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**Milestones of Europeanization 2003-5**

(for 1999-2002 see under [www.assurances.de](http://www.assurances.de))

At annual or biennial intervals, the Institute of Insurance Sciences (IVW) at Friedrich Alexander University Erlangen-Nuremberg documents the outstanding events of the Europeanization of German insurance law and insurance markets (selection of topics on the basis of expert consultations).

1. In April 2004, the governmental commission for the reform of the law of insurance contracts presented its final report, which supplements, modifies and – to a certain extent – also corrects the interim report of May 2002 discussed in Milestones 2002. Regrettably, the concerns of the author and others regarding the insured's release from liability in the case of ordinary negligence (Herrmann, *Ist der VVG-Reformvorschlag zum Recht der Obliegenheiten europarechtskonform?*, *VersR* 2003, p. 1333-1242) have not been met sufficiently by the commission. It has to be noted, though, that a new section on the so-called ongoing insurance is suggested for incorporation into the VVG (new version of ss. 56-59), with the provision that in this field non-observance of an incidental obligation before the insured event must only be slightly negligent to release the insurer from the obligation to pay (new version of s. 59 subsection 2). This will esp. concern the fields of credit and surety and fidelity insurance (for a general overview see Herrmann, *Kredit- und Kautionsversicherung*, in: Beckmann/Matusche-Beckmann (ed.), *Versicherungsrechtshandbuch*, 2004, p. 2065 seqq.).

2. With reference to Nr. 2 of the preceding report it is to add that the mentioned draft of an EC Directive on Insurance Mediation from 30<sup>th</sup> January 2002 (OJ C 029 E) has in the meantime entered into force as Directive 2002/92/EC of the European Parliament and Council from 9<sup>th</sup> December 2002 (OJ from 15<sup>th</sup> January 2003 L 9/3), but despite of a ministerial draft bill of the then BMWA (VIII B 4-12 03 63 from 9<sup>th</sup> December 2004) has not been implemented into German law until today. After the transposition period run out, there were still significant dissensions about detail questions, esp. in regard to the competence for the register of intermediaries and the levels of education. Until now, the great coalition of CDU/CSU and SPD building the government since autumn 2005 has not shown any clear intention to which extent the provisions of the ministerial draft shall be maintained.

This allows here to refer to the comments of the author and other speakers at the Second Nuremberg Insurance Day on 11<sup>th</sup> November 2004 (Wambach/Herrmann (ed.), *Zweiter Nürnberger Versicherungstag*, IF-Verlag, 2005, p. 65 seqq., 90 seqq.) The provisions gear to a large extent to the rules of advice applicable to banks and investment brokers as they were laid down in the EC Investment Services Directive 93/22/EC of 10<sup>th</sup> May 1993 (OJ L

141/27).<sup>1</sup> To the suitability relating to the investor and the object of investment correspond the duties to identify the individual needs and provide a balanced market analysis as well as a detailed documentation, the latter being of especial practical significance given the duties of advice already existing, but free of documentation (see Herrmann, *ibid*, p. 83 seq.) Changes in the marketing organization of insurers as well as pyramid systems begin to take shape (see Herrmann, *Neuerungen im Recht der Verbraucherinformation, Zur Förderung strukturvertrieblicher Marktentwicklungen*, in: Haas/Ivens (ed.), *Innovatives Marketing*, H. Diller zum 60. Geburtstag, 2005, p. 455-475).

Regarding British law, the Directive 2002/92/EC was implemented before the European deadline by rules of the Financial Services Authority (cf. Wilkens, in Wambach/Herrmann, *ibid*, p. 111 seqq.). Above all, the client is to be handed out a clearly laid out abstract about the essential features of the product (product summary, alternatively key features document) (ICOB 5.3.1 with 5.5, available under [www.fsa.gov.uk](http://www.fsa.gov.uk)). From the lacking implementation into German law result *inter alia* claims for damages against the FRG, additionally, according to the continuous holdings of the ECJ a direct application of the directive comes into question as far as the European provision is sufficiently precise to show clearly what rules are intended for the member states. One cannot conclude from this, though, that specific contents of information and advice, such as providing information in the shape of a product summary under British law, apply in Germany irrespective of the implementation of the Directive 2002/92/EC. But where duties of advice have been acknowledged by German law before, it can be concluded without problems that a corresponding documentation is intended by European law. If this standard is neglected and this causes damages to an insured, at least public liability of the FRG seems appropriate. By way of precaution, it is recommended to the insurance industry to provide for such documentations (for more details see Herrmann/Wilkens, *Das Schicksal der Versicherungs-Vermittlerrichtlinie in Deutschland 2005/06*, in *NWiR 2005*).

3. The most important of the further fields of reform is the regulation on Solvency II, which on the lines of banking supervisory law of Basel II shall establish a new Europe-wide legal framework for supervision with orientation towards „actually existing” risks. As Basel II, this approach aims at a risk orientation of insurance companies, which comprises besides the quantitative element of capital equipment as well the quality of the risk management by the individual enterprise. A further aim is to raise the risk transparency for the federal supervisory authority for financial services (BaFin) and the general public. This question was also discussed at the Second Nuremberg Insurance Day in autumn 2004 (see for an introduction Oehlenberg, *Solvency II – Aktueller Stand*, in: Wambach/Herrmann, *ibid*, p. 13 seqq.). The first phase of European regulation being finished, the Lamfalussy procedure shall be pursued by a framework directive, to which now consultations are conducted (see Oehlenberg, *ibid*, p. 15). A first result is expected only for 2008 though.

4. The European requirement of transparency in the field of the so-called *Zillmerung* used for life insurance contracts continued to meet with lively attention. Here the BGH decided already in 2003 that is not sufficient to provide in the standard terms of the insurance contract that in the case of termination the surrender value is reduced asymmetrically over the years. Rather it is necessary to make clear to the client that in the case of termination within the first years nothing of his paid premiums will be reimbursed (BGH *NJW* 2001, 2012, 2014). The decision has been heavily attacked by legal scholars already as regards information law

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<sup>1</sup> In the Meantime repealed by the Directive 2004/39/EC, OJ L 145 of 30.4.2004, primarily to be implemented until 30.4.2006; now prolongation until 30.10.2006 envisaged by the proposal for a directive in KOM(2005)253 final of 14.6.2005.

(Herrmann, *Transparente Zillmerung und Europarecht der Verbraucherinformation*, in: Vieweg/Veelken/Krause, *Gedächtnisschrift für Wolfgang Blomeyer*, 2004, p. 353 seqq.; the same, *Transparente Abschlusskosten in der Lebensversicherung und Europarecht*, in *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht*, 2004, p. 45 seqq.), however, this criticism has not prevented the court from declaring invalid above all the attempts of the insurance industry to adjust the terms in the sense of better transparency, objecting that they still allowed the shrinking to zero (BGH NJW 2005, 3559; commented by Elfring, NJW 2005, 3677 seqq.). Already before this, in July 2005 the BVerfG had decided in other proceedings that despite the “Zillmerung” the insured is to be entitled to an “appropriate” participation in the assets and hidden reserve of his insurer. The federal government is given time until the end of 2007 to amend the respective provisions (BVerfG v. 26.7.05, case number BvR 957/96, 782/94 and 80/95, on 30th December 2005 available as excerpt under [www. Bundesverfassungsgericht.de /bverfg\\_cgi/pressemitteilungen](http://www.Bundesverfassungsgericht.de/bverfg_cgi/pressemitteilungen), full version in NJW 2005, 2363 and 2376).

To begin with, for a comment it is to say that the BVerfG certainly mentions the “Zillmerung” and states in this context that this instrument can involve disadvantages for the insured, which create a need of protection in the case of transfer of total stock. However, from the decisions can neither be inferred an interdiction of the “Zillmerung” nor any measure for the adequacy or transparency of burdening the insured with the costs for the conclusion of the contract.

Looking at the decision of the BGH it is to say that it combines aspects of transparency with those of the material control of fairness. In the exceptional circumstances, this was right, the decision dealing with contracts which in the opinion of the BGH had been concluded on the basis of “Zillmerung” terms not being transparent and thus burdening the insured with economic disadvantages which he had not effectively approved when concluding the contract. Whether it was admissible, though, to prescribe for the adjustment of the “Zillmerung” after remanding to the district court a minimum surrender value amounting to half of the paid premiums (BGH *ibid.*), may be rightly doubted. Once more the court went as far as exercising capacities of price control, which it already does not have as a consequence of § 307 section 3 first sentence BGB. However, the district court will hardly refuse to follow this. – Totally differently is to be judged in the cases in which the contract is from the beginning concluded on the basis of a transparent “Zillmerung” clause. In this case the requirement of transparency is to be applied without any material assessment of fairness. The BGH acknowledges this explicitly in the judgment of 12<sup>th</sup> October 2005 by emphasizing the exceptionality of the particular case.

For the rest can here be only pointed out that the insurance branch emphasizes correctly that, implementing the demands of the courts, the costs incurred for the mediation of contract conclusion would have to be financed by the community of the clients instead of the persons terminating their contract (see Hussla, *Gerichtshof-Urteil wird für deutsche Lebensversicherer teuer*, *Handelsblatt*, 14.10.2005, p. 25: half of million amounts in the three figure range). The discussion reminds very much of that about the financing of account maintenance charges, which was effected until the 90ies by way of asymmetric value dates, but then rightly judged by the BGH as unfair. Today as then, the point is to indicate the prices for the respective services openly and to expose them to the forces of competition (for more details see Herrmann, *DZWiR* 1993, 54, 56 ff.; the same, *Versicherungsvermittlung im europäischen Wettbewerb*, appearing 2006).

5. An aspect not based on Community law, but given the European deregulation, striking as arguably most important reversed trend is the increase of the limit of the statutory insurance by the red-green government since 2003 to today 3,900 €. Thereupon the fresh business in the

private health insurance is comparatively declining, although it can be still noted an increase. According to the newest information of the association of the private health insurance the increase fell most clearly in the first half of 2005, namely to the half of the preceding year (76,300 in the first half of 2004; 39,200 in the first half of 2005).<sup>2</sup> Another scene can be observed in the field of private supplementary insurance. 2004 already counting 16.14 million members of the statutory insurance who decided for a supplementary insurance, the figure rose in 2005 to 17.1 million.<sup>3</sup> All in all, however, it can arguably be stated positively that there is no indication for the assumption that the legal changes have led to dramatic losses.

6. Already at on 23<sup>rd</sup> May 2005 the federal cartel office imposed a penalty of 130 Mio. € on 10 German industrial insurers for the breach of the general prohibition of cartels.<sup>4</sup> This related in the core to the principles of the specialized committee for industrial property insurance within the General Association of German Insurers (GDV), according to which measure for the “financial rehabilitation” of the markets were taken due to ruinous practices of competition in the consent of the market participants and “disturbing” offers to customers were prevented. The parties concerned deny an infringement of the prohibition of cartels and have in part resorted to the OLG Düsseldorf to decide about the penalty notices contested by appeal under s. 63 GWB.<sup>5</sup> According to the statements of purpose by the FIS members the aim seems to be a kind of combat against structural crises, which until the legal reform of May 2005 required so-called release orders of the federal cartel office respectively the federal ministry of economic affairs as far as the respective behaviour fulfilled the statutory definitions. As the relevant details have not yet become known by the public, an assessment by the author shall not be attempted here. The proceedings present insofar milestones of the European development of law as the opening of the insurance markets for the competition of price and conditions aimed at by the EC deregulation finds here a further practical test.

7. Another unfinished subject is the development regarding the establishment of safety funds, even though the relevant legislation in this context was passed already with the reform of the VAG of 15.12.2004 (BGBl. I, 3416). Thereby the hitherto existing regulation of insolvencies, which provides for the unitary competence of the regulatory authority in the country of origin (ss. 88 seqq. VAG), is amended to that effect that in the fields of life insurance and substitute health insurance safety funds with compulsory membership must be established in order to ensure in cases of insolvency not only the safeguarding of the claims of the insureds but to secure as well the continuation of concluded contracts. This happens by order of the BaFin zur?? transfer of the whole amount of insurance business if the case of insolvency or safeguarding under ss. 88 seqq. VAG has occurred and the reorganizing matters concerning this matter have failed (s. 125 subsection 2 VAG). The reorganization funds is by law allocated to the credit institution for reconstruction (s. 126 VAG), however, under s. 127 VAG, it may be by ordinance transferred to a legal person of private law in the way of the so-called “Beleihung”. Thus the general meeting on 4<sup>th</sup> August 2005 of the Protektor AG, which was until then in charge of the voluntary safeguarding in the life insurance sector, resolved upon an amendment of its articles of association providing for performing the functions allocated by the state. As the possibility to transfer official functions to private persons was not changed under the reform of the VAG from 22<sup>nd</sup> September 2005, there are no more objections to this measure. This applies accordingly to the Medicator AG.

<sup>2</sup> PKV Publik of 15.12.2005, p. 104.

<sup>3</sup> Ibid.

<sup>4</sup> PKV Publik of 15.12.2005, p. 104.

<sup>5</sup> Report on AXA under [www.rhein-zeitung.de/on/05/03/23/wirtschaft/t/rzo137654.html](http://www.rhein-zeitung.de/on/05/03/23/wirtschaft/t/rzo137654.html), looked up on 28.12.05.

By these measures Germany has implemented a level of protection, which – as far as can be seen – safeguards the worldwide most comprehensive insolvency protection.<sup>6</sup> At European level it is currently considered if this should be followed with more or less restrictions in order to approximate the conditions for the protection of the insured Europe-wide.<sup>7</sup>

8. As usually follows some information about the most important European and global mergers in the insurance industry. A first impression is presented by the following overview (retroactively replenished by specifications in ZVW, p. 3 seqq.):

Year	Transfer	Volume in Mrd. €
2001/5	Allianz takes over Dresdner Bank. Sales in Europe since Sept. 2005 bundled as SE (Verdi stays). Take over of the Italian RAS*	
2003/2005	Sale of Gerling Rück to Achim Kann, now Globale Rückversicherung (approval of the competent US insurance supervision still to be awaited); Gerling Leben, Gerling property insurance etc. now sold to Talanx (before HDI)	approx. 20**
Jan. 2005	After survival of crisis sale of WÜBA to the British Flowers Group	
Jan. 2005	Citi Group sells daughter Travellers Life and others to Metlife (worldwide greatest one-stop financial Services (Allfinanz) failed)	11,5
Jun. 2005	MLP Life sold to Clerical Medical and now trades under the name Heidelberger Leben; Gothaer Allg. Versicherung AG takes over MLP Versicherung AG	271 Mio. 14 Mio***
Sept. 2005	Wave of mergers of public law insurers comes to a temporary end. Provinzial Nordwest (Kiel/Münster) and SV Versicherungen pool together IT and administration of property and found a new investment company	investment volume 32,5****
Nov. 2005	Württembergische LV (daughter of Wüstenrot&Württembergische) takes over further 90,1 % of Karlsruher Versicherungen (in total now 96,1 %) with approval of the BaFin and the federal cartel authority and thereby moves up to the 10 largest insurers of the FRG*****	“one-time merger costs” 30 Mio. (press release of Karlsruher 10.10.05
Nov. 2005	Swiss Re buys General Electric Insurance Solutions	7,6*****

\* HBl. 18.11.05 p. 23, 25.11.2005, p. 30.

\*\* HBl. 9.11.2005,pS. 23: 18 Mrd. €

\*\*\* HBl. 20.6.2005, p. 19

\*\*\*\* HBl. 13.9.2005, p. 24

\*\*\*\*\* HBl. 23.11.2005

\*\*\*\*\* HBl. 21.11.05, p. 29

As to the merger of the Allianz AG and the RAS to a European company limited by shares (Societas Europaeae) according to Art. 2 subsection 1 of the SE Regulation it is assumed that besides purposes of better controllability of foreign daughters this aims also at improvements at further mergers. It is to assume that the example of the insurance giant will set a precedent

<sup>6</sup> Cf. only Müller, VW 2005, 170.

<sup>7</sup> Bürkle, ZfV 2006, 27.

(see D. Kuhr, Ein europäischer Leuchtturm, Süddt.Z of 13.9.2005, p. 27) and thus contribute to the Europeanization of insurance markets at large.

9. Without a doubt, in 2003-5 there are further developments of considerable weight induced by Community law. Above all it is to be mentioned that the works on the European insurance contract law have been in progress for some years and were brought forward significantly in 2004/5 (for more details see Heiss, VersR 2005, p. 1 seqq. and the seminar for insurance practitioners in the summer term 2005). However, the points mentioned under 1-6 stand out from the view of the works of the IVW, so that the activity of the institute will be seen in the core or the environment of the aforesaid areas as well in 2006. On request we will gladly send you the activity report 2004/5 and the report on the developments of the IVW. Despite of all points which can be criticized, the lively development in the reported years gives reason to be confident that the concerns of Europeanization should continue to proceed. In this sense we wish all readers a good new year.

Nuremberg, 31<sup>st</sup> December 2005

signed H. Herrmann