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Community co-insurance: Comparative profiles

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Abstract

Community co-insurance is a contract which stems from European Law (Directives 78/473/EEC, 88/357/EEC, 2009/138/EC) and which has been subject to a troubled *iter* of transposition into the national laws of various Member States, having also received four condemnatory sentences from the Court of Justice of the European Union in 1986, for violations of art. 169 EEC Treaty (art. 226 EC Treaty) reported by the Commission. This paper, through a historical-juridical analysis on the phase of implementation of this Community law, will offer some observations from the comparison of various implementation laws, in particular with regard to the figure of the leading insurer. The aim is to understand the reasons for the limited application of this type of contract.

Key words: Community co-insurance, structure, leading insurer, comparative perspective

1. FROM ORIGIN IN COMMUNITY LAW TO IMPLEMENTATION BY MEMBER STATES

The origin of Community co-insurance, as the *nomen iuris* of this institute clearly shows, can be found in European Economic Community (EEC) laws and, in particular, in Council Directive 78/473, 30th May, 1978.

The *iter* which led to the approval of said norm proved to be particularly troubled, as well as being characterized by several uncertainties. The first proposal by the Council, forwarded by the Commission on 15th May, 1974, assigned Community co-insurance (*Proposal of Council Directive*, 1974, art. 1) an area of operations which was wider than in the final draft, excluding from its power only those risks connected with motor insurance liability. This solution was fully

motivated by the Economic and Social Committee which, when asked to give an opinion (Published in *G.U.C.E.*, N.C. 47/41, 22nd February, 1975) on the abovementioned draft, observed that if further exceptions had been made, the proposed Directive would have been deprived of its objective. The proposed law was aimed at a wide harmonization of heterogeneous national laws, with a view to a future, global coordination of insurance systems within Member States – so as to favour free offer of insurance services (Berr, 1974, 314; Steindorff, 1977, 133; Zimolo, 1978, 565–589; Capotosti, 1980, 25; Tizzano, 1980, 225–239; Mazzoni, 1981, 311; Floridi, 1983, 513; Flory, 1988, 281; Loheac, 1988, 271–273), as well as observing art. 59 and following, from the EEC Treaty (EC Treaty, art. 49 and following).

This approach was significantly welcomed by EU jurisprudence (Tizzano, 1980, 225; Tizzano, 1985, 1), to the extent that the need for a reasonable opening towards European co-insurance transactions was overshadowed by the special conditions attached to carrying out these activities.

The abovementioned reasons influenced the final draft of Directive 78/473/EEC¹. With regard to its objective, this law limited the application of Community co-insurance (art. 1) to specific risks categorized in Annex 1, Point A, Council Directive 73/239/EEC, 24th July, 1973, also defined as „First Council Directive on the Coordination of Laws”, regarding insurance other than life assurance (numbers 3, 4, 5 and 6: land vehicles, trains, aircraft, sea, lake and river and canal vessels, regardless of damage suffered; no. 7: goods in

¹ In fact, an authoritative paper (Capotosti, 1978, 112) cleverly remarked how the abovementioned Directive was adopted „con lo scopo palese, dichiarato nel preambolo, di preparare l'avvento della libertà di prestazione dei servizi assicurativi e di predisporre strutture commerciali e mentalità operative alla formazione di un mercato unico delle assicurazioni, che è nelle prospettive dell'integrazione economica europea” (Abbadessa, 1999, 629-630).

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transit (including merchandise, baggage and all other goods); no. 8: fire and natural forces; no. 9: any damage suffered by the goods (other than those included in the abovementioned categories), caused by hail or frost, as well as any other event, such as theft, different from those indicated in *sub* 8; numbers 11, 12 and 13: public liability regarding aircraft, sea, lake and river and vessels, and public liability in general (excluding nuclear or health risks); no. 16: money losses of any kind). The risk, „situated within the Community”, (art. 2) should be covered by a number of insurance undertakings (one of whom being the leading insurer) among whom there need not be a relationship of mutual solidarity.

Art. 2, comma 1, Directive 78/473 also dictated three further, fundamental rules: a) in order to guarantee the risk dealt with, „the leading insurer is authorized in accordance with the conditions laid down in the First Coordination Directive, i.e. he is treated as if he were the insurer covering the whole risk” (letter c); b) also, „at least one of the co-insurers participates in the contract by means of a head office, agency or branch established in a Member State other than that of the leading insurer” (let. d); c) and said leading insurer „fully assumes the leader’s role in co-insurance practice and in particular determines the terms and conditions of insurance and rating” (let. e).

In addition, the minimally necessary conditions for the insurer to be able to access said operations could not be differently acknowledged by the single national law systems, as laid down by Directive 78/473 (art. 3)².

Subsequently, Community co-insurance was the object of two further EU Law provisions, i.e.: (i) Council Directive 88/357/EEC, 22nd June, 1988 (also defined as „Second Council Directive”, regarding insurance policies other than life assurance), which modified Directive 73/239, laying down provisions for insurance undertakings, as per First Coordination Directive, so as to facilitate effective exercise of freedom to provide services; (ii) Directive 2009/138/EC of the European Parliament and of the Council, 25th November, 2009, regarding taking-up and pursuit of the business of insurance and reinsurance (Solvency II).

Directive 88/357, art. 26, limited the risks which could be co-insured within the EU to those listed *ex art.* 5, let. d), Directive 73/239, i.e. only large risks.

² Particular interest, though not within the subject matter of contracts, was, finally, aroused by articles 4 and 7 of the Directive, the former with regard to technical reserves covering negotiable obligations deriving from the abovementioned relationships of co-insurance, the latter as a regulator of the effects of compulsory administrative liquidation of insurance companies on such transactions.

Directive „Solvency II”, in the end, dictated the cumulative and essential conditions (art. 191) which allowed insurance undertakings to issue Community co-insurance policies – large risks within the EU; co-insurers not bound to one another, of whom one with the role of leading insurer, determining insurance terms and conditions; head office or branch of one of the non-leading co-insurers in a Member State other than that of the leading insurer: art. 190 (Ambroselli, 2008, 4).

A few of the most significant norms within Directive 2009/138 can be highlighted: a) the rule which is imposed on co-insurers to adopt technical reserves not inferior to those applied by the leading insurer, according to the law of the home Member State (art. 192); b) equalization of duties deriving from Community co-insurance to those originated by other insurance contracts, in the case of insurance winding-up (art. 194); c) exchange of information among supervisory authorities of the various Member States, to verify implementation of special norms *ex art.* 190 and following (art. 195).

The EU norm regarding this matter, here analyzed, was not implemented by the various Member States for a few years. The innovative philosophy of this law did not actually appear to be easily reconcilable with the inspiring principles of national law of each Member State, in a period when the harmonization of various national laws, the aim of EU legislators, was still at its initial, experimental phase, meeting a good deal of resistance at the moment of implementation.

It appears useful then, from a comparative perspective, to take into consideration those national laws which more clearly show the problems of adjustment mentioned above, so much as to modify various basic aspects of Community co-insurance to the requirements of internal laws.

Among the first attempting to solve EU obligations, French legislators approved *loi* 7th January, 1981, no. 81-5, followed by *décret* 7th May, 1981, no. 81-443. Nowadays, however, reference laws regarding Community co-insurance in French law are articles 30 and 31, *loi* 4th January, 1994, no. 94-5, as well as art. 12, *décret* 25th July, 1994, no. 94-635, which modifies articles L352-1, and R331-31 *Code des assurances*, respectively. See also art. R332-1, comma 3, from the same Code (De Luca, Di Fonzo, 2004, 417; Bigot, 2012, 12).

Soon after, Denmark adopted, regarding this matter, Decree no. 459, 10th September, 1981, n. 459, as well as Ireland, which, with art. 4 in the „*European Communities (co-insurance) Regulations 1983*” (norm on Community co-insurance - SI no. 65, 1983) was meant to transpose Directive 78/473.

In the same year, the German Federal Republic implemented the EU norm on Community co-insurance with the fourteenth law of amendment, on 29th March, 1983 of „*Versicherungsaufsichtsgesetz*” (law of surveillance on insurance policies: the so-called VAG) (Esser-Wellié, Hohmann, 2004, 1211).

Italy, though several years after the approval of the Directive, was not amongst the last Member States to conform with this EU law, through Law of Implementation no. 772, 11th November, 1986, made up of a good twelve articles.

In 1986, Italian law, with regard to commas 2 and 1 in art. 9 of law no. 772, on the one hand, allowed mediation for „il collocamento all'estero in coassicurazione” of „quote di rischi situati nel territorio italiano” (co-insurance abroad for risks within Italy), while, on the other, introduced a specific derogation to the prohibition *ex art.* 114, comma 1, Decree by the President of the Republic, 13th February, 1959, no. 449 (Consolidated Act on private insurance companies)³, aimed at guaranteeing full freedom in drawing up co-insurance contracts.

Later, the rules dictated by Law no. 772/1986 were substantially revised under many aspects, by art. 32 of legislative Decree no. 49, 15th January, 1992 (Ricolfi, 1993, 644), issued precisely with the aim of implementing Directive 88/357 in Italy. A few years on, art. 125, Legislative Decree no. 175, 17th March, 1995⁴, explicitly abolished Legislative Decree no. 49/1992 (except for articles 38, 39 and 40), as well as Law no. 295, 10th June, 1978 implementing the First Council Directive on the Coordination of Laws (La Torre, 1987, 131).

At its highest point, the acceptance in Italy of the *figura iuris* here examined saw its last phase in the approval of the Private Insurance Code (Legislative Decree no. 209, 7th September, 2005), in which articles 161 and 162 dictate the norms on Community co-insurance.

In Belgium, transposition was ruled by articles 31-35 of the Royal Ordinance of implementation (ruling of 22nd February, 1991) of the law on supervision on insurance companies, 9th July, 1975 (De Luca, Nicola, Di Fonzo, Fabio, 2004, 419; Bigot, Jean, 2012, 20–21). In addition, this ordinance also contains the list of the so-called large risks in art. 7, comma 1; while in Spain, adaptation is dealt with in art. 33 a) *ley de Contrato de Seguro* 8th October, 1980, no. 50, introduced in point 3

³ A provision which forbade “la mediazione per il collocamento di rischi all'estero.”

⁴ Implemental to Directive 92/49, regarding non-life insurance.

disposición adicional sexta ley, 8th November, 1995, no. 30 (Muñoz Paredes, 1996, 459).

Finally, looking at *Common Law* as the most significant juridical experience, the English law system summarily regulates Community co-insurance in art. 6, § 2, *Statutory Instrument 2001 no. 2635. The Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001* (Cunningham, Clive, 2001, 1394; De Luca, Nicola, Di Fonzo, Fabio, 2004, 421).

2. REGIME OF COMMUNITY CO-INSURANCE IN NATIONAL IMPLEMENTATION LAWS

From the point of view of positive law, it appears obvious that, when drawing up a Community co-insurance policy, the *ad validitatem* form is not contemplated, since the norms of implementation of the various Member States simply foresee that the contract is subscribed by all co-insurers (Ambroselli, 2006, 316–317; Russo, 2013, 660; Cod. Ass., art 162, comma 1, art. 33 let. a; *ley de Contrato de Seguro*, comma 1, let c). Thus, there seems to be an universal agreement on an opinion which comes from an authoritative source according to which, to corroborate this assumption, it is noted that there is neither an express judgement of invalidity, nor (for those who would consider an indirect rendition of the sanction, due to a defect of form, admissible), a form *ad substantiam* generally agreed upon. This in any case would be difficult to hypothesize on the basis of any supposed difference in an insurance policy drawn up according to the national law of a Member State, even if drawn up as co-insurance, complying with the particular aspects which take into account all objective and subjective assumptions made, when drawing up any policy (Partesotti, 2006, 470)⁵.

According to art. 1, comma 1, let. a), of Law no. 772/1986, a policy could cover only risks within Italy (not in the whole Community), and such risks would be divided *pro quota* among insurers with their head office in a Member State of the Community (even if not within the Italian Republic), on the condition that at least one of said co-insurers was authorized to practice within Italy, being established therein, according to Law no. 295/78, title II, paragraphs I and II. Also, still with regard to the efficacy of the matter here examined,

⁵ Partiesotti, Giulio. (1987) Commento alla legge 11 novembre 1986, n. 772. Disciplina della coassicurazione comunitaria, *Le nuove leggi civili commentate*, 4, p. 610, with bibliographical notes, followed by Bellotti, Massimiliano. (2006) *Sub artt. 161-162 cod. ass. Coassicurazione comunitaria*, in *Commentario al Codice delle assicurazioni*, edited by Bin, Marino, Padua, p. 470.

even insurance undertakings with branches in a given Member State, having their headquarters in another Member State within the EEC, including Italy, were permitted to participate. The risks insured obviously had to be included among those expressly indicated in Directive 73/239, letter A, Annex 1, reiterated in Law no. 295/1978, with the exclusion of a few quantitative limits, imposed in Law no. 772/86, art. 1, comma 1, let. d).

With regard to the position of leading insurer, this was granted, in everyone's interest, only to authorized and established insurers within Italy (Law no. 772/86, art. 1, comma 1, let. b).

On this matter, later ruled by Legislative Decree no. 49/92, art. 32, the abovementioned rules were modified as follows: 1) the criterion of authorization was entirely withdrawn from Law no. 772/86, art. 1, comma 1, being found only in the same Law, art. 3; 2) the criterion of subjective link, whereby at least one insurance undertaking should have its head office in Italy and be the leading insurer, was omitted; 3) co-insurance may now take place also among undertakings whose head offices are not within Italy, nor are expressly authorized or have branches therein.

With regard to the reasons which induced Italian legislator to make the abovementioned modifications, it is worth remarking how, in Legislative Decree no. 49/92, art. 32, the subjective area of implementation of Community co-insurance has become wider, since certain aspects, which had previously not been taken into consideration, were now contemplated *ex lege* no. 772/86 (even though already contemplated in Directive 78/473), perhaps due more to mere economic reasons⁶, rather than to an autarchic spirit. It was already evident, in fact, on a first analysis of law no. 772 (Partesotti, 1987, 600; Ricolfi, 1993, 648), how the rule outlined by Italian law in 1986 was evidently in opposition to the liberal interpretation given by Directive 78/473, art. 2, comma 1, let. c), (inspired by principles of free offer of services within Community territory, found in articles 59 and 60 of the EEC Treaty). Therefore, the imposition on the leading insurer of the obligation of a previous establishment in Italy, and authorization to operate therein, *ex lege* no. 295/78, appeared to be inadmissible.

Said restriction did not occur solely in Italian legislation, since there are precedents in the legal systems of other Member States.

⁶ One might think of the potential income from premiums for companies with offices in the Member State in question, with consequences both on the national economy, and on government revenues in that Member State (see Partesotti, Giulio, *supra* note 5, pp. 598–599).

In particular, the French Parliament, with *loi* no. 81-5, followed by *décret* no. 81-443, obliged companies within the Community to have offices in France, or to submit themselves to a procedure of authorization, so as to be enabled to offer co-insurance services therein, as leading insurers. Insurance companies outside France were not allowed to draw up co-insurance policies for risks which, due to their nature or entity, were not contemplated by *décret* no. 81-443, art. 1 (Bigot, 2012, 12).

In Denmark, according to Decree no. 459/1981, insurance companies within the Community were obliged to have offices in Denmark to be enabled to offer, as leading insurers, co-insurance services, forbidding, at the same time, undertakings established abroad from participating in Community co-insurance operations. This law also imposed that both Danish insurers and Danish branches of companies with their head offices in other Member States obtained a special authorization to offer co-insurance services abroad (Hodgin, 1987, 273).

A few years later, in Ireland, SI no. 65 in 1983, art. 4, stated that insurance undertakings within the Community, intending to offer their services in that country as leading insurer, needed to have offices in that country and be authorized to operate therein or, in certain cases, would have to inform the Irish minister charged with these matters, obtaining his or her consent. In addition, as per specified in the Annex to said norm, § 3, insurance undertakings were not allowed to offer co-insurance services in Ireland for policies of amount lower than specified in said paragraph (Hodgin, 1987, 273).

In Germany, finally, the norms of the reformed VAG on Community co-insurance established that the leading insurer would need to have an office in the Member State in question, as well as being authorized to operate therein, when the risk insured was located within the German Federal Republic. The same ruling, from the „*Bundesaufsichtsamt für das Versicherungswesen*” (Federal office of supervision on insurance undertakings), or German Supervisory Authority, also fixed very high limits for risks such as fire, public liability for aircraft and public liability in general, foreseen in Community co-insurance (Esser-Wellié, Hohmann, 2004, 1211).

About one month after the publication of Law no. 772/86, the Court of Justice of the European Union (CJEU), rejecting this restrictive exegesis and the conservative adaptation to Directive 78/473, delivered, on the same day, four judgements⁷ against the German

⁷ CJEC, 4th December, 1986, no. 205 (case 205/84), *Commissione CEE v. Repubblica Federale di Germania, Assicurazioni* (1986) 2, 211 and following, with a note by

Federal Republic, Ireland, France and Denmark, as the result of four infringement procedures forwarded by the Commission, according to art. 169 of the EEC Treaty (art. 226 of the EC Treaty), condemning the abovementioned States to fully comply with Community obligations, implementing full liberalization in favour of the leading insurer.

Moreover, the sentence issued against Germany (case 205/84) had a double effect, since the VAG, as per in the fourteenth law of amendment, 29th March, 1983, did not allow insurers without any branch offices in that country to cover for national risks, in life or damage sectors, except for obligatory policies and transportation policies.

The Italian legal system was among the few to run for cover, with the abovementioned art. 32, today the contents of which is included in art. 161 of the Insurance Code, but even notwithstanding said type of interventions, given the *erga omnes* efficacy of the judgements delivered by the EU Court in Luxemburg, freedom of head office for the leading insurer should be equally guaranteed within Community territory, given the four jurisprudential precedents from 1986⁸.

Capotosti, Renzo, in *Rass. avv. Stato* (1987) 1, 41 and following, in *Foro. it.* (1988) 4, 18–31, with notes by Frignani, Aldo, Coassicurazione nella Cee and Scordamaglia, Vincenzo, Libertà di stabilimento e libera prestazione di servizi nel settore assicurativo, in *Giur. it.* (1988) 1, 1857 and following, with a note by Greppi, Edoardo, Diritto di stabilimento, libertà di prestazione dei servizi e mercato comune delle assicurazioni; CJEC, 4th December, 1986, no. 206 (case 206/84), *Commissione CEE v. Irlanda, Assicurazioni* (1986) 2, 212 and following, with a note by Capotosti, Renzo; CJEC, 4th December, 1986, no. 220 (case 220/83), *Commissione CEE v. Francia, ibidem* (1986) 2, 210 and following, with a note by Capotosti, Renzo, in *Dir. econ. ass.* (1986), pp. 409 and following, in *Giur. it.* (1988), 1857 and following, with a note by Greppi, Edoardo, *supra*; CJEC, 4th December, 1986 no. 252 (case 252/83), *Commissione CEE v. Danimarca, Assicurazioni* (1986) 2, 211 and following, with a note by Capotosti, Renzo. Two quite accurate comments to the abovementioned four sentences come from Berr, Groutel, 1987, 83 and Hodgkin, 1987, 273.

⁸ It should be remembered that judgements passed by the Court of Luxemburg, observing the principle of *stare decisis*, are binding for all Member States and all citizens within the EU (Barile, 1973, 2406). It should also be observed how the ambiguous form used in Directive 78/473, art. 2, comma 1, lett. c), could also plausibly let one infer, in agreement with Capotosti, Renzo, *supra* note 1, 115–116, „che laddove le legislazioni nazionali non richiedessero per il rilascio dell'autorizzazione all'esercizio delle assicurazioni la condizione dello stabilimento” the leading insurer „potrebbe anche essere non stabilito nel Paese del rischio, pur essendo ivi autorizzato ad operare” (even if this solution was not admissible in Italy, according to Decree by President of the Republic no. 449/59, art. 17 and following). However, in case 205/84 the Court indicates the limits within which a restrictive norm may be compatible with the contents

The legal system in Spain, instead (*ley de Contrato de Seguro* art. 33 a), comma 1, letters a), b) and e); Muñoz Paredes, 1996, 459; De Luca, Di Fonzo, 2004, 420), has fully complied with Directive 78/473, with regard to those aspects highlighted by the Court of Justice.

With regard to provisions involving the figure of the leading insurer, it should be noted that, according to widespread practice, the role of leading insurer necessarily comes into effect starting from the phase preceding the final drawing up of the co-insurance operation, since the prerogative of fixing policy terms and conditions has to be included (*Codice delle assicurazioni private*, 2005, art. 162, comma 4; *ley de Contrato de Seguro*, 1980, art. 33a), comma 1, let. g); Partesotti, 1987, 611).

Similarly, adaptation in the mercantile field, or the procedure which regulates management within the EU, has contributed to obtaining full harmony of national laws of each Member State (*Codice delle assicurazioni private*, 2005, art. 162, comma 3; *ley de Contrato de Seguro*, 1980, art. 33a), comma 1, let. g); *Code des assurances*, 2005, R331–31; Capotosti, 2007, 311–312; Desiderio, 2007, 22–23; Nobile, 2009, 160; Irrera, 2011, 250).

The English norm in *Statutory Instrument 2001*, art. 6, § 2, is also particularly interesting. According to this, non-leading co-insurers are not considered as contractors, nor actual insurers, to the extent that all responsibilities deriving from a contract fall entirely on the leading insurer (Cunningham, 2001, 1396; De Luca, Di Fonzo, 2004, 421). There does not seem to be a similar ordainment in the legislation of other member States, being justified, however, within the UK, given the characteristics of this subject in that country.

3. CONCLUSION

When comparing laws which have had a highly developed transposition, also due to the fact that they were issued by Member States where the concept of Community co-insurance raised greater interest, from a technical and practical point of view, there are still some clear discrepancies which the Court of Justice did try to eliminate, but with a limited follow-up by legislators and national law courts in each Member State.

of art. 59. The norms, in the first place, have to be justified by a general interest, and applied to all service providers. Also, the general interest in question need not be already guaranteed by the Law of the Member State where the insurer has its head office. Such restrictions, finally, need to be generally acknowledged as necessary (Greppi, Edoardo, *supra* note 7, 1862).

The availability of an abstract, completely liberalized model, the creation of which EU jurisprudence has significantly contributed to, should have made Community co-insurance much more appealing to companies, with implementation of Directive 78/473 in each Member State.

Despite revisions introduced by national laws in various Member States⁹, which helped redefine the implementation limits of this operation and enhance compliance on the part of insurers with Directives 88/357 and 92/49, various points of disagreement that occurred during the (still ongoing) phase of adaption have slowed down the diffusion of this phenomenon in the mercantile area.

International commercial operators are indeed unwilling to face the costs deriving from some points of Community co-insurance which have not yet been clearly defined, a potential risk for extenuating, contentious legal suits, freezing considerable amounts of money for years (Bigot, 2012, 22).

A few further unsolved points, regarding configuration of said matter, arise from the transposition of Directive 2009/138, regarding which only the *ley de Contrato de Seguro*, in art. 33 a), and to some extent, art. 162 of the Insurance Code, seem to guide their own legal systems (Spanish and Italian, respectively) towards a relatively easy adaptation. Also, the rules on technical reserves (art. 192) and on the treatment of co-insurance policies when winding up a company (art. 194) appear to be quite difficult to implement, and the ensuing norms of implementation will require careful consideration¹⁰.

EU jurisprudence should probably acknowledge failure in harmonization of legal systems within the various Member States through the issuing of Community Directives, by adopting one, common set of rules on Community co-insurance, immediately applicable in relationships between private individuals, but also suitable for unifying legal systems of the Member States. Working towards this goal, operators in the market might feel encouraged, as has already

⁹ One may consider the adoption of the Italian Private Insurance Code, the reform of the Spanish *ley de Contrato de Seguro*, and of the French *Code des assurances*.

¹⁰ With regard to the Directive "Solvency II", recently, the European Insurance and Occupational Pensions Authority (EIOPA) has made available the *Guidelines on preparing for Solvency II* for public consultation (27th March, 2013 – 19th June, 2013) in order to help insurance companies and Supervisory Authorities in Member States adapt to the new regime. This document, however, does not bear any particular reference to co-insurance.

happened in other areas (Altili, Losavio, 2010, 655)¹¹, after so much disappointment over the last twenty-five years, with interventions from the Court of Justice not being applied by national courts.

SUMMARY

The norm contemplated in Directive 78/473 has regulated the operation of Community co-insurance, limiting its implementation (art. 1) to certain risks, indicated in the list in Council Directive 73/239, Annex 1, point A, defined also as First Council Directive on the Coordination of Laws, regarding insurance policies other than life assurance policies (numbers 3, 4, 5 and 6: land vehicles, trains, aircraft, sea, lake and river and canal vessels, regardless of damage suffered; no. 7: goods in transit (including merchandise, baggage and all other goods); no. 8: fire and natural forces; no. 9: any damage suffered by the goods (other than those included in the abovementioned categories), caused by hail or frost, as well as any other event, such as theft, different from those indicated in *sub* 8; numbers 11, 12 and 13: public liability regarding aircraft, sea, lake and river and canal vessels, and public liability in general (excluding nuclear or health risks); no. 16: money losses of any kind).

Directive 78/473, art. 2, comma 1, has stated three principles: i) "the leading insurer is authorized in accordance with the conditions laid down in the First Coordination Directive, i.e. he is treated as if he were the insurer covering the whole risk" (letter c); ii) "at least one of the co-insurers participates in the contract by means of a head office, agency or branch established in a Member State other than that of the leading insurer" (let. d); iii) said leading insurer "fully assumes the leader's role in co-insurance practice and in particular determines the terms and conditions of insurance and rating" (let. e).

Community co-insurance was later regulated also by Directive 88/357, regarding coverable risks, and by Directive 2009/138, with regard to solvency of insurers, especially the leading insurer.

After four judgements passed by the EU Court in Luxemburg in 1986, the following points should be *ius receptum* within Member States: i) the operation may involve any large risk within the entire European Union; ii) co-insurers may operate freely with regard to

¹¹ Reference here is made particularly to the agricultural and food market, whose incongruence and ambiguities, caused by Directives and several interventions of the EU Court in Luxemburg, were finally overcome, adopting Community Regulation no. 178/2002.

their offices and authorizations; iii) the leading insurers may have their registered office in any Member State.

In addition, the process of harmonization of different, national legal systems, triggered by the abovementioned Community Directives, has given rise to the rule according to which the leading insurer, operating based on ongoing commercial practice, has the prerogative of fixing policy terms and conditions.

In conclusion, the scanty implementation of EU jurisprudence ruling within each Member State, in a context made even more complex by resistance on the part of national courts to implement precedents (even if binding) of the Court of Justice, thus hindering implementation in national law, and by the supervision of Directive 2009/138, have all discouraged markets from signing Community co-insurance policies.

Key words: Community co-insurance, structure, leading insurer, comparative perspective

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