparency at the time of conclusion of the contract with the consequence that the clause is invalid. Then, supplementary interpretation of the contract applies taking into consideration the hypothetical intention of the parties, based on the development of the market prices as much as possible. [55] The latest jurisdiction of the *BGH* concerning *Zillmerungsklauseln*[56] seems to stick to this principle. According to the correct,

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[49] *Herrmann*, VersR 2003, p. 1333, 1339.
[50] BGHZ 119, 55, 59; also OLG Hamm, NJW-RR 1993, p. 1501; OLG Celle, VersR 1993, p. 1343.
[51] Council Directive 93/13/EEC, OJ L 95/29 = NJW 1993, p. 1838.
[52] From 7/19/1996, BGBl. I. p. 1013.
[53] Palandt/*Grünberg* § 309, margin 11.
[54] Cf. only *Horn*, NJW 1985, p. 1118, 1120.
[55] Cf. only BGHZ 90, 69, 78 "Tagespreisklausel II" – day price clause II; BGHZ 97, 212, 213 "Zinsvorbehalt"- reservation of interest; in detail *Herrmann*, DZWiR 1993, p. 54 et seqq., 95 et seqq.
[56] "Zillmerung" is named after the mathematician *August Zillmer* and refers to life insurance contracts. By this method of calculation, the acquisition costs – mainly brokerage and administrative expenses – are amortized with the premiums of the first years. The consequence is that premium reserves can only be accumulated after all administrative

however not undisputed[57] analysis of the latest jurisdiction concerning the *Zillmerung*, the content of the main subject may only be judicially reviewed if the contract was concluded with intransparent clauses regarding *Zillmerung*. The interference with the freedom of decision and choice (caused by intransparency) would (otherwise) not be remedied and would therefore remain.[58]

For the European private insurance law, the limitations of the transparency principle to clarity and comprehensibility must be approved. This is supported by Art. 6 subsection 2 of the directive on unfair terms in consumer contracts from 1993[59], whereupon controlling the content of the main subjects of a contract is interdicted. In this respect, it is assumed that contractual freedom and functions of competition on domestic markets are sufficient to bring about adequate results to the market.[60] By deregulating the insurance markets, the corresponding objectives of competition were pursued, as has been demonstrated. Therefore, premium adjustment clauses generally must not be scrutinized to be reasonable in content. Exceptions can only be considered in case of intransparent premium adjustment clauses at the time of concluding the contract. The same applies if functioning insurance competition does not exist on the relevant market, unlike in Germany at the present.[61]

3. Deferred Compensation and Value Equality under the Employers' Retirement Benefits Law

Additional issues concerning European Law arise from the *Zillmerungsverbot* under the BetrAVG (employers' retirement benefits law). According to a more recent decision of the *LAG Munich*[62] this can be concluded from § 1 sec. 2 no 3 of the employer's retirement benefits law which provides for deferred compensation and "entitlement of equal value" for retirement provisions. The principle of value equality *(Wertgleichheitsgebot)* is said to be

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expenses are covered. If the policyholder terminates the contract within the first years, the surrender value is very low or zero.

[57] Considerably more extensive interpretation Federal Constitutional Court 2/15/2006 – 1 BvR 1317/96, NJW 2006, p. 1783; VersR 2006, p. 489 Ls. 4.

[58] Federal Court of Justice 10/12/2005 – IV ZR 162/03 no. 45; insofar consenting *Herrmann* NWiR autuum issue 2008, accessible under http://www.nwir.de/.

[59] Official Journal L 95/29.

[60] So-called exemplar predictions under conditions of competition cf. only *v. Hayek*, Der Wettbewerb als Entdeckungsverfahren, Freiburger Studien (1969), p. 249 et seqq.; Schneider/*Hoppmann*, Grundlagen der Wettbewerbspolitik (1968), p. 9 et seqq., p. 14 et seqq.; *Graf*, Muster-Voraussagen und Erklärungen des Prinzips bei F.A. von Hayek (1978); overview: *I. Schmidt* Wettbewerbspolitik und Kartellrecht, 7. ed. (2001), p. 14 et seqq.

[61] *Herrmann*, DZWiR 1993, p. 54 et seqq., 95 et seqq.

[62] LAG Munich (4th Chamber) of 3/15/2007 VersR 2007, p. 968; consenting *Mauersberger*, VersR 2008, p. 169 et seqq.; also *Reinicke*, DB 2006, p. 555, 562 et seq.; *Schwintowski*, BetrAV 2004, p. 242, 243; different opion LAG Munich (10th Chamber) of 7/11/2007, NZA 2008, p. 362; OLG Celle of 9/13/2007, NJOZ 2008, p. 22; ArbG Siegburg of 2/27/2008 – 2 Ca 2831/07; implicit also ArbG Stuttgart of 1/17/2005 – 19 Ca 3152/04, BetrAV 2005, p. 692; ArbG Kempten of 11/30/2006 – 05 Ca 441/06; *Kollroß/Frank*, DB 2007, p. 1146; *Neumann/Schwebe*, ZIP 2007, p. 981; *Cisch/Kuip*, NZA 2007, p. 786; *Reich/Rutzmoser*, DB 2007, p. 2314, 2319; *Hopfner*, DB 2007, p. 1810; *Jaeger*, VersR 2006, p. 1033; *Diller*, FA 2007, p. 193; *Diller*, NZA 2008, p. 338; *Veit*, VersR 2008, p. 324; *Herrmann*, NWiR autuum issue 2008, accessible under http://www.nwir.de/.

violated in cases of short-term cancellation, where the employee obtains none or a remarkably lower surrender value than the sum of premiums which he has already paid due to the *Zillmerung* (or underwriting under § 4 BetrAVG).[63] Thus according to § 134 BGB, a violation of law exists, leading to invalidity of the agreement.[64]

Available literature partly objects to the opinion that control according to the principle of value equality and under the rule of transparency is excessive as long as the *Zillmerung* causes an "actuarial equivalence" even though the results of the first years seem to be inappropriate.[65] The mathematical aspects should not be commented upon here.

a) Guidelines of Art. 49 ECT

Seldom discussed[66] so far, however not less important are the arguments regarding freedom of services under Art. 49 ECT. Increasing international competition with life insurers from Great Britain and other member states of the EU[67] will not stay away from companies in the intermediate term.[68] The relevance of this potential competition is decisive, if the European Court of Justice[69] deals with a case where cross-border market access and surrender value calculations by the *Zillmerung* are affected under English Law[70]. Interference with Art. 49 ECT exists in cases of discrimination and impairment of access[71] by foreign countries within Europe, because the *Keck*-jurisdiction[72] of the European Court of Justice concerning insubstantial modalities of sale and only applies to free movement of goods under Art. 28 ECT. Due to a lack of practical identifiable criteria, transferring this jurisdiction to other types

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[63] LAG Munich of 3/15/2007, II.1. b) aa) = VersR 2007, p. 968.

[64] Also already *Reinecke,* RdA 2005, p. 129 et seq.; *Reinecke,* DB 2006, p. 555, 562; *Schwintowski,* VuR 2003, p. 327.

[65] Cf. *Kollroß/Frank,* DB 2007, p. 1146.

[66] Correct approach *Bürkle,* VersR 2006, p. 250 et seq. to III.; in more detail *Herrmann,* VersR 2009, p. 7; Even recently no information thereupon *Mönnich* Hdb. Versicherungsrecht (2004) no. 7-9; even too strict *Ebers,* Die Reform des VVG vor dem Hintergrund des Gemeinschaftsrechts (2004).

[67] In 2003 638 companies from the service sector of the EEA out of Germany were registered with the BaFin (cf. *Mönnich* Hb. Versicherungsrecht (2004), p. 65, fn. 242); in July 2008 according to the information provided under http://www.bafin.de/ there were already 892 registrations; the associated companies, which are considered to escape from Germany, are probably not included, yet, thereto *Langsch,* Lebensversicherer ergreifen die Flucht, Handelsblatt 12/6/2007, p. 21; such migration movements cannot be excluded from European Law fort he home country principle applies.

[68] Cf. only monopoly commission Hauptgutachten 2002/3 (2004), Tz. 218.

[69] Cf. European Court of Justice 5/12/2006, Rs. C-94/04 and C-202/04 "Cipolla" EurR 2007, p. 82, no. 58 et seq., where the court due to the hinderance of access even assumes relevance without giving former information.

[70] Minimum surrender values are not provided there, but it is only referred to an actuarially accurate calculation of costs. cf. only *Collinvaux's* Law of Insurance (1997) § 10.04 218 et seq. and the warning of the Association of British Insurers under www.abi.org.uk accessed 7/28/2008.

[71] Cf. again European Court of Justice of 12/5/2006, Rs. C-94/04 and C-202/04 "Cipolla" EuR 2007, p. 82 no. 58 et seq.

[72] European Court of Justice of 11/24/1993, Rs C-267/91 „Keck" and C 268/91, NJW 1994, p. 121 „Hünermund".

of fundamental freedoms is not recommended.[73] In particular, access is made more difficult due to the fact that the rules of the *Zillmerung* are related to the financing of the insurance intermediaries' commissions and therefore already exert considerable influence on the sales result of national competition.[74] With reference to international market access this applies more than ever, especially since knowledge about the foreign product and competent comparisons are crucial. The sales result of the foreign candidate seeking access will be extremely affected if the ban of the *Zillmerung* or a minimum surrender value reduced the margins for the premiums and the intermediaries' commissions.

For justification, according to § 49 ECT the jurisdiction demands that important common interests like the interest of consumer protection are specified. However, the ban on excess must be obeyed, particularly the principle of least interference.[75] For this purpose the European Court of Justice has developed the prevalence of informational regulation[76], meaning that interferences with the freedom of services (like interferences with the freedom of establishment under Art. 43 TEC) should be effected by imposing duties to inform rather than by enacting bans or obligations. According to this principle, protection by transparency in regards to clauses of *Zillmerung* also seems to be preferable, provided that functioning competition regarding clauses of *Zillmerung* exists. In the controversy, better arguments have favoured the competitive view since the introduction of the responsible customer (i.e. a consumer who is willing to be informed) as a role model; and since the introduction of the product summary sheet according to § 4 VVG-InfoV, even the legislator explicitly seems to be in favour of this view.[77] This prevalence of informational regulating of private insurance law has the effect of there being in principle protection by mere transparency. Only in case of ineffective competition and because of specific reasons are further regulations permitted.

b) Market-oriented interpretation and teleological reduction of the legal scope of § 1 sec. 2 no. 3 BetrAVG

Within the German discussion concerning company pensions, a part of the literature also finds the principle of control of balance is unwarranted.[78] However, in this respect it is not referred to the informational prevalence of European Law discussed here, but to the fact that generally with deferred compensation according to German contract law, a just price which can be scrutinized by a court acting as a price inspector, does not exist. According to

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[73] *Kort,* JZ 1998, p. 132, 136; Grabitz/Hilf/*Randelzhofer/Forsthoff* Art. 49,50 ECT, margin 96.

[74] See also *Kisch/Kruip,* NZA 2007, p. 786 to V.1b/bb.

[75] Cf. – elementary – European Court of Justice, Rs. 120/78 20/2/1979, „Rewe-Zentrale/Bundesmonopolverwaltung für Branntwein", „Cassis de Dijon" Corpus 1979, p. 649; NJW 1979, p. 1766.

[76] Cf. *Grundmann,* Europäisches Schuldvertragsrecht – Das europäische Recht der Unternehmensgeschäfte (1998), p. 41; *Merkt,* ECFR 2004, p. 1, 17; *Fleischer,* Informationsasymmetrie im Vertragsrecht (2000), p. 497 et seq., passim; *Fleischer,* ZEuP 2000, p. 773, 784 et seqq.; especially to the „Zillmerung", *Herrmann,* NWiR, autuum issue 2008, accessible under www.nwir.de.

[77] See also Bruck/Möller/*Herrmann,* § 7, margin 25, 54 et seqq.

[78] *Hopfner,* Der ‚gerechte Preis' bei der Entgeltumwandlung, Diss. Erlangen 2002, p. 141 et seq., passim; *Hopfner,* DB 2007, p. 1810; similar *Reich/Rutzmoser,* DB 2007, p. 2314, 2318 with correct notice that the *Zillmerung* is permitted outside of labour contract law; similar *Jaeger,* VersR 2006, p. 1033.

the intentions of the legislator, the principle of value equality of § 1 sec. 2 no. 3 BetrAVG was also not meant to enable price control. In these instances, specifically the inferiority of the employee which is typical for employment law does not exist, since the status of employment itself is not affected in cases deciding on deferred compensation.[79]

However, in favour of the view held by the *LAG Munich*, it must be admitted that the wording of § 1 sec. 2 no. 3 BetrAVG is too broad and therefore misunderstanding occurs. However, this problem can and must be fixed by teleological reduction[80]. Due to the fact that competition is limited in case the current employment or (if the job changes) the future employment contract is affected, a control of content by control of equal value must not be completely excluded. Provided that competition works, namely in cases where clauses of *Zillmerung*[81] are sufficiently transparent, the control of equal value should be limited to instances where obvious and/or severe deviations from the content a clause would have had under the usual conditions of competition.[82] The requirement of one-sidedness which is essential for a control of the equivalence is also fulfilled in case of deferred compensation, as the surrender value always requires termination of contract by one party. As a result, the systematic coherence with the control of equity according to § 315 sec. 3 BGB becomes obvious. Under § 315 sec. 3 BGB, the party which is entitled to define performance can be granted extended discretion, but gross and/or obvious unfairness will be adjusted. [83]

In conclusion, the *Zillmerung* must not be used for the financing of acquisition costs which obviously have not been caused or would not have been caused to the same extent if the contract had been concluded on a market not determined by deferred compensation.[84] According to the facts of the case decided by the *LAG Munich*, for mediation of products with *Zillmerung*, an office had been set up in the employer's company. Therefore, acquisition costs for mediation might have been incurred.

The transparency rules established by the *BGH* in 2001[85] still apply to insurance contracts concluded prior to 1/1/2008, since according to Art. 4 sec. 2 EGVVG, § 176 VVG

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[79] See again *Hopfner,* l.c. (previous footnote), p. 101 et seq.; additional reasons of collective bargaining law see p. 113 et seqq.

[80] Cf. *Herrmann*, NWiR autuum issue 2008, accessible under http://www.nwir.de/; however, it is insufficient to deny the legal character of § 1 sec. 2 no. 3 BetrAVG being a ban and therefore deny the legal consequence of invalidity under § 134 BGB (cf. Hanau/Arteaga/Rieble/*Veit* Entgeltumwandlung 2. ed. (2006) margin 138, 141; *Veit,* VersR 2008, p. 324 to II.1). For invalidity without limitations under § 306 BGB would still exist. § 138 BGB does not help also (but see *Veit,* VersR 2008, p. 324 zu III. 2.), for the requirements of evidence are too heavy.

[81] Cf. BGH 5/9/2001, BGHZ 147, 354 = VersR 2001, p. 841; BGH 5/9/2001, BGHZ 147, 373; partly critical *Herrmann,* FS Blomeyer (2004), p. 354, 367 et seqq.; *Herrmann,* DZWiR 2004, p. 45, 50 et seqq.

[82] Cf. again *Reich/Rutzmoser,* DB 2007, p. 2314, 2318; *Jaeger,* VersR 2006, p. 1033, only taking into account if such a "Zillmerung" would also have been used if employment law was not involved, but disregarding the discretionary limitations stated here.

[83] Cf. again RG from 5/12/1920, RGZ 99, 106; BAG, DB 1982, p. 1939; Palandt/*Grüneberg,* § 315 margin 5; in detail *Herrmann,* NWiR autuum issue 2008, accessible under http://www.nwir.de/.

[84] Cf. *Schwintowski,* VuR 2004, p. 282; consenting *Herrmann* l.c. (previous footnote).

[85] BGH from 5/9/2001, BGH/ 147, p. 354 = VersR 2001, p. 841; BGH from 5/9/2001, BGHZ 147, p. 373.

old version applies even after 1/1/2009. These transparency rules are also relevant to insurance contracts concluded since 1/1/2008, although the regulations of the new VVG do generally apply since 1/1/2009 (Art. 1 sec. 1 EGVVG e contrario).[86] This rule is generally not accompanied by a ban of *Zillmerung* deduced from § 1 sec. 2 no. 3 BetrAVB. The *Zillmerung* is only interdicted by way of exception due to the principle of value equality if there were no intermediation services as in cases without deferred compensation or if the *Zillmerung* as grossly unfair due to other reasons.

4. Minimum Surrender Value

For calculating acquisition costs and commissions in cases of termination of a life insurance contract *(Zillmerung)*, the jurisdiction assumed to be entitled to distribute minimum surrender values. [87] These minimum surrender values are moderated by § 169 sec. 3 p. 1 for contracts concluded since 1/1/2008, since only the requirements for the mode of calculation of the *Zillmerung* are regulated. In this respect, both the jurisdiction to the old law and the new legislation seem to be inconsistent with the European requirements of the ban of excess which have to be obeyed in cases of interference on freedom of services.[88]

Although the *BVerfG*[89] has certified the jurisdiction of the *BGH*, stating that the *Zillmerung*, even if it is clarified to the policyholder, must not go below half the potential sum of the premium reserve excluding the *Zillmer*-mode (*Hälftelungsgebot*, principle of half), there are objections under the aspect of European Law. Obviously, this estimation is based on the jurisdiction[90] that consistently connects aspects of intransparency with aspects of content equity. Yet, under German Law this connection is vulnerable as was already shown. Additionally, specific objections of European Law must be taken into account: National regulations of consumer protection, which limit the freedom of services, according to Art. 49 ECT are only permitted when they are necessary, are within the range of the ban on excess, provide reasonable means and are consistent with the principle of least interference. Regarding the priority of informational regulations deduced from the principle of least interference it is insufficient that the new legislation only requires that the insurer distributes

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[86] To the interim law of the Introductory Act to the German Insurance Contract see *Marlow/Spuhl*, p. 301, 258.

[87] Cf. BGH, l.c.; consenting *Elfring*, NJW 2005, p. 3677; different opinion EFTA-Court from 5/25/2005, Rs E-1-05, accessible under http://www.eftacourt.lu/; thereto *Bürkle*, VerR 2006, p. 250; similar *Herrmann*, NWiR autuum issue 2008, accessible under http://www.nwir.de/ with further references.

[88] C.f. – elementary – European Court of Justice, Rs. 120/78 20.2.1979, "Rewe-Zentrale/Bundesmonopolverwaltung für Branntwein","Cassis de Dijon" Corpus 1979, p. 649; NJW 1979, p. 1766 (due to „gleicher Wirkung" – equal effect – according to Art. 28 ECT); to the development of the Dijon-Doctrine and to transference to freedom of services cf. only European Court of Justice 12/5/2006, Rs. C-94/04 and C-202/04 "Cipolla" EurR 2007 82.; thereto *Kleine-Cosack*, NJW 2007, p. 1405 et seq.; *Herrmann*, NWiR autuum issue 2008, accessible under http://www.nwir.de/.

[89] BVerfG, 2/15/2006, NJW 2006, p. 1783; VersR 2006, p. 489; majority in the literature, cf. only *Veit*, VersR 2008, p. 324 to III. 2.

[90] Cf. only BGH from 7/1/1992, BGHZ119, p. 55, 59 – premium adjustment clauses; BGH from 3/24/1999, NJW 1999, p. 2279; BGH from 5/9/2001, NJW 2001, p. 2014, 2016; Palandt/*Grünberg*, § 307, margin 17.

the acquisition costs and commissions at least over the first five years and that the *Hälftelungsgebot* should no longer apply. This provision (§ 169 sec. 3 BGB) is not only a transparency rule providing for a general method but also establishes minimum surrender values[91] since the acquisition costs and commissions at least have to be distributed over the first five years. The customer who terminates the contract after a short time (e.g. after three years) is not obliged to pay the acquisition costs which were intended to be allocated to the remaining proportion of the 5 year period. Taking competitive aspects of composition of clauses into account, a legal establishment of minimum surrender values seems to be unnecessary as long as there is sufficient transparency. In cases of intransparent *Zillmerung* neither the *Hälftelungsgebot* nor the 5-year-method is objectionable under European Law since these methods do not lead to fundamentally different results. Concerning the principle of least interference the jurisdiction acknowledges a legal scope for the legislator which is not judicially reviewed *(gesetzgeberische Entscheidungsprärogative).* According to the prevailing opinion, the more the intentions of legislation affect the social system of the Member States instead of being economical, the larger the scope left to the legislator is.[92] Consumer protection on insurance markets is one of these welfare aims.

Since prevalence of informational regulations regarding the German law of *Zillmerung* has hardly been recognized, the jurisdiction and § 169 sec. 3 BGB are in danger of causing a modification to freedom of contract.[93] However, *Schwintowski* proves that there are important differences to politically and legally intended cross-subsidies, according to § 12 g VAG concerning start-up financing of private nursing care insurance or risk structure compensation within the new basic tariff for private health insurance. Nevertheless, this does not prove that the ban of excess is not violated by interfering with the freedom of services. Indeed *Schwintowski* emphasizes that this jurisdiction is exceptionally justified due to deficiencies in the functioning of competition[94]. Nevertheless, the violation of the principle of least interference remains as far as functioning competition of clauses is assumed to exist due to transparency of the clauses. Indeed, this exception is controversial.

Opponents deny efficient competition of clauses since the customer is assumed to ignore the clauses, which is economically reasonable. Moreover, clauses are not sufficiently understandable.[95] Even on the basis of the reasonable consumer as a role model[96] it is regarded as unrealistic that the average customer reads and understands general terms and

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[91] Also *Marlow/Spuhl*, p. 240; different opinion *Schwintowski*, VersR 2008, p. 1425, 1426.
[92] Cf. only EuGH, Rs. C-275/92 "Schindler", Corpus 1994 I-1039, p. 1096 et seq., margin 59-61; *Randelzhofer/Forsthoff* Grabitz/Hilf, before Art. 39-55 EGV, margin 172 with further references; different opinion *Schroeder*, EuGRZ 1994, p. 373, 379.
[93] *Schwintowski*, ZVersWiss 2007, p. 449 et seqq., who does not consider this danger to be realized; to the following 457 et seq.
[94] Cf. also *Schwintowski*, ZVersWiss 2007, p. 449, 458, where he emphasizes, that competition concerning life insurance products is only functioning to a limited extent.
[95] Cf. only *Adams*, BB 1989, p. 781, 784; explicitly regarding insurance law *Schmelzl/Klute*, ZIP 1989, p. 1509, 1517; despite the different approach also *Breidenbach*, Die Voraussetzungen von Informationspflichten bei Vertragsschluss, 1989, p. 27; however generally correct *Köndgen*, NJW 1989, p. 943, 949; consenting *Drexl*, Die wirtschaftliche Selbstbestimmung des Verbrauchers 1998, p. 360 et seq.
[96] Cf. – elementary – EuGH from 7/6/1995, Rs. C-470/93, Corpus 1995, I-1923, p. 1944 "Mars".

conditions regarding credit contracts or clauses regarding *Zillmerung*.[97] In favor of competitive efficiency of price related and other important general terms and conditions the duty of publication must be mentioned. General terms and conditions not only have to be published by a clearly visible notice according to § 305 sec. 2 BGB[98] but even have to be submitted to the policyholder as consumer information prior to conclusion of the contract in order to avoid that the objection period lasts up to one year after payment of the first premium (according to § 5a sec. 3 VVG old version).[99] According to §§ 7, 8 sec. 2 VVG of the new law the preventive effects are even fortified since the right of revocation is not constraint in time if the relevant information was not given in good time prior to contract conclusion. Combining this effect with the European role model of a reasonable customer ready to be informed, the large number of empirical surveys concerning deficiencies of information[100] loses relevance. In addition, there are the duties to advise and to warn the policyholder according to §§ 6, 60 et seqq. and the product summary sheet according to § 4 VVG-InfoV. Thereby, the policyholder's attention is at least called to the most important risks of the general conditions of insurance. Due to these duties, insurance intermediaries in particular take notice of the content and may refrain from placing critical products.[101]

The criticism under the aspect of European Law is of considerable importance for practice since according to § 4 sec. 2 EGVVG, § 169 VVG it is not applicable to life insurance contracts concluded prior to 1/1/2008, but instead § 176 VVG old version applies. Therefore, if the opinion on European Law held here wins recognition, for all contracts concluded prior to 1/1/2008, their current value[102] is no longer crucial for calculation but rather the premium reserve according to § 169 sec. 3 p. 1 VVG. Moreover, instead of the *Hälftelungsgebot* (principle of half) established by the jurisdiction which violates the European Law, the requirement to distribute acquisition costs throughout the first five years without a minimum level is applicable. Even after 1/1/2008 this has to be taken into account in case of supplementary interpretation of contracts concluded prior to 1/1/2008 according to the requirements established by the *BGH* in 2005.

However, § 169 VVG is applicable until the European Court of Justice decides in a preliminary ruling procedure according to Art. 234 sec. 1 p. 2, sec. 2 ECT that the provision contradicts European Law. The *BGH* might be obliged to initiate a preliminary ruling procedure under Art. 234 sec. 2 ECT if a court of lower instance holds the wide-spread but objectionable view regarding contracts concluded prior to 1/1/2008 that a minimum surrender value is even necessary if the *Zillmerung* is transparent; or in case the contract concluded after 1/1/2008 does not meet the requirements of § 169 sec. 3 VVG, but contains a transparent clause of *Zillmerung*. Nevertheless despite the clear wording that conflicts with this, the *BGH* could even interpret § 169 sec. 3 VVG in a way which is consistent with European Law.[103]

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[97] Cf. *Reifner*, VuR 1989, p. 63; *Reifner*, VuR 1990, p. 185, 186; as to results of opinion polls s. the references in *Drexl*, l.c.

[98] To the so-called publicity by publishing a clearly visible note cf. *Herrmann*, Grundlehren BGB/HGB 2006, p. 153 et seqq.

[99] To the preventive effects cf. *Drexl*, l.c., p. 486.

[100] Thereto see again *Drexl*, l.c., p. 486.

[101] As to the coherence between the duties to advise and the transparency rule, see also Bruck/Möller/*Herrmann*, § 7 VVG, margin 26.

[102] Only for unit-linked life insurances the current value is still relevant for calculation (§ 169 sec. 4 VVG).

[103] Cf. BGH from 4/9/2002; BGHZ 150, 248, 254 et seqq.; thereto and to EuGH from 4/17/2008, Rs. C 404/06, ZIP 2008, p. 794, "Quelle" s. *Mörsdorf*, ZIP 2008, p. 1409, 1415 et seq.

IV. Free Premium Competitions and Dumping of Premiums

As a result of deregulation, there was an emergence of competition between new insurance products and the relevant general conditions of insurance, but there was also intense price competition and competition for the formation of premiums. Consequently, jurisdiction and literature fixed limits according to § 81 sec. 1 p. 5 VAG. The relevance of theses limits to European Law was not revealed until a more recent judgement on the low price competition by the European Court of Justice[104]. Private Law is also affected by this judgement, for in case of violation of the VAG, claims of competitors based on advantage by legal breach under § 4 no. 11 UWG (Act Against Unfair Practices) have to be considered.[105]

Since the mid-1990s, a severe price competition has developed particularly for automobile insurances in different business classes.[106] Large insurance companies with low premiums report having offered price dumping for new customers which may be as much as 15 % lower than the usual premiums.[107] Dumping means that the premium does not cover the expenses of the insurance company, i.e. being insufficient to cover the statistically expected claim expenditure and administrative expenses. Market experts primarily take cross-selling motives into consideration. This means that by gaining a customer as an automobile policyholder a door is opened with the possibility to sell other insurance products. Therefore, for business management reasons it seems to be logical to offer the basic product of automobile insurance below the actual cost.[108] As a result, a cross-subsidisation from other classes of insurance to automobile insurance must be considered.

It appears from legal statements that information on the dumping of premiums has only been developed for the right of supervision.[109] In part, the view is hold that the competence to interfere according to § 81 sec. 1 p. 5 VAG must be considered (financial supervision), since compliance with this rule is said to be judged individually for each class of insurance and cross-subsidisations cannot be allowed if compliance with these obligations is not assured without these cross-subsidisations.[110] The contrary opinion denies the ban of

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[104] From 12/5/2006, Rs. C-94/04 and C-202/04 „Cipolla" Corpus 2007 I , p. 82.

[105] According to the rule under § 1 UWG former version see BGH 6/7/1996, GRUR 1996, p. 786, 788; to the innovations since 2004 see Baumbach/Hefermehl/*Köhler*, Kommentar zum Wettbewerbsrecht, 23. ed. (2004), § 4 margin 11.54 et seqq.

[106] Cf. only *Knospe,* VW 1999, p. 541; *Müller,* VW 1993, p. 548, 549 et seq.

[107] Cf. again *Knospe,* VW 1999, p. 541; the Association of German Insurers predicts for 2008 to be in the red again for the first time since 2003, for price war have intensified cf. *T. Schmitt* HBl. 6/13/2008, p. 21.

[108] Cf. *Knospe,* VW 1999, p. 541.

[109] Additionally, there is a long-standing jurisdiction regarding price dumping under the UWG (s. – elementary – RG 12/18/1931, RGZ 134, p. 342 "Benrather Tankstelle"; to the more recent development s. Baumbach/Hefermehl/*Köhler*, Kommentar zum Wettbewerbsrecht, 23. ed. (2004), § 3, margin 60 et seq.; § 4, margin 10.185 et seq., 10.192: as far as we can tell, the relation to the insurance supervision law has not been at issue, yet.

[110] Cf. only *H. Müller,* Versicherungsbinnenmarkt 1995, margin 652, 658; *Präve,* ZfV 1994, p. 199, 204.

cross-subsidisations, pointing out that §§ 53 c, 81b GISA provides sufficient protection.[111] The European Court of Justice required in the "Cipolla"-case[112] that the bans on price dumping competition for freelance professionals must comply with the strict ban on excess from the "Dijon"-doctrine. Accordingly, for this also applies to insurances[113], with regard to the VAG one must subscribe to the perspective which denies the ban of cross-subsidisation.

D. Law of Insurance Mediation

Recently, the Insurance Mediation Directive (IMD) of 2003 has brought about substantial innovations for the German private insurance law.[114] The directive was transposed into German law (§§ 42 a-k VVG former version) on 5/22/2007[115] – very behind schedule[116] – and was additionally amended in §§ 6, 59-68 VVG 2008. Within this text, only a limited number of subjects which are relevant to other branches of law should be addressed, highlighting the basic concerns of the directive and the transposed rules.

I. Basic concern of the Insurance Mediation Directive (IMD)

Art. 3 sec. 1 IMD states that an insurance intermediary and a reinsurance intermediary have to be registered with the supervising authority in their home Member State. According to sec. 3 of this provision the registration depends on professional requirements, being regulated under Art. 4 sec. 1 p. 1 IMD, which states that appropriate knowledge and ability must be proven. Additionally, duties to inform and to give suitable advice are regulated according to the European Insider Trading Directive[117], and must adequately correspond to the customer's requests and interest. For breaches of duties regulated by the directive, member states must provide appropriate penalties (Art. 8 sec. 3 IMD).

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[111] Prölss/*Kollhosser,* § 81, margin 34, 36; similar *Dreher,* VersR 1993, p. 1443, 1453; *Dreher,* ZVersWiss 1996, p. 499.

[112] Rs. C-94/04 and C-202/04 „Cipolla"Corpus 2007 I 82 no. 66-70; thereto *Kleine-Cosack,* NJW 2007, 1405 et seq.; *Herrmann,* EWS 2009, p. 10.

[113] As to generalisation for the law of architects see *Mailänder,* NJW 2007, p. 883 et seqq.; to the economic similarity of insurances and freelance professions see already *Akerlof,* Quartely Journal of Economics 1970, p. 488, 492; *Fleischer,* Informationsasymmetrie im Vertragsrecht (2000), p. 517; *Wein,* ZVersWiss 1997, p. 103, 104 et seq.

[114] Directive 2002/92/EC from 12/9/2002, Official Journal 1/15/2003 L 9/10; imprinted in *Herrmann/Wambach,* Erster Nürnberger Versicherungstag (2003), p. 145 et seqq.; bilingual display English-German accessible under http://eur-lex.europa.eu/Notice.do?mode=dbl&lang=en&ihmlang=en&lng1=en,de&lng2=bg,cs,da,de,el,en,es,et,fi,fr,hu,it,lt,lv,mt,nl,pl,pt,ro,sk,sl,sv,&val=283599:cs&page=

[115] Art. 4 sec. 2 of the *Gesetz zur Neuregelung des Versicherungsvermittlerrechts* (Act reforming the intermediaries' law) from 12/19/2006.

[116] The deadline for transposition ended on 1/15/2005 according to Art.16 sec. 1 IMD; thereto in detail *Herrmann.* DZWiR 2006, p. 309.

[117] Directive 93/22 EEC about investment services from 5/10/1993, Official Journal L 141/27; meanwhile substituted by the Directive 2004/39/EC from 4/30/2004, Official Journal L 145; to the similarity between the law of intermediaries and to the standards of conduct concerning investment services see Wambach/*Herrmann,* p. 79 et seqq.

Greater details which address the duties to inform are regulated in Art. 12 IMD, and define that both the insurance broker and the insurance agent has to inform the customer if there are cross ownerships with insurance undertakings prior to conclusion of the contract (sec. 1 lit. c/d), or if advice is given based on the "obligation to provide a fair analysis", (sec. 1 lit. e (I)), and if there is a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings (lit. e (II). In the first case, according to sec. 2, the broker is obliged to give advice based on the analysis of a sufficiently large number of insurance contracts available on the market, in order to make a recommendation which considers the insurance contract that would be adequate to meet the customer's needs. The obligatory orientation towards the customer's requests postulates that prior to conclusion of an insurance contract and in accordance with the information provided by the customer, first his demands and needs are specified and this is followed by an explanation of advice (sec. 3).

According to Art. 13 sec. 1 IMD all information shall be documented on paper or on any other durable medium that is accessible to the customer. Other modes of documentation may apply where the customer requests it, or where coverage is immediate. In these cases the documentation shall be provided to the customer immediately after the conclusion of the insurance contract. The same applies in case of selling telephones (Art. 13 sec. 2 and 3 IMD).

According to number 8 of the explanatory statement, the directive aims to achieve coordination of national provision of professional requirements for insurance intermediation and therefore contribute both "to the completion of the single market for financial services and to the enhancement of customer protection in this field". While English Law introduced a duty to enrol in a register in the 1970s, no such thing existed in Germany until 2007. In this instance duties to inform and to give advice had been developed by jurisdiction.[118] However, the duty to document all information was lacking, therefore the policyholder's prospect of claiming damages was minimal if he obtained insufficient advice or inaccurate advice regarding assets.[119]

II. Transposition into German law

In the meantime, the duties to enrol in a register and to inform have been transposed into German Law.[120] But a considerable number of ambiguous questions remain and can be solved correctly only by taking into account the roots of European Law.

1. Obligation to enrol in a register and professional requirements

According to § 11a GewO each *IHK* (Chamber of Industry and Commerce) has its own register for insurance intermediaries. The register aims to allow everybody, especially policyholders and insurance enterprises to review authorization and the scope of the

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[118] Cf. only BGH, VersR 1992, p. 217 under 1. d); *Römer*, VersR 1998, p. 1313; *Römer*./Langheid, § 159, margin 1 et seqq.; partly to a further extent, but without obligations to document, English Law cf. Basedow u.a./*Hodgin*, Anleger- und objektgerechte Beratung, Anforderungen an die optimale Beratung im englischen Versicherungsrecht (1999) 79, p. 86 et seqq.

[119] Especially instructive the example of the OLG Stuttgart from 6/9/2004, VersR 2004, p. 1161; thereto Wambach/*Herrmann*, p. 82 et seqq.

[120] See the section on German Insurance Law.

intermediaries' businesses who are obliged to enlist in a register. The competent authority is supervised by the highest regional authority. The *IHK* is a public body, committed to the public welfare and can therefore be regarded as a "competent authority" according to the Directive.

According to § 34d GewO in connection with the VersVermV (German Insurance Mediation Regulation)[121], intermediaries have to verify their knowledge and ability in a examination after concluding courses of at least 222 units á 45 min. When studying full-time it takes around one and a half semesters. Yet, it is more realistic to assume that studies occur simultaneously with a full-time job so that the duration of studying will likely be one to two years. The adequacy of the duration of this training is not questioned.

The exceptional rules are not simple to judge. According to Art. 4 sec. 6 IMD the Member States may reinforce the requirements to enroll in a register but they may not reduce the requirements or establish exceptions not already set out in the directive. The German legislator complies exactly with this, e.g. excluding insurance agents who are under a contractual obligation to conduct insurance mediation business exclusively with one insurance enterprise from the requirement of authorization by § 34d sec. 4 GewO if the insurance enterprise assumes full responsibility for his actions.[122]

However, it is different under § 34d sec. 9 no. 2 GewO, whereupon building associations or intermediaries being instructed by them are exempted, when insurances involved are part of building loan contracts and are concluded within the scope of a collective agreement. Moreover, according to this provision intermediaries dealing with residual debt insurance are also exempted from the requirement to enroll in a register and from the professional requirements. The literature legitimately criticizes both for violation of European Law.[123]

With reference to the provision addressing building associations, the underlying purpose[124] says that within the scope of collective contracts the insurance is part of the building loan. The argument against this is that regularly complex and risk life insurances that require advice are involved and that there are definitely alternatives to inclusion in the loan agreement.[125] The German provision seems to be based on a continued deep-rooted distrust of the competition between insurance products which was the intention of the European Law since the deregulation. Especially with regard to collective agreements, considerable effects and extensive restrictions on competition within the domestic market can be anticipated.

With regard to the exception for residual debt insurance, it is similar. According to the legislative background it is an insurance "sui generis" and therefore extra effort for registration and training is said not to be justified.[126] However, this conclusion is already logically inconsistent, since the need for advice increases rather than decreases in

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[121] From 5/15/2007, BGBl. I, p. 733.
[122] Likewise Art. 4 sec. 1, p. 3 IMD.
[123] Cf. *Reiff,* VersR 2007, p. 717; to the residual debt insurance also the statement of the Federal Association of the consumer advice centre from 4/7/2006, p. 16 cited according to *Reiff,* VersR 2007, p. 717.
[124] BT-Drucks. 16/ 1935 p. 20.
[125] Like this *Reiff,* VersR 2007, p. 717.
[126] BT-Drucks. 16/ 1935, p. 20.

extraordinary cases.[127] It may be too strong[128] a statement to say that the legislator intentionally violated European Law to keep a distribution channel open[129], but this is not the crucial point. In all instances, it does not comply with the central concerns of the IMD, that the publicity effect of professional and mediation requirements are the most effective means of consumer protection because they create competition in domestic markets.

Furthermore, § 34d sec. 3 GewO regulates that there is an exception applicable to persons who do not mediate insurances on a regular basis[130], but who distribute insurances in addition to their principal profession (so-called accessoriness of products). This is in accordance with Art. 2 no. 7 IMD which requires that insurance mediation complements the goods or services that are supplied within the framework of the principal profession. Moreover, according to the legislative background the criteria of additional products (accessoriness of products) are exceptional cases and have to be interpreted restrictively.[131] However, it is not questioned that automobile traders who mediate third party automobile insurances or automobile collision insurances in connection with this profession do not need authorization.[132] On the other hand, the mediation of life insurances in connection with the allocation of loans by a bank is clearly not free of authorization. It is controversial if the same also applies to the distribution of insurances as a component of a financing plan, thus for the basic business unit of the so-called 'pyramid selling'.[133] In favour of an activity not requiring authorization, it is referred to the factual interrelation between the financial product and the insurance offer and to the standardized distribution of this component.[134] However, this is not crucial for the restrictive interpretation demanded here. In fact it can only be spoken of as a complementary activity if the principal product is not one of the insurance business. However, by all means this does not apply to many financial plans, if the premium level and the conditions of the insurance in terms of competition of the financial products being involved do not play only a totally subsidiary role. In this respect, a considerable need to provide advice emerges that the IMD wants to support where the turnover is traditionally made by 'pyramid selling'.

2. Duty to Inform and provide Advice under the VVG

According to the VVG numerous questions are unsolved which are being connected to the principal concern of the IMD. Again due to space restrictions only examples can be provided.

a) Consistent Sanctions for Incompliance with Obligations

The transposition of the required sanctions according to Art. 8 sec. 3 IMD, § 63 VVG (and § 42 e VVG former version respectively), set out that in the event of a violation of

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[127] *Reiff*, VersR 2007, p. 717: „Nebel der Gesetzesbegründung" (fog of underlying reasons).
[128] Exercise of influence of credit insurers at least is not published.
[129] ibid.
[130] Waiver according to § 32d sec. 9 no. 1 GewO.
[131] BT-Drucks. 19/1635, p. 19; *Beenken/Sandkühler*, p. 37.
[132] The same applies to mediation of an insurance policy for glasses if glasses are bought, *Beenken/Sandkühler*, p. 37.
[133] Dissenting *Reiff*, VersR 2007, p. 717; *Beenken/Sandkühler*, p. 178.
[134] See the references in *Reiff*, VersR 2007, p. 717.

provisions of the duties to inform or to give advice, claims for damages shall be provided. However, damages cannot be claimed for violation of the obligatory documentation requirement according to § 62 VVG (and § 42d former version respectively). The literature regards this as a loophole which can not be filled by § 311 BGB (culpa in contrahendo) since the law of insurance intermediation is said to be regulated conclusively.[135]

This somehow stands in contrast to § 6 sec. 3 VVG, referring to the entire sec. 1, and also to sec. 1 p. 2 which regulates the obligatory documentation requirement. The contradiction is intensified by § 6 – which unlike the IMD – regulates the duty of insurance enterprise to give advice, but according to sec. 6 p. 2 exempts cases where the contract is mediated by a broker.[136]

As an underlying reason and in order to close this gap the IMD can be consulted. As has already been described the requirement of sanctions under Art. 8 sec. 3 IMD is regulated without exceptions for the provision governing documentation. Indeed, it is only required that the sanctions are appropriate, which might imply that it is sufficient if the German law provides disadvantages such as the burden of proof in case of violations of obligatory documentation requirements. In some cases mere disadvantages such as the burden of proof are not considered appropriate sanctions. For example, a legal action based on the violation of duties to inform can be considerably delayed if the advice documentation is missing and after a long period of time it turns out that the action must be based on the distribution of the burden of proof.

b) Intermediaries' Obligations, Changes to Sales and Distribution and Competition of General Conditions of Insurance

In the preceding sections it has already been pointed out that the IMD aims for structural changes. Instead of widespread door-to-door brigades, the sales and distribution department shall adjust to become responsible for information and advice shall be given by adequately educated intermediaries. This is already present in the purpose of the IMD, which not only aims to harmonize the legal systems of the Member States, but also for consumer protection. With respect to the transformation of German Law, extraordinary importance has been attached to this basic concern of the Directive.

It has to be emphasized here that pyramid selling cannot be exempted from the obligation to enrol in a register or from the crucial professional requirements. In particular, duties to advise have to be regulated and enforced where marketing and sales concepts aim to supply large numbers of customers in a standardized way, dispensing with individualized (suitable) customer related advice. As a matter of course, the new concepts also focus on rationalisation and automatism, which is also done by discount brokers with reference to investment advice.[137] According to the correct but disputable opinion, there is no general waiver from standards of conduct under § 31 WpHG.[138]

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[135] *Marlow/Spuhl,* p. 29.
[136] Probably as well *Marlow/Spuhl,* p. 28.
[137] Cf. only Schimansky/Bunte/Lwowski/*Kienle* Bankrechtshandbuch, 2. ed. (2001) volume III, § 110, margin 48.; to the according duties to advise concerning insurance law and bank law see Wambach/*Herrmann,* p. 79, 87 et seqq.
[138] See Assmann/Schneider/*Koller,* Wertpapierhandelsgesetz, 4. ed. (2006) before § 31, margin 135 et seq.; *Köndgen,* ZBB 1996, p. 361, 365; Schwark/*Schwark,*

The requirement of consistent sanctions for breaches of duty, originally based on reasons of European Law, point to a change of sales and distribution. Again it has to be emphasized that it should be possible not only to claim damages for breach of the duties to inform, to advise, and to warn but also for breaches of documentation requirements. Mere disadvantages caused by the burden of proof, although of considerable practical importance for a trial cannot be regarded as appropriate sanctions according to Art. 8 sec. 3 IMD.

Moreover, proof that competition of general terms of insurance on the domestic market is intended by submission of information, is independently and extensively important. The literature has already acknowledged for a long time that consumer information demanded by Third Directives deregulation is based on the concept of a 'responsible consumer'[139] and a 'consumer willing to get information'[140].[141] With respect to the underlying reasons for the draft of the VVG 2008 it is emphasized that it has to comply with the needs of modern consumer protection and therefore act on the requirements of functional competition.[142] However, it is not always recognized that with this purpose, the older and still prevailing opinion is abandoned, which assumes that the customer generally does not read or understand the fine-print clauses and therefore creating a competition of clauses is not intended by the reviewing general terms and conditions.[143] But there are also voices at least implicitly holding the view that the competition of clauses is operative[144] and is at least possible where duties to inform and to advise are involved and where the crucial content is summed up in a product summary sheet.[145] That such an information sheet is now obligatorily required for consumers according to § 4 VVG-InfoV[146], in addition to the general terms of insurance, it cannot be

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Kapitalmarktrechtskommentar, 3. ed. (2004), § 31 margin 65 et seqq.; however different opinion BGH 10/5/1999, BGHZ 142, p. 345, 355; Schimansky/Bunte/Lwowski/*Kienle* Bankrechtshandbuch, 2. ed. (2001), volume 3, § 110, margin 48; Horn/Schimansky/*Nobbe* Bankrecht 1998 (1999), p. 235, 253.

[139] Cf. only *Marlow/Spuhl*, p. 9.

[140] Especially cf. BGH 10/20/1999, NJW-RR 2000, p. 1490: the alertness of the average customer in the same situation; thereto *Emmerich*, Unlauterer Wettbewerb, 7. ed. (2004), p. 266; *Herrmann*, Wirtschaftsprivatrecht BGB/HGB (2007), p. 200.

[141] In particular to the customer information cf. already *Grundmann*, JZ 2000, p. 1133, 1143; *Fleischer*, ZEuP 2000, p. 772, 777 et seq.; Prölss/*Präve*, § 10a, margin 1.

[142] BT-Drucks. 16/3945.

[143] Cf. – in detail – *Drexl*, Die wirtschaftliche Selbstbestimmung des Verbrauchers (1998), p. 485 et seqq.; *Basedow*, VersR 1999, p. 1045, 1046; *Rehberg*, Der Versicherungsabschluss als Informationsproblem, Diss. Berlin 2003, 39 et seqq. with empiric information, 43 et seqq.; *Schäfer/Lwowski*, Konsequenzen wirtschaftsrechtlicher Normen, Theorie der AGB-Kontrolle (2002), p. 279, 305 et seqq.

[144] Cf. only *Schwintowski*, Der private Versicherungsvertrag zwischen Recht und Markt (1987), p. 161; Basedow/Meyer/Rückle/*Schwintowski*, Transparenz und Verständlichkeit, Berufsunfähigkeitsversicherung und Unfallversicherung – Das Transparenzgebot im Privatversicherungsrecht (2000), p. 85, 89.

[145] Cf. only *Römer*, VersR 2007, p. 618: Introductory sheet to the general conditions of insurance; similar also *Schimikowski*, r+s 2007, p. 133; Statement of the Association of German Insurers of the hearing in the committee of legal affairs on 3/28/2007, p. 26 cited according to *Marlow/Spuhl*, Das neue VVG kompakt, 2. ed. (2007), p. 11.

[146] From 12/18/2007, BGBl. I 2007, p. 3004.

doubted that the information processing by the customer is intended to support competition of clauses on the domestic market as intended by European Law.[147]

In addition to this, it should be considered that once the IMD has been transposed, competitive information processing will have to be performed under the guidance of the insurance intermediary providing advice.[148] As a rule, an isolated decision without supporting advice is no longer required.[149] Indeed the product information sheet according to § 4 VVG-InfoV shall be composed to enable the policyholder to understand the content even without advice. The competitive decision intended by law should begin with the exclusion of benefits and risks according to § 4 no. 4 VVG-InfoV and its consideration in terms of additional premiums or reduction of premiums. Despite this, in the end this can only be evaluated by a qualified intermediary.

Therefore, it can also be assumed that intermediaries will base their information and advice not only on particular clauses from the general conditions of insurance, which is too time-consuming to read in its entirety, but also on the product summary sheet. It is reported from the ombudsman's practical experience that even in 2007 standard forms have been developed, which assist to ensure intermediaries do not leave out anything and which guard against any reproach for failure to fulfil the duty to give advice.[150] However, coordination of these supporting forms according to the product summary sheet to some extent seems to be self-evident, particularly because reference to the sources of information within the general conditions of insurance is explicitly required.[151]

3. Conclusions for the German Law

The view held here on the competitive intensions of the IMD is that it has far-reaching impacts on the German intermediary law and on the provisions involved. Primarily it applies to rules concerning advice, whose scope has already been discussed. Also concerning the scope of duties it has already been referred to the relation to market and competition of the Suitability-Doctrine which is based on the law of investment advice.

a) Exclusions of Advice

Making no claim to be complete, it must be added that the composition of the broker's duties to inform about a limited range of insurance products and insurers under § 60 sec. 1 p.

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[147] Already previously to the principle of transparency under § 307 sec. 1 p. 2 and the basis of European Law, the Unfair Terms in Consumer Contracts Directive from 4/5/1993 (1993/13/EEC, Official Journal L 95/29 from 21.4.1993.) *Herrmann*, DZWiR 1994, p. 45 et seqq.; p. 95 et seqq.; 2004, p. 45 et seqq.

[148] This coherence is also recognized by *Römer*, VersR 2007, p. 618 to I.; cf. also *Franz*, DStR 2008, p. 303, 305; Wambach/Herrmann/*Wilkens*, p. 111, 119 et seq. with reference to the information sheet with key features according to no. 6.5 of the Sourcebook Conduct of Business in the handbook of the Financial Services Authority, accessible under http://www.fsa.gov.uk/.

[149] There are some exclusions of advise.

[150] *Römer*, VersR 2007, p. 618 et seq. to III.

[151] Emphasis in the underlying reasons to § 4 VVG-InfoV imprinted in VersR 2008, p. 183, 190.

2 VVG (§ 42b sec. 2 p. 2 VVG former version) is influenced by this systematic interrelation. It is particularly relevant in practice where a broker is unwilling to include direct insurers in his analysis since he will not receive a brokerage fee from them.[152] The provisions mentioned allow that the advice will only be based on an analysis of a limited range of insurance products and insurers exclusion where a broker expressly communicates it. The direct insurers exclusion does not have to be communicated individually, merely a description of the class of offerors[153], e.g. direct insurers, is sufficient. Moreover, due to the term "expressly" in § 60 sec. 1 p. 2 VVG (§ 42 b sec. 2 p. 1 VVG former version) an extra statement which is presented textually separate from other contractual modalities is not necessary. The legislator requires this only for cases under sec. 2, where there is a waiver of information by the policyholder, a separate written statement is required.

But it goes too far if the exclusion notice is included in the general terms and conditions of the broker. For the ban of surprise under § 305 c sec. 1 BGB conflicts with such a restricted market selection due to the crucial importance of competition of such an exclusion, even when the exclusion clause is clearly highlighted in the text and is placed in a adequate position. It is a case of the ban of 'surprising attacks'.[154] The exclusion of this important market segment does not comply with the policyholder's expectation, since he does not know that the direct insurers do not pay the brokerage fee. Moreover, he does not have to anticipate that the broker's interest in the brokerage fee is decisive. This can be concluded explicitly from § 60 sec. 1 p. 1 VVG (§ 42 b sec. 2 p. 1 VVG former version), whereby advice has to be based on professional criteria and not on the personal interests of the broker.[155]

b) Provision of Advice provided in good time and Product Summary Sheet

For the law of consumer information, conclusions can be drawn regarding the communication with the customer and the new product summary sheet in good time prior to contract conclusion. Fundamental results are:

Consumer information can be submitted in good time if the intermediary hands it over and there is an opportunity to include the crucial information during the advising of the customer. As a result, a second visit of the intermediary is unnecessary.

The product summary sheet must be provided during the advisory service. Therefore, the transparency requirements of the general terms and conditions can be lowered slightly to avoid excessive impacts which interfere with competition. On the subject of the *Zillmerung* contrary to the *BGH*[156] the view can no longer be held that – prior to conclusion of the contract – the insurer must advise the policyholder on the fact that he must expect a surrender value of zero during the first years if he terminates the contract due to the *Zillmerung*. This could be accomplished during advisory service, because the time can be used to explain the correspondence between the proportional decrease of intermediation costs and sales costs over

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[152] Cf. *Marlow/Spuhl*, p. 143.
[153] Cf. *Marlow/Spuhl*, p. 143.
[154] Cf. only BGH from 9/29/1983, NJW 1984, p. 171, 173 – "fixed price clause"; BGH from 5/17/1982, BGHZ 84 109, 112 et seqq.; MüKo/*Basedow*, § 3 AGBG, margin 10; *Herrmann*, Grundlehren BGB/HGB (2006), p. 181 et seq.
[155] Thereto see again *Marlow/Spuhl*, p. 141.
[156] BGH from 5/9/2001, VersR 2001, p. 841; partly critical *Präve*, VW 2002, p. 1836, 1838; *Herrmann*, VersR 2003, p. 1333,1337 et seq.

the following years. However, it does not have to be expressed as a requirement of transparency in the general conditions of insurance, deterrence of enterprises using the method of *Zillmerung* would be the inevitable consequence.

E. EU- Block-Exemption fromAnti-Trust Law

Literature: *Adel,* Deregulierung der Versicherungswirtschaft durch die Gruppenfreistellungsverordnung der europäischen Kommission, ZVersWiss 1994, p. 77; *Basedow/Schwark/Schwintowski,* Informationspflichten, Europäisierung des Versicherungswesens, Anerkannte Grundsätze der Versicherungsmathematik (1995); *Baudenbacher,* Neueste Entwicklungen im europäischen und internationalen Kartellrecht (ikf 2003); *Bechtold,* Grundlegende Umgestaltung des Kartellrechts: Zum Referentenentwurf der 7. GWB-Novelle, DB 2004, p. 235; *Brinker/Schädle,* Versicherungspools und EG-Kartellrecht – Erste praktische Erfahrungen mit der neuen Gruppenfreistellungsverordnung für den Versicherungssektor, VersR 2003, p. 1475; *Brinker/Schädle,* Kartellrechtliche Marktabgrenzung in der Versicherungswirtschaft, VersR 2004, p. 673; *Bunte,* Eine Gruppenfreistellungsverordnung für die Versicherungswirtschaft, WuW 1992, p. 893*; Dreher,* Das europäische Kartellrecht der Mitversicherungsgemeinschaften, Festschrift Immenga (2004), p. 93; *Dreher,* Die kartellrechtliche Abgrenzung der Mitversicherung im Einzelfall von der Bildung einer Mitversicherungsgemeinschaft, Festschrift Larenz (2004), p. 211; *Emmerich,* Kartellrecht, 9. ed. (2001); *Europäische Kommission,* Bericht an das Europäische Parlament und den Rat über die Anwendung der VO (EWG) Nr. 3932/92 v. 12.5.1999-Komm (1999), 192 endg., accessible under http://ec.europa.eu/comm/competition/antitrust/ins_rep1999_de.pdf; *Europäische Kommission* Leitlinien zur Anwendung von Art. 81, ABl. 2004 C 101/97; *v. Fürstenwerth,* EG-Gruppenfreistellungsverordnung für die Versicherungswirtschaft, WM 1994, p. 365; *Herrmann,* Die Gleichgewichtskontrolle in der EU-kartellrechtlichen Freistellung von Muster-AVB – Von der Europäisierung zur neuen rechtlichen Ordnung Europas, Festschrift Schirmer (2005), p. 199; *Hirsch/Montag/Säcker,* Münchener Kommentar zum Europäischen und Deutschen Wettbewerbsrecht (2007); *Hollenders,* Die Bereichsausnahme für Versicherungen nach § 102 GWB, Diss. 1985; *Hübner,* Rechtliche Rahmenbedingungen des Wettbewerbs in der Versicherungswirtschaft – Eine vergleichende Untersuchung zu den Rechtsordnungen Großbritanniens, Frankreich, der Schweiz und der Vereinigten Staaten von Amerika Rechtliche Rahmenbedingungen des Wettbewerbs in der Versicherungswirtschaft (1988); *Immenga/Mestmäcker,* Kommentar zum Europäischen Kartellrecht, 4. ed. (2007); *Kirscht,* Versicherungskartellrecht: Problemfelder im Lichte der Europäisierung (2003); *Kahlenberg,* Die EG-Gruppenfreistellungsverordnung für die Versicherungswirtschaft, WuW 1994, p. 985; *Königs,* Die VO 1/2003, DB 2003, p. 755; *Martinek/Habermeier,* Das Chaos der EU-Gruppenfreistellungsverordnungen, ZHR 158/1994, p. 107; *Lichtenwald,* Kooperation auf dem Gebiet der Versicherungswirtschaft aus EU-kartellrechtlicher Sicht, VR 1993, p. 317; *Römer,* Der Prüfungsmaßstab bei der Misstandsaufsicht nach § 81 VAG und der AVB-Kontrolle nach § 9 AGBG (1996); *Schnelle/Bartosch/Hübner,* Das neue EU-Kartellverfahrensrecht (2004); *Schroeter*/Jakob/Mederer, Kommentar zum Europäischen Wettbewerbsrecht (2003); *Schümann,* Die Gruppenfreistellungsverordnung Nr. 3932/92 für die Versicherungswirtschaft (1998); *Stanke,* Vorsicht beim Informationsaustausch! VW 2004, p. 1479; *Vernimmen,* Die Gruppenfreistellungsverordnung für die Versicherungswirtschaft, VW 1993, p. 559; *Wagner,* Der Systemwechsel im EG-Kartellrecht, WRP 2003, p. 1369; *Wiedemann,* Kommentar zu den Gruppenfreistellungsverordnungen des EG-Kartellrechts (1998); *Windhagen,* Die Versicherungswirtschaft im europäischen Kartellrecht, Diss. 1996.

The following section deals with the European insurance anti-trust law, as there are special rules for the insurance law. In the centre of this discussion is the EU Block Exemption Regulation of 2003. A complete comment on the block exemption regulation cannot be achieved[157], but instead an overview can be provided, enabling orientation for the reader who is primarily interested in private law and in clarifying the connection of anti-trust law and economic private law.

I. Question of the exceptions to the legal scope of article 81 ECT

The European Cartel Ban requires that competition is restricted or shall be restricted by agreements of enterprises, by the decisions of enterprise associations or by coordinated modes of behaviour. For both the subjects of behaviour and the modes of behaviour, there are

[157] But see Immenga/Mestmäcker/*Veelken,* part 1, GVO Versicherungen, p. 1113 et seqq.; Hirsch/Montag/Säcker/*Herrmann,* volume 1, Versicherungs-GVO, p. 1050 et seqq.

wide-range ongoing questions, which must be referenced within the general commentary of literature addressing anti-trust law. There are specific problems in private insurance law that occur only in terms of the legal scope of the cartel ban and the block exemption regulation.

1. The Fire Insurance Judgment of the European Court of Justice 1987

Since the judgment of the European Court of Justice in 1987 on fire insurance[158] it has been clarified that the European Law contains neither implicit exceptions for the legal scope of insurance cartels or other restrictions of competition by insurance enterprises, nor can there be deviation from national laws of supervision addressing exemptions for the legal scope. The judgment also complies with the newer jurisdiction which deals with exemptions for the legal scope of freelance professions, because it has been established that Art. 81 ECT does not apply only where the state authority has reserved final decisions for a specific provision.[159] According to the prevailing opinion, legal supervision of freelance trade associations by the supervisory authorities is insufficient for inapplicability of Art. 81 ECT.[160] Accordingly, insurance controls which go beyond mere legal supervision especially in regards to deficiencies, also do not have sufficient authority to control. Therefore, the EU anti-trust law is not displaced.

2. Scope

This applies equally to private insurance enterprises and to insurance enterprises which are subject to public law. Even substitute insurances are subject to anti-trust law, though they are functionally allocated to the social insurance system. Only genuine social insurance carriers and compulsory health insurance funds according to the Imperial Insurance Code (RVO) are excluded, as their legal relationship is regulated entirely by the SGB.[161] However, there are also important counter-exceptions, according to Art. 81 ECT, namely where the social insurer operates like an enterprise; demanding remedies, auxiliary means or hospital services.[162] As long as cartel or other restraints on competition can be practised, Art. 81 et seq. ECT applies. For it is completely unacceptable that the state depending on the legal form granted to its economic activities has a right to choose between public law and private law basing the decision on whether anti-trust law applies or not.[163] According to Art. 86 sec. 2 p. 1 ECT (former Art. 90) this only differs if special duties are legally transferred to the state

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[158] Rs. C-45/85 Corpus 1987 405 – „Verband der Sachversicherer“.
[159] European Court of Justice 19/2/2002 Rs. C-35/99 „*Arduino*“ Corpus 2002 I, p. 1529 = NJW 2002, p. 882.
[160] Cf. only *Kilian,* WRP 2002, p. 802, 807; *Römermann/Wellige,* BB 2002, p. 633, 637; different opinion *Eichele,* EuZW 2002, p. 182, 183; *Lörcher,* NJW 2002, p. 1092, 1093; *Hartung,* EWS 2002, p. 133.
[161] Cf. only European Court of Justice 3/16/2004, Corpus 2004 I, p. 2524, 2542 et seqq.; *Emmerich,* § 31 with further references.
[162] Cf. only – elementary – BGH from 3/12/1991, BGHZ 114, p. 218, 221 et seq., regarding assignment of carriers; Immenga/Mestmäcker/*Emmerich,* § 130, margin 25.
[163] Cf. – beside the references in the previous footnot – *Immenga,* AG 1998, p. 547, 551; *Möschel,* Recht der Wettbewerbsbeschränkungen (1983), Tz. 107; however different opinion *T. Schwarz,* Die wirtschaftliche Betätigung der öffentlichen Hand im Kartellrecht (1969).

or its enterprises by exception and it is impossible to comply with these duties without violating the provisions of anti-trust law.[164]

Examples of anti-trust law practices against insurance enterprises are supervision of deficiencies performed by the *BKartA* (Federal Cartel Office) with regards to recommendations for conditions that unnecessarily disadvantage customers[165], interference with premium adjustment clauses that pass one-sided risks to policyholders[166], recommendations for excessive premiums on household insurance[167] or recommendations for rates too low for rental cars, resulting in situations where automobile insurers discriminate against rental agencies and businesses with loaner vehicles in cases of damage reimbursement[168].

Today, as far as activities are concerned which are related to co-operations exempted by the GVO, the capability of the Competition Council to interfere with these regulated activities must to be taken into account.

II. The Block Exemption Regulation of Insurances from 1992 and 2003[169]

As has already been mentioned, after the Fire Insurance Judgement of the European Court of Justice in 1987, which disapproved of implicit exceptions from anti-trust law, the Commission subsequently received more than 300 registrations from insurance co-operations. Therefore it seemed to be adequate to solve this "mass-problem"[170] by way of a regulation. Firstly, the European Council on the 5/31/1991 enacted a regulation addressing authorization.[171] The block exemption regulation number 3932/92 from the 12/21/1992 (GVO 1992) [172] followed regulating the right of exemption from its effective date until 2003.

Herein, the scope of authorization was not fully exhausted, for sufficient experience was lacking according to the controversial opinion[173], but instantly it was referred to another block exemption regulation in the future.[174] With the new block exemption regulation of 2003 enacted more than 10 years later and coming into effect for seven years on the 4/1/2003 until the 3/31/2010 according to Art. 12, this announcement turned into reality. However,

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[164] Cf. only Immenga/Mestmäcker/*Emmerich*, p. 130, margin 27 et seq.; consenting KG WuW/E OLG 5821, 5838.
[165] Thereto – however to the previous law – *Hollenders*, p. 325 et seqq.
[166] BKartA TB 1983/1984, p. 111 – „Carpartner".
[167] BKartA TB 1989/90, p. 118.
[168] BKartA, TB 1991/92, p. 140.
[169] Regulation of the Commission concerning applicability of Art. 81 sec. 3 ECT to groups of agreements, decisions or coordinated modes of behaviour in the insurance sector, 2/27/2003, 358/2003/EC Official Journal L 53; imprinted in *Prölss* appendix I, p. 1714 et seqq.
[170] No. 7 of the underlying reasons of Regulatin 1534/91; similar already Kom., 19. Wettbewerbsbericht 1989, Tz. 30.
[171] Regulation 1534/91 from 5/31/1991 concerning applicability of Art. 85 sec. 3 ECT to groups of agreements, decisions or coordinated modes of behaviour in the insurance industry Official Journal L 143/1.
[172] Official Journal L 143/1.
[173] Regarding doubts cf. only *Bunte*, WuW 1992, p. 893, 894.
[174] Kom. Dok. IV/1004/92-D Tz. 3; see also 22nd competition report 1992, Tz. 276.

practically important exemptions for agreements on common claims processing[175] as well as preparation of indexes and information exchange for increased risks were left out[176]. Therefore, the agreement framework of insurers with suppliers is still risky in regards to the conditions which apply to the suppliers' actions in relation to the policyholder.[177] There is merely a letter of comfort for the cases of agreements concerning direct regulation between third party liability insurers.[178] Since 2004, there has been a new regulation under Art. 1 lit. d, which is based on Art. 1 subsection1 lit. of the regulation of authorization.

Four content of agreements are still exempted: common risk premium tariffs, based on mutually agreed statistics or on claims history; the making of samples for general conditions of insurance; corporate coverage of special kinds of risks and scrutinizing and acknowledgement of security measures. Compared to the previous version of the block exemption regulation, these regulations are more detailed and precise, resulting in a partial tightening but also a partial facilitating and above all effecting greater legal certainty. Against the background of individual exemptions cases which are cancelled and the risk for enterprises related to it, this legal change has to be appreciated. Moreover, due to the cancellation of the previous "white clauses" the strait jacket effect[179] no longer applies, having been frequently criticized with respect to other block exemption regulations.[180] Now, there are only "black clauses" (so-called basic restrictions)[181]. The Commission's approach is more economically oriented and geared less towards regulations.[182] However, the idea that "generally everything is allowed which is not expressly forbidden"[183], is too exaggerated a statement, since the "black clauses" and the reasons for cancellation cannot be regarded as a final catalogue.

III. Overviews

The subject of exemptions found in Art. 1 GVO can be outlined as follows:

"Agreements" are covered, but according to Art. 2 no. 1 are expressly on equal terms with decisions of an association of enterprises and with coordinated modes of behaviour. In the case of a mere recommendation from the association director, it can be regarded as a

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[175] Cf. *Brinker/Siegert*, VersR 2006, p. 30, 34.
[176] But the regulation under Art. 1 lit. b, based on Art. 1 sec. 1 lit. f of the regulation addressing authorization is new.
[177] Also *Brinker/Schädle,* VersR 2003, p. 1475, 1476 with reference to long-term experience in Great Britain. Art. 81 sec. 3 can be applied directly (Art.1 sec. 1 Regulation 1/2003 from 12/16/2002 concerning implementation of the rules of competition regulated under Art. 81 and 82 Official Journal 2003 L 1/1).
[178] Schroeter/Jakob/Mederer/*Schumm*, margin 44-47.
[179] *Brinker/Schädle,* VersR 2003, p. 1475, 1476; „straitjackets forcing agreements" without explicit economic basis *Korah,* Cases and Materials on EC Competition Law (2006), p. 357.
[180] Cf. only *Wiedemann,* Kommentar zu den Gruppenfreistellungsverordnungen des EWG-Kartellrechts (1990) I, p. 33.
[181] GVO F&E no. 7 of the underlying reasons; GVO Spezialisierungsvereinbarungen, no. 5 of the underlying reasons 5.
[182] Press release of the Commission, accessible under http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action. gettxt = gt&doc = IP/02/10.htm.
[183] *Brinker/Schädle,* VersR 2003, p. 1475, 1476.

decision of the association if the articles of association indicate that the members have granted general authorization.[184]

Firstly, the exemption applies to corporate calculation of average costs based on the statistical number of claims and particular insured risks according to Art. 1 lit. a, 3-4 GVO. Frequency tables such as mortality, frequency of diseases, invalidity and accidents should all improve the insurers' knowledge of risks and therefore facilitate risk assessment. The same applies to corporate studies on probable impact of factors involving considerable risk according to Art. 1 lit. b GVO. However, the impacts have to be based on general circumstances beyond the sphere of influence of the involved enterprise, for example the trends for future development of claims and impacts of franchising on the development of claims. However, the study of future development of costs and benefits is not exempted. As it is necessary for industrial open price systems[185], information has to be restricted to general and anonymous data and must not be connected with internal factors of calculation.[186] Otherwise the scope of competitors' will be more appreciable than it is necessary for statistical reasons and therefore accessible for coordinated behaviour according to Art. 81 sec. 1 ECT.

The purposes of the sample *AVB* according to Art. 1 lit. c/d, Art. 5-6, Art. 10 lit. b GVO are only partly consensual. Generating statistics on the associations and recommendations of net premiums is facilitated by improved comparison on the benefit scope of insurance enterprises.[187] At the same time, transparency for consumers is enhanced which enables an organizing of selection on the market that is targeted towards the fundamental differences of insurance offers.[188] However, this only in part matches the exemption according to Art. 10 lit. b which can be revoked if the *AVB* sample causes a substantial imbalance of rights and obligations. Besides transparency protection, the Commission has the ability to control content. Undisputedly, both the impact of competition and consumer protection is considered in the purpose of the rule, but there is controversy over the scope of attention given the politically intended objective of consumer protection.[189] It is seldom adequately considered that the control competence for content constitutes a unique feature of anti-trust law and therefore should be interpreted rather narrowly. At any rate, with regards to the primary purposes of the exemption features of Art. 6, primary intentions are recognized concerning the open behaviour of market participants for competition are concerned, such as preventing organized behaviour (sec. 1, lit. a, b, subsection 2, 3 and 5) or assuring flexibility of the policyholders on the market (sec. 1 lit. d-j).

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[184] European Court of Justice, Corpus 1987, p. 447, 455 no. 32 – „Verband der Sachversicherer"; *Hootz* Gemeinschaftskommentar GVO, Versicherungswirtschaft VO 358/2003 Art. 1, margin 8.

[185] Cf. only European Court of Justice, Corpus 1998 I, p.3138, 3161 – „J. Deere"; *Emmerich,* § 37, 8a with further references.

[186] In detail Art. 3 (1) lit. c, (2) lit. a.

[187] Cf. *Vernimmen,* VW 1993, p. 559, 560.

[188] Thereto especially no. 7 of the underlying reasons of GVFO 1992; Baudenbacher/*Honsel,* p. 215, 218; Basedow/Schwark/Schwintowski/*Schumm,* Die Gruppenfreistellungsverordnung für die Versicherungswirtschaft , p. 75, 81.

[189] Vgl. nur Immenga/Mestmäcker/*Veelken,* GVO 199, 2 part H margin 6: „primär wettbewerbsbezogene Regelung"; different opinion Beckmann/Matuschke-Beckmann/*Präve,* § 10, margin 45 et seq.:"verbraucherschützende Seite" des Wettbewerbsrechts.

The exemption of co-insurance and co-counter-insurance associations facilitates market access for enterprises which are – due to their size – unable to cover large, infrequent or novel risks. On the other hand, joint risk coverage naturally requires uniform conditions for insurance and gross premiums so that the remaining competition between those involved is affected. Therefore, in Art. 7 sec. 2 lit. a/ b the barrier of market share is 20 and 25% respectively for the co-insurance- and co-counter-insurance associations, instead of the respective 10 and 15%[190] which was present until now. Experiences with previous rules have suggested an easing of the rules over time.

According to Art. 1 lit. f, 7-8, the exemption of cooperatives from safety precautions under theGVO applies only to devices and not to services such as e.g. monitoring procedures. It aims to standardize security standards in Europe in order to concentrate competition between more homogenous products and to intensify competition by reducing excessive product variety.[191] However, regulations on the level of the European Community prevail where traditional legislation is concerned or in case of standardizations of associations.[192] The danger of discrimination, inobjectivity, and disproportionality should be counteracted by the requirements for exemptions under Art. 8, insofar as considerable artificial barriers could be established for market access.[193]

[190] Art. 11 (1) lit. a/ b GVO 1992.
[191] No. 15 – 17 of the underlying reasons.
[192] Cf. Art. 9 lit. l.
[193] Underlaying reason no. 17 et seq.; thereto *Vernimmen*, VW 1993, p. 559, 562 et seq.