

# CCBE POSITION PAPER ON PROFESSIONAL INDEMNITY INSURANCE

24/04/2015

The Council of Bars and Law Societies of Europe (CCBE) represents the bars and law societies of 32 member countries and 13 further associate and observer countries, and through them more than 1 million European lawyers. In this paper the CCBE addresses the problems lawyers may face with regard to obtaining a professional indemnity insurance that covers cross-border services.

In the [Final Report](#) "Evaluation of the Legal Framework for the Free Movement of Lawyers" researchers from Panteia and Maastricht University rightly state that the [Lawyers' Services Directive 77/249 EEC](#) does not address the topic of professional indemnity insurance. They recommend to amend the Lawyers' Services Directive so that it states, "when a lawyer renders temporary cross-border services, these must be covered by his home country insurance." In so far as this recommendation describes the desirable mechanism regarding insurance coverage for cross-border services – be it the outcome of market-led or national regulation, the CCBE agrees. However, in so far as the recommendation describes an EU regulatory approach, the CCBE disagrees.

## **(1) Desirable Insurance Mechanism**

A PII regime in all (home) Member States that would – on the basis of a single premium – provide for equivalent or essentially comparable insurance coverage, both in the home Member State and in all possible host Member States within the European Union and the European Economic Area, is certainly a fascinating prospect. In order to reach this goal two challenges need to be met:

- (1) availability of cross-border (i.e., for practice in the domestic laws of the EU and EEA Member States, as opposed to home Member State and EU laws) insurance coverage; and
- (2) comparability of coverage governed by differing insurance contract law in Member States.

Best practice in a number of Member States demonstrates that at least the first challenge can be met. While lawyers still face difficulties in purchasing insurance coverage for their cross-border services, such difficulties do not derive from a lack of obligations to take out such coverage, but from a lack of supply by the insurance industry.

In almost all EU Member States lawyers are obliged to take out insurance coverage for the services they provide, including for services rendered in another country. However, these obligations imposed on lawyers have not, in all Member States, brought about a corresponding supply from the insurance industry.

Even Single Market instruments allowing Member States to require service providers to subscribe to professional liability insurance ( Article 23 (1) of the [Services Directive 2006/123/EC](#); Article 7(1) of the [Professional Qualifications Directive 2005/36/EC](#); Article 6 (3) of the [Lawyers' Establishment Directive 98/5/EC](#)) have, to date, not produced an increased supply from the insurance industry. The Commission Staff Working Document, "[Access to insurance for services provided in another Member State](#)" rightly states, "European law does not provide that Member States should ensure that appropriate insurance is available, especially for service providers from other Member States. Nor is there an obligation for insurers to provide insurance"(page 4).

Article 6.3 of [Directive 98/5/CE](#) of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained provides that:

*"The host Member State may require a lawyer practising under his home-country professional title either to take out professional indemnity insurance or to become a member of a professional guarantee fund in accordance with the rules which that State lays down for professional activities pursued in its territory. Nevertheless, a lawyer practising under his home-country professional title shall be exempted from that requirement if he can prove that he is covered by insurance taken out or a guarantee provided in accordance with the rules of his home Member State, insofar as such insurance or guarantee is equivalent in terms of the conditions and extent of cover. Where the equivalence is only partial, the competent authority in the host Member State may require that additional insurance or an additional guarantee be contracted to cover the elements which are not already covered by the insurance or guarantee contracted in accordance with the rules of the home Member State."*

As opposed to this obligation imposed on established lawyers in their capacity as service providers, the [General Services Directive 2006/123/EC](#) does not regulate financial or insurance services. Recital 99 of said Directive explicitly states, *"Finally, there should be no obligation for insurance companies to provide insurance coverage"*.

Lawyers, obliged under home or host Member State law to take out insurance coverage for cross-border services they provide, in a number of Member States, including e.g., Austria, Hungary, Italy, Norway and Ireland, face an insurance market that does not offer policies covering both the practice of domestic law, including EU law, and the practice of respective domestic laws in other EU and EEA Member States at the same time.

On the other hand, existing PII regimes, for instance in France, Germany, the UK and a range of other Member States, do demonstrate that it is possible to make cross-border insurance coverage available by a collective negotiation (e.g., France) or by regulatory means in the home Member State (e.g., Germany). Where domestic, EU, and EEA wide coverage for practice in a host Member States' jurisdiction is offered on the basis of a single premium to a sufficiently large number of lawyers, insurers can assess risks in spite of the coverage extension to cross-border services and offer insurance coverage at a reasonable premium.

## **(2) Regulatory Approach**

To change the Lawyers' Services Directive so that it states *"when a lawyer renders temporary cross-border services these must be covered by their home country insurance"* (Panteia Final Report), however, is an inadequate regulatory approach for several reasons:

- It would neither provide access to cross-border insurance, nor would it facilitate the assessment of equivalence.
- Smart regulation, however, would need to aim to facilitate access to insurance coverage provided by the home Member State insurance industry, thus satisfying the requirements of a respective host Member State on the basis of a single premium covering the whole territory of the EU and the EEA, i.e., to bring about the necessary supply from the insurance industry.
- Should market-led solutions fail to bring about supply from the insurance industry, the addressee of the regulation will have to be the insurance industry, complementing the existing obligations imposed on service providers.
- Lawyers are already obliged to take out insurance coverage for their cross-border activities due to obligations deriving from home Member State legislation (bar rules or statutes) and the CCBE Code of Conduct. They may also be subject to obligations to take out additional insurance coverage according to host Member State legislation, in so far as such requirements do not obstruct the freedom to provide services to an extent that goes beyond the regulating power of Article 23 of the General Services Directive 2006/123/EC with regard to attributes to Member States.
- Lawyers are, in conformity with Member State legislation implementing Article 22 (1) lit k) of the General Services Directive, bound to inform clients and potential clients about existing PII, including territorial coverage.
- To deprive service providers of the possibility – if need be – to purchase additional PII insurance coverage in a host Member State, in case the home Member State insurance industry does not offer adequate policies, would aggravate the need for a not yet sufficiently provided supply of insurance coverage.

- There is no added value at all in shifting the competence to impose an obligation on service providers to take out cross-border insurance coverage from Member States to the level of European secondary law.

### **(3) The Way Forward**

Therefore, the CCBE prefers market-led solutions. The CCBE has offered to support the Commission in their effort to convince the insurance industry of the following:

- that it needs to supply insurance coverage for cross-border services, demonstrating that there is a sufficient demand from the side of service providers;
- that risk assessment is possible, where a large number of service providers take out insurance coverage for cross-border services where domestic and cross-border insurance coverage is offered by the insurance industry on the basis of a single premium; and
- that in order to solve the problem of comparability, the insurance industry would have to develop a new "Harmonised European Insurance Policy" covering not only liberal professions, but all service providers, while at the same time covering different domestic insurance contract law regimes (e.g., coverage triggers: claims made vs. acts occurring; extent of coverage; conditions and exclusions).

A market-led solution could facilitate the provision of cross-border services under the condition that, the insurance industry, in cooperation with liberal professions/lawyers, finds a solution in the form of a European insurance policy for all national laws - with guaranteed returns, a negotiated premium and coverage for cross-border services. This would have to be applied on a voluntary basis, without the need for the European Commission to implement an additional, specific legislative framework.

With regard to lawyers, we would recommend the creation of a European policy with an adequate minimum level of coverage.

If the market led solution process fails, the European Commission retains the possibility of a more formal intervention. However, an amendment to the Lawyers' Services Directive would not be helpful.

Any regulatory solution would have to regulate PII insurance contracts offered by the insurance industry to service providers established in one of the Member States. Member States should become obliged to ensure that appropriate insurance is available, especially for services provided in other Member States. Professional indemnity insurance policies should cover the entire territory of the EU and EEA on the basis of a single premium.