

# O V E R

## • Recent European Legal Developments Affecting

**M**UCH AS FEDERAL INITIATIVES in the United States can have differing consequences as they play out in the individual states, the effect of directives from the European Union fluctuate markedly from country to country.

Recent EU directives dominated insurance and reinsurance developments on the Continent in 2007, but the impact varied. Sparking the most legislative action was the EU's environmental liability directive (Directive 2004/35/CE), which imposes strict liability for damage to biodiversity by environmentally hazardous operations. While it was the intention of EU legislators to create a uniform and level playing field when accounting for environmental damage, the provisions of the directive leave room for the application of differing levels of liability. Insurers and reinsurers will need to be alert to this.

Many EU countries failed to meet the April 2007 deadline for transposing the directive into their own law (and some haven't even submitted a draft local law for consideration), but enough have done so to give a sense of the variety of ways that individual countries are complying with it.

Expect continuing legislative action in response to a fifth EU motor liability directive affecting insurance and reinsurance exposures, which became effective in June 2007. This directive provides for an EU-wide minimum level of compensation for vic-



In 2007, there were a number of important legal developments in Europe that affected casualty insurance and reinsurance companies throughout the Continent—many as the result of EU directives. But common legislation doesn't always translate into a common legal landscape.

# T H E R E

## the Insurance and Reinsurance Industries •

tims of motor accidents at the following levels:

- › Bodily injury per person—up to 1,000,000 euros
- › Property damage per event—up to 1,000,000 euros
- › Bodily injury per event—up to 5,000,000 euros.

Most Western European countries already provide for minimum limits that are higher. But in newer EU member states in Eastern Europe, the revised minimum limits are in some cases significantly higher than what was provided for in existing legislation. An increase in insurance claims severity should be expected as a result. And a sixth motor liability insurance directive is already in the pipeline and promises to promote further pan-European changes.

In a September report, *Recent Legislative and Judicial Trends in Continental Europe Affecting the Casualty Insurance Industry*, global reinsurance

broker Guy Carpenter, in conjunction with the global law firm DLA Piper, tracked legislative and judicial developments and analyzed the effects country by country. The following highlights from the report (the third in a series of bi-annual studies) detail recent action in individual countries related to the EU directives and other regulatory and legislative action affecting casualty insurers and reinsurers.

### **Austria**

The EU Environmental Liability Directive will be implemented in Austria by a federal environmental liability act, *Bundes-Umwelthaftungsgesetz* (B-UHG), which was passed in draft form by Austria's Council of Ministers in May 2007 and is now subject to debate in parliament.

The B-UHG applies only in the event of damage to water and to soil (and of any immediate danger of such

A large magnifying glass is positioned over a map of Europe. The lens of the magnifying glass is focused on the European continent, which is highlighted in a lighter shade against a darker background of the rest of the world. The magnifying glass has a dark, textured handle and frame.

**By David Lewin**

damage) as a result of occupational activities that are deemed environmentally hazardous. However, the B-UHG does not apply to traffic, agriculture, or environmental damage caused by nuclear energy or for operations regulated under the Soveso II regime, an integrated pollution protection and control mechanism for major accident hazards of certain industrial activities.

The B-UHG defines damage to water as damage that has significant detrimental effect on the ecological, chemical, or quantitative condition of water. Damage to soil is defined as contamination that poses a significant risk to human health. However, the law does not clearly define the term "significant." Also, the law defines costs as all costs that are necessary for the due and efficient enforcement of the law, a very broad meaning that makes the insurer's risk calculation all the more difficult. However, it's possible that a more precise provision will be introduced in the course of parliamentary debate.

Due to general elections in October 2006 and the change of government in January 2007, the EU directive on insurance against civil liability in the use of motor vehicles has yet to be implemented in Austria.

### **Belgium**

In a July 12, 2007, ruling, the Belgian Constitutional Court examined whether a 2006 law concerning the architectural profession violates relevant provisions in the Belgian Constitution on equal treatment and nondiscrimination.

The provisions of the 2006 law serve to limit architects' professional liability at the same time that they require all architects, whether operating as a legal entity or not, to carry adequate liability insurance. Because it's not always possible to identify the responsible party in the event of construction damage, in practice, all parties involved in the construction process, such as architects and contractors, are jointly liable. However, because the 2006 law requires architects to hold adequate liability insurance, it's likely that architects will be asked to take sole responsibility for paying all damages in connection with a casualty claim. The Belgian Association of Architects had asked the Constitutional Court to declare provisions of the 2006 law null and void to the extent that they discriminate against architects relative to other parties involved in the construction process.

While the court ruled that architects were indeed the subject of discrimination, it reasoned that this discrimination isn't caused by the architects' insurance obligations under the 2006 law but rather by the absence of similar obligations for other parties who are involved in the construction process. The request of the Belgian Association of Architects was therefore declared valid but ill-founded. As a result, further legislation will be required to extend liability insurance to other parties involved in the construction process.

### **France**

A law passed in February 2007 introduced controversial reforms related to legal protection insurance. The law requires that indi-

viduals who are insured with legal protection coverage be assisted or represented by legal counsel (and not only by their insurer) if they or their insurer are informed that the opposing party is being assisted or represented by counsel. All related legal fees are to be negotiated by the lawyer and the insured (not the insurer). In a climate supporting legal aid reforms, the French Justice Ministry subsequently reinforced its support for these controversial legal protection measures by highlighting their role in facilitating citizens' access to justice.

A 2005 EU reinsurance directive (2005/68/EC) designed to harmonize the regulatory framework that applies to the reinsurance sector in various EU member states stipulated that each member state needed to transpose its provisions into national law by Dec. 10, 2007, at the latest. The French law is expected to bring significant changes to the French reinsurance sector, including the phasing out of existing collateral arrangements for EU reinsurers.


### **Germany**

Up until last year, environmental liability in Germany meant liability for bodily injuries and damages to a third party's property through environmental means (air, water, or soil). A recent environmental damages act, *Umweltschadensgesetz*, sets liability for the environmental damage itself, with the objective of loss prevention, loss minimization, and loss rehabilitation.

Under the terms of the new law, the perpetrator of environmental damage is obliged to report new or imminent environmental damage to a designated authority. The authority will coordinate measures to prevent, minimize, and rehabilitate environmental damage, with the responsible party (normally a company) bearing the resulting costs. The responsible party must either execute cleanup measures itself or face a claim for reimbursement from the authority. Although the German law didn't become effective until Nov. 14, 2007, it applies to environmental damage having arisen from occurrences and incidents as of April 30, 2007. This last part was necessary in order to comply with the time limit set by the EU for the latest possible implementation of its directive.

The new law is limited to corporate activities. Damage to water, soils, and biodiversity through purely private acts is not governed by the law. Also, the law focuses specifically on operations that are listed as particularly hazardous to the environment. All such listed activities are subject to strict liability. For any occupational activities that aren't listed, liability is limited to damages to biodiversity, provided that deliberate intent or negligence can be proved. The party that is responsible for environmental damage has to bear the cost of rehabilitation, prevention, and damage limitation. There may be a conflict with existing operating licenses for some operations that are subject to strict liability under the new law. It's unclear how the legalizing effect of such operating licenses will affect an obligation to reimburse costs. The law allows acknowledged environmental associations, apart from those directly affected by environmental damage, to apply for intervention.

Existing insurance products available on the German insur-



ance market are not completely able to cover the new risk created by the new law because:

- ▶ Until passage of the law, only specific environmental impairment of property and health was insurable, not general damage to the environment;
- ▶ German third-party liability insurance law is characterized by the fact that coverage is offered only for liability claims under private (civil) law and liability under the new law is subject to public law.

As the new law doesn't distinguish between third-party damage and own damage, the insurance industry faces the challenge of creating an overall insurance solution.

A new (nonbinding) response that discusses damage resulting from interruptions of operation has been published by the association of German insurers, Gesamtverband der Deutschen Versicherungswirtschaft (GDV). However, it's foreseeable that not all insurers will adhere to the recommendations of the GDV, preferring instead to create their own response.

### Italy

The EU's environmental directive was implemented in Italy through a 2006 legislative decree that contains a definition of environmental damages that's in line with that of the EU.

At his own expense, a polluter is obliged to implement necessary measures to prevent damage within 24 hours of the moment when an ecological threat became evident. The polluter also has the duty to immediately inform the local authorities of any action taken.

The new law entitles the Italian government to seek compensatory damages in any case where environmental damage couldn't be avoided, without affecting work undertaken to restore previous environmental conditions. Where it's not possible to quantify the damage without prejudicing the restoration of the environment, the assessed cost against the polluter is three times any monetary sanction that is applied.

On April 24, 2007, the Italian government approved a bill on the reorganization, coordination, and integration of criminal offenses against the environment. The bill, which is currently being discussed in parliament, provides for a new set of articles to be included in the criminal code. Anyone found to be unlawfully attempting to introduce substances or energies into the environment that may damage it or local vegetation and animals would be punished with imprisonment of up to six years and a fine of up to 60,000 euros.

### Netherlands

The Dutch parliament is in the process of adopting a law that will implement the EU's environmental liability directive. Currently, environmental protection is primarily regulated in an environmental management act (*Wet milieubeheer*) and a soil protection act (*Wet bodembescherming*). The environmental management act imposes a general duty to protect the environment and allows the competent authorities to take measures to prevent environmental damage. The soil pollution act contains a separate provision to reclaim damages from the polluter (or any third party that benefited

from remediation measures).

To implement the EU directive, the government has proposed changing the existing environmental management act. This means that the directive will be applied through public law and not by means of civil law. Regarding the reclaiming of costs expended in environmental remediation, the proposed legislation allows competent authorities involved in remediation to determine those costs and thereby avoid a lengthy civil law wrongful act procedure. The polluter may protest any determination of costs through the usual legal channels. At the same time, the proposed law denies competent authorities the option of waiving costs. The only exception is with soil pollution. The government proposes to leave the soil protection act intact, so that to reclaim damages with regard to soil pollution, competent authorities have a choice of basing their case on specific provisions in the new law or wrongful-act provisions in the Dutch civil code. The proposed law complies with an EU directive requiring that competent authorities be the ones to reclaim damages and charges those authorities with the responsibility of initiating damage reclamation proceedings against polluters.

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**The proposed regulation would oblige casualty companies operating in Spain to appoint a Spanish fiscal representative who is a native with habitual residence in Spain or a company that is established in Spain.**

### Spain

Under Spanish law, motor vehicle insurance has both voluntary and compulsory elements. As a result of government approval of the EU directive, the Spanish regulation on motor vehicle insurance is expected to be amended.

Currently, Spanish motor liability rules allow the victim of an accident to make a claim only to the insurance company of the individual responsible for the accident. A proposed new regulation would give the victim the option of filing with either his own insurance company or the insurance company of the guilty party. Before passage of the EU directive, the Spanish government had introduced a measure requiring that insurance companies in general collaborate and assist insured individuals in the preparation of indemnification requests and necessary documentation for calculating liquidation damages. The new regulation would establish this requirement with regard to motor liability insurance. It would also oblige insurance companies to justify their indemnification offers and to communicate them to insured parties within three months. If the insurance companies

don't fulfill this obligation, the new regulation would impose default interest charges on the insurance companies, thereby increasing the indemnification amount.

Finally, the proposed new regulation would oblige casualty insurance companies operating in Spain under the freedom of services regime to appoint a Spanish fiscal representative who is a native with habitual residence in Spain or a company that is established in Spain.

### Sweden

The EU environmental directive was implemented in Swedish legislation on Aug. 1, 2007. The implementation required some changes to the Swedish Environmental Code (*Sw: Miljöbalken* [1998:808]). A new ordinance from the same date offers supplemental regulations on grave environmental damage.

Exceptions to the rules for remedying damage apply to military authorities, agriculture, forestry, the reindeer industry, fishing for a livelihood, and, in certain cases, road maintenance.

The new regulations regarding responsibility for remedying environmental damage will be applicable only to damage that has occurred after April 30, 2007. Penalty clauses regarding transgression of Sweden's 1998 chemical products and biotechnical organisms ordinance have been incorporated into the new law.

Sweden is already largely in compliance with the EU's motor liability directive. But additional adjustments may be necessary to Sweden's traffic damage and insurance business laws, laws applicable to certain insurance contracts, and its law governing foreign insurers' and pension institutions' business in Sweden.

### Switzerland

The Swiss law governing safety of technical equipment and facilities (*Gesetz über die Sicherheit von technischen Einrichtungen*) faces modification to make it correspond with required European product safety standards.

There is also a new Swiss product safety law containing certain duties, such as product monitoring, for manufacturers and importers, including the authorities' abilities to order a recall of dangerous products. At the same time, all agricultural products are now subject to the new law.

It's interesting to note that Switzerland continues to broadly follow EU legislation. This is clear in the latest product safety legislation, and in due course, it's likely we will see EU environmental liability regulations reflected in Swiss law. ●

DAVID LEWIN is a London-based managing director at Guy Carpenter and oversees product and technical development within the firm's International Casualty Specialty Practice. The report *Recent Legislative and Judicial Trends in Continental Europe Affecting the Casualty Insurance Industry*, from which this article is adapted, was produced by Guy Carpenter in conjunction with the international law firm DLA Piper.

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