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**SUMMARY OF THE CCBE POSITION
ON THE ISSUE OF FREE CHOICE OF LAWYERS
IN LEGAL EXPENSES INSURANCE**

Conseil des barreaux européens – Council of Bars and Law Societies of Europe

association internationale sans but lucratif

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(I) Introduction

On 15 May 2008, the Austrian Supreme Court for civil and criminal matters lodged a reference for a preliminary ruling before the European Court of Justice (ECJ). The questions referred to the ECJ relate to Article 4 of Directive 87/344 on legal expenses insurance¹. In summary, the question is whether so-called 'mass torts clauses' in legal expenses insurance are permitted, even though such clauses allow insurers to select a lawyer for the insured persons, thus restricting the insured persons' right to choose their own lawyer.

Article 4 of the Directive grants insured persons the freedom of choice of lawyers in legal proceedings as well as in administrative proceedings and in any case when a conflict of interests may arise.

Section 158 k VersVG (Austrian Code of Insurance Contracts) fully implemented Article 4 of the said Directive in Austria by granting the freedom of choice of lawyers in general, irrespective of whether a conflict of interests may arise. This way of implementing the Directive in Austria is considered as being in compliance with the Directive, since it is still left to a Member State to grant more rights to the insured persons than the Directive does.

Article 6.7.3 ARB² 1995 (the insurance term in dispute) restricts the freedom of choice of lawyers provided for in Article 4 of the said Directive and implemented by Section 158 k VersVG in Austria.

(II) CCBE's position on the issue at stake

- Going back to the initiative which resulted in the Directive and studying what the Directive aimed at, it is very clearly to be seen that the Directive's intention was to avoid any possible conflict of interests in any case (see ABL NRC 198 of Aug 7th 1979, 2; ABL nr C 260 of Oct 12th 1981, 78³)
- Any narrowing and/or restriction of the consumers' freedom of choice of lawyer (as provided for in the said Term) is in complete contradiction to all EU-wide as well national efforts to improve the legal protection of consumers.
- According to the Notice of the Commission of March 13, 2007 (COM 2007/99), consumer protection in Europe is to be improved, especially in the area of access to justice and the legal protection of consumers.
- According to the Suggestion of the Commission for the Directive "Solvabilität II" of July 18, 2007, (COM 2007/361), Article 4 of the said Directive (Legal Expenses Insurance) will not be changed, although the number of cases of "mass-claims" has increased since the days when the Directive was first adopted in 1987.
- The German Federal Ministry of Justice recently suggested an amendment of the German Code for Insurance Contracts entitling insurance companies (under certain specified conditions) to choose the lawyer for insured persons. However, this suggestion was refused, the proposed

¹http://eurlex.europa.eu/smartArticleapi/cgi/sga_doc?smartArticleapi!celexplus!prod!DocNumber&type_doc=Directive&an_doc=1987&nu_doc=344&lg=en

² "Allgemeine Rechtschutzbedingungen", ie in English, General Terms/Conditions for Legal Expenses Insurance.

³ "ABL NRC 198" refers to the "Amtsblatt" containing publications of the Commission.

amendment was not implemented into German Law (see Section 1 127 d VVG idF DBGBl I, 2631-59 to be applied since January 1, 2008).

- The German Association of Judges raised serious concerns against any restriction of the freedom of choice of lawyers (see homepage www.drj.de).
- Article 6.7.3. ARB 1995, (i.e. the legal expenses insurance term restricting the consumer's right to a free choice of lawyers in cases of mass-claims)⁴ does not result in any "advantage" for insured persons. On the contrary:

According to the term in dispute, the insurance company is entitled to choose any lawyer for the insured persons, no matter if the lawyer chosen is an expert for the legal interests to be pursued and adequately experienced in handling such cases or not. By the term in dispute, consumers are put under pressure to stay with the lawyer the insurance company has chosen for them and not to choose a lawyer themselves. Besides, insured persons are not informed about the fact that the lawyer chosen by the insurance company will (primarily) pursue the interests of the insurance company, i.e. the interest to keep the amount necessary for the cover as modest/low as possible.

- The risk of conflicts of interests is much higher in cases of "mass-claims" (as specified above), since there are so many different interests to be pursued in the course of handling the case, so that possible conflicts of interests are not easy to identify. In individual cases, where the individual consumer is entitled to the free choice of lawyer without any restriction, it is much easier to identify possible conflicts of interests and to avoid them (by choosing another lawyer).
- For the consumer it is, furthermore, not clear whether the legal interest to be pursued will be covered by the insurance. In case "several" other persons are pursuing the same legal interest (which is determined by mere coincidence), the consumer will be denied freedom of choice of lawyer. In case the consumer "alone" is pursuing legal interests, the consumer will be entitled to a free choice of lawyer and to obtain coverage for the costs of the lawyer.
- By this, insurers are shifting part of the risk they are supposed to take on to consumers: The consumer is paying the premium to the insurer in return for having the risk taken by the insurer, if the event insured against will happen and how frequently. Although the consumer is aware of what type of risk is covered by the insurance in principle, the consumer will not obtain coverage for the costs of a lawyer chosen by himself in case the event insured against turns out to be (by mere coincidence) a case of "mass-claims". Hence, the term in dispute results in a non-transparent condition for consumers and is, hence, in contradiction to Directive 93/13 of April 5, 1993.
- **Any narrowing and/or restriction of the consumers' freedom of choice of lawyer, which is dictated by insurance conditions, results in unjustified interference in the market for legal services as a result of actions by insurance companies. This is because insurers will only choose lawyers who are willing to accept the fees offered by insurers as well as to accept that the insurers' interest is to be given priority in any case. Hence, this will affect the numbers of lawyers on the market. This is in contradiction to the principle of free movement as well as to the freedom to provide services, both principles applying not only to the market of insurance companies but to the market of lawyers as well.**

⁴ hereafter "the term in dispute"