

Response to the Questionnaire on Mandatory Insurance
By the AIDA German Chapter

GERMAN NATIONAL REPORT

ON

MANDATORY INSURANCE

1. Basic Factors

1.1. The Mandatory Insurance Contract or Coverage Requirement is Laid Down

In Germany the term *Versicherungspflicht* (obligation to insure) is predominantly used in a narrow sense to mean an obligation imposed on a person by law. This narrow usage may be caused by the fact that § 113 I German Insurance Contract Act (hereinafter referred to as VVG) defines the term *Pflichtversicherung* (mandatory insurance) to be a liability insurance, for the conclusion of which there exists an obligation by statute or other legal provision. While §§ 113 et seqq. VVG only apply directly to mandatory insurances that are liability insurances this does not, however, mean that a *Pflichtversicherung* cannot be another type of insurance. In a larger sense, furthermore, *Versicherungspflicht* may also signify the contractual obligation to seek insurance cover.

1.1.1. By Law

1.1.1.1. The majority of compulsory insurance requirements are laid down in **national law**. In one more recent study it was held that 45 different types of mandatory insurances exist within Germany, of which 34 are laid down in federal and 11 in regional law (i.e. law of the Bundesländer) (cp. *Michaels*, in: *Hamburger Gesellschaft zur Förderung des Versicherungswesens* (ed.), *Pflichtversicherung – Segnung oder Sündenfall*, Karlsruhe 2005, p. 1 at 3). Other scholars have forwarded lower numbers in the vicinity of 20 mandatory insurances (*Prölss*, in: *Prölss/Martin* (eds.), *VVG*, 27th ed., Munich 2004, Vorbem. IV, paras. 1 et seqq. – who only listed federal obligations to insure, though). To our findings the first assessment seems to be closer to the truth. At the very least there is a consensus that the majority of obligations to insure are imposed by federal law (*Lemmel*, in: *Basedow/Focke* (ed.), *Europäisches Versicherungsvertragsrecht*, vol. 1, Tübingen 2002, p. 305 at 313) – at least if one does not count every obligation of one Bundesland as a single obligation but rather groups them together. The obligations to insure laid down in regional law – which may by their nature differ from one Bundesland to the other or may even exist in one and be absent in the other – cover(ed) such areas as professional liability insurance for certain professions within regional legislative competence (e.g. obligation to insure for architects and for structural engineers), dog owner insurance and (though to our knowledge no longer in force in any Land) commercial animal insurance and homeowner's fire insurance.

1.1.1.2. **International law** *stricto sensu* may not be the direct basis for an obligation to insure (EU law – which may have a direct effect [esp. regulations] – is not regarded as international law *stricto sensu*, but as a category of its own: so-called EG-Recht). The

predominant German opinion has it that international law has no direct effect on its citizens, but needs to be transposed in order to do so. Insofar the obligation must be laid down in national law. Some obligations to insure may, however, be influenced by international law and may serve to fulfil Germany's international obligation to provide for an obligation to insure. Such an obligation to insure would be the one forcing car owners to seek third party liability insurance, which, while having been enacted in 1965, now serves to fulfil Germany's obligation to provide for such a mandatory insurance within the EU. There are, furthermore, some EU regulations, which have by their legal nature an *effet direct* in all Member States, providing for an obligation to insure; e.g. the obligation imposed on air carriers and aircraft suppliers to take on liability insurance against damages caused to passengers, luggage, goods or third parties (EC Reg. 785/04).

1.1.2. Systematically by a Co-Contracting Party

1.1.2.1. It is quite common that a **bank** seeks to secure the repayment of a **loan** by requiring the debtor to conclude a so-called *Darlehensversicherung*. This is a risk life insurance with the debtor being the policy holder and usually the bank being the beneficiary. In the case the debtor deceases before having repaid the loan in full, the bank receives benefits in the outstanding amount (including interest) as a one-time payment (cp. *Wandt, Versicherungsrecht*, 5th ed., Cologne et al. 2009, para. 219 (fn. 168)). Whether or not such an obligation to insure is systematically imposed by banks on their debtors is difficult to say. Typically banks will only impose such an obligation if the loan is not sufficiently secured by physical securities (e.g. mortgage or land charge) but hinges on the debtor's ability to make an income and thus pay off the debt.

1.1.2.2. More importantly many **banks** will require the debtor to conclude fire and/or storm insurance for a mortgaged house intended to secure a **loan**. Other than the evident advantage that by this way the physical security is protected against risks such an insurance protection is of further interest for the bank. Pursuant to § 15 Pfandbriefgesetz covered bonds may only be emitted if the house situated on the mortgaged property is properly insured against all likely risks. Insofar to allow themselves to turn the mortgage into a Pfandbrief later on, many banks are very keen to allow for this already at the moment of contract conclusion.

1.1.2.3. Some **lessors** require their lessees to conclude a content insurance and a liability insurance covering damages caused to the rented space. If such obligations are not individually negotiated but are part of the general terms and conditions such an obligation will most likely be regarded as a surprising clause and will thus be held null and void by a German court. Even if such an obligation is individually bargained for, there is a high risk of it being annulled. This is due to the fact that there is a maximum security deposit of three months' rent, which will usually be collected by the landlord, and which would be surpassed if the landlord were to gain additional security by the lessee having to conclude a security which was to benefit him (in-)directly (cp. *Jendrek* [2003] NZM 697 at 698). In the letting of business spaces the obligation to conclude those types of insurances is less problematic and is more widely used.

1.1.2.4. One **other example** would be the freight forwarding business, where § 29 of the Allgemeine Deutsche Speditionsbedingungen (ADSp; German General Terms and Conditions for the Freight Forwarding Business) obliges the carrier to conclude and carry professional liability insurance throughout the term of the contract. In general it is not uncommon for

commercial contracts to require one side or the other to conclude or upkeep certain insurance (typically some kind of liability insurance).

1.1.2.5. Another important group of mandatory insurances are those that are only **indirectly imposed** by law. Such is for example the case for German physicians concerning their professional liability. On the one hand, statute does not impose any duty to conclude such an insurance. Yet it does require every person qualified to act as a physician to seek admission to a chamber of physicians. The chamber, on the other hand, requires physicians to seek appropriate cover (§ 21 MBO-Ärzte [Model Code of Professional Conduct of the Medical Profession]) (see *Bergmann/Wever*, *Die Ärztehftung*, 3rd ed., Heidelberg et al. 2009, p. 241). For German lawyers it is § 51 I BRAO (Federal Code for the Legal Profession) that stipulates the obligation to insure.

1.1.2.5. Finally there are those mandatory insurances that are imposed neither directly by law nor explicitly by contract but rather by **due diligence** considerations. In some instances courts have found by way of contractual interpretation that a person was obligated towards another to have a certain risk insured, the failure of which led to the result that the other person could treat the person in question as if an insurance had been concluded (cp. *OLG Hamm* [2001] VersR 376 with note by *Wandt*).

1.2. Context in Which a Mandatory Insurance Requirement was Laid Down

1.2.1. Insurance was Made Mandatory

No general statements can be made about how an insurance is turned into a mandatory insurance in Germany. The process varied from one type of obligation to insure to the other. In general, however, German politics did not show an overt tendency to introduce mandatory insurance in a sped up legislative process in reaction to cases of public interest. Nevertheless such cases have often be at the root of public discussion for introducing mandatory insurance and are thus also at the root for legislative action. One more recent example would be the flood of the Elbe in 2002 or European windstorm Kyrill in 2007 which rekindled discussion of whether a coverage for natural phenomena (such as esp. floods; so-called *Elementardeckung*) should be made mandatory for house owners (cp. *Viezens* [2007] VersR 1494; *Armbrüster* per ibidem). Whether the legislator will pick up on this request by some authors remains to be seen.

1.2.1.1. Without Haste

In the beginning an obligation to insure existed only for certain types of businesses that were regarded as posing a substantial risk for the well being of citizens (e.g. aerial, fluvial or railway transportation) and for which due to that risk a non-fault based liability was introduced. Here, while it was certainly pondered whether or not the concept of mandatory insurance was per se a good idea, politics did not display much reluctance to impose an obligation to insure on the businesses in question. While one cannot say that these laws were passed in haste – at least not when applying modern standards – they were certainly passed in reaction to certain cases of public interest. Discussion really started to take momentum when first individuals were targeted to be submitted to an obligation to insure (which on a federal level was probably the obligation to insure for hunters; interestingly enough this was also the first mandatory liability insurance in a sector that only knew fault based liability). Here and especially what concerns the discussions about the envisioned obligation to insure for motor vehicle owners a rather intense political discussion commenced. Here even though there was

some political pressure for public action one cannot speak of a hasty decision but rather of a well grounded political compromise, whether it is one one favours or not.

1.2.1.2. In Haste

The same cannot be fully said for some more recent examples of mandatory insurance. While there are no specific examples, where one can really say that it was a truly hasty decision, one often hopes for a more thorough discussion. One occasionally gets the impression that the state grows less scrupulous in assessing whether there is a distinct societal need for the introduction of a specific mandatory insurance.

1.3. Nature of the Risk

Mandatory insurance exists or is discussed to be introduced in almost all areas of insurance. For the time being, the vested domain of mandatory insurance remains, however, mandatory liability insurance. There are some examples from other areas of the law, though.

1.3.1. Property Insurance

1.3.1.1. The modern German legislator has hitherto been rather reluctant to oblige home owners (or the owners of other valuable objects) to conclude property insurances. Historically this has not always been the case. In fact, German mandatory **fire insurance** – i.e. private undertakings (often initiated by government) that were then turned into monopolies by the legislator, from which every house owner of a certain region had to take insurance – is widely regarded as the birth place of mandatory insurance (cp. *Puskás*, lemma ‘Pflichtversicherung’, in: Farny et al. (eds.), *Handwörterbuch der Versicherung*, Karlsruhe 1988, p. 513). Many (Bundes-)Länder used to provide for such a mandatory fire insurance for house owners. One rather prominent example was the *Hamburger Feuerkasse* – established in 1676 and thus arguably the oldest still existing insurance undertaking – from which every house owner had to take fire insurance. This monopoly and with it the obligation to insure was ended in 1994 due to the EC deregulation of the insurance sector (on the history of the *Hamburger Feuerkasse* see *Schloz* (ed.), *Es begann 1676: Hamburg, Geschichte, Katastrophen, Feuerbrünste, Hamburger Feuerkasse*, Hamburg 2001). The same is true for all other Bundesländer, in a way that to our knowledge no regional mandatory fire insurance for house owners exists any more. One early exception of a federal mandatory fire insurance was the one forced on home owners whose house were subject to a specific public land charge (the so-called *Abgeltungslast*). For western Germany this regulation has long become irrelevant as all charges had been paid off, but the reunification gave rebirth to many such *Abgeltungslasten* obliging those house owners to take out fire insurance. To our knowledge, however, all charges on eastern German houses have now been paid off (for the *Abgeltungslast* cp. *Röder-Persson*, *Das Privileg der öffentlichen Grundstückslast*, Berlin 2004, pp. 33 et seq.).

1.3.1.2. One mandatory **fire insurance** (and the insurance against other **accidents**) that still exists is that imposed on the **fructuary**. § 1045 I of the German Civil Code (BGB) states that “the usufructuary must insure the thing for the duration of the usufruct against damage by fire and other accidents at his own cost, if the insurance corresponds to proper management.” As can be taken from this passage this very early example of a mandatory insurance is only imposed in those cases where the average person in the position of the owner would deem it due to take out insurance (cp. *Bassenge* in Palandt (ed.), *Bürgerliches Gesetzbuch*, 68th ed., Munich 2009, § 1045, para. 1). This mandatory insurance exhibits one particularity: pursuant to common opinion the owner and the usufructuary may contract out of this obligation (see

e.g. *Pohlmann*, in: MünchKomm, 5th ed., Munich 2009, § 1045, para. 1). In this respect it only resembles the obligation to insure against fire and other hazards imposed on the **warehouse keeper**, which, however, is constructed in such a way that the depositor can by unilateral demand oblige the warehouse keeper to take out (fire) insurance (see *Prölss*, in: *Prölss/Martin* (eds.), VVG, 27th ed., Munich 2004, Vorbem. IV, para. 11). If the depositor is a consumer the warehouse keeper must inform him on the possibility of insurance cover (see § 472 I 2 Code of Commerce [HGB]).

1.3.1.3. Another example of a mandatory property insurance, which however is triggered by the professional capacity of the person, is the obligation on the **professional pawn broker** to insure **pawned objects** against fire, supply water, burglary and in a reasonable manner against robbery, with the insured sum being at least twice the amount of the loan granted on the object (see § 8 Verordnung über den Geschäftsbetrieb gewerblicher Pfandleiher, BGBl. 1976-I, S. 1334).

1.3.1.4. One other mandatory insurance that used to be widely spread in the Bundesländer was the **commercial animal insurance**. When in the late 19th century veterinarian control became more and more important in order to safeguard public health, the risk of having ones stock destroyed increased, making it necessary for livestock owners to insure against such a risk. In many regions this was turned into a mandatory insurance, in order to safeguard the functioning of the agricultural sector and thus the provisioning of the public with meat at stable prices. The obligation to take commercial animal insurance against certain risks has, however, long been abandoned, with Bavaria – before abrogating it – having for years been the last Bundesland to provide for such an obligation (*Puskás*, lemma ‘Pflichtversicherung’, in: *Farny et al.* (eds.), *Handwörterbuch der Versicherung*, Karlsruhe 1988, p. 513 at 517).

1.3.2. Liability insurance

As mentioned before, in Germany mandatory insurance is almost a synonymous term to mandatory liability insurance. It is insofar not surprising that the vast majority of still existing obligations to insure fall within this category.

1.3.2.1. Professional or Business liability

Mandatory insurances in the commercial sector are manifold. For a more comprehensive overview one may categorise them in obligations to insure that attach to the operation of a certain risk (1.3.2.1.1.), the production of certain products (1.3.2.1.2.) and most importantly the pursuit of a specific profession (1.3.2.1.3.).

1.3.2.1.1. Operation Liability

Compulsory insurance quite often attaches to the operation of a specific hazard, which must not necessarily be commercial. The best known operational hazard, entailing an obligation to insure, is that of operating a motorised vehicle, i.e. car, motorcycle etc. In the latter case the obligation to insure is not limited to the operation of the vehicle in a professional capacity (insofar this obligation to insure is treated below, see *infra* 1.3.2.2.2.). Other mandatory insurances attaching to the operation of a risk – while not explicitly being limited to professional activities – are by the nature of the risk more confined to commercial activities.

1.3.2.1.1.1. One well known example is the obligation incumbent on **air carriers, aircraft suppliers and other airplane owner’s**. Here a three-partite approach is necessary. For the liability under the contract for carriage an obligation to insure exists under the Art. 50

Montreal Convention (respectively the implementing regulation and law). In a second step one must appreciate the obligation to insure under Regulation 785/2004/EC (see supra 1.1.1.2.), which is the transposition of the Montreal Convention, to which the EU (but also Germany individually) is a signatory. In a third step there remains a purely national obligation to insure for certain aspects not covered by the aforementioned instruments (e.g. operators not within the scope of application of the regulation, insurance of damages to persons or goods to which regulation is inapplicable, losses caused by delay (cp. § 50 Luftverkehrsgesetz, §§ 101 et seqq. LuftVZO). Combining these three instruments one could say that Germany has more or less laid down an all-encompassing obligation to insure for this sector (for an extensive study see *Morscheid, Pflicht-Haftpflichtversicherung im gewerblichen Land- und Luftverkehr*, Karlsruhe 2008, pp. 129 et seqq.). There exists another mandatory insurance in the air transportation industry. **Companies providing ground services** (*Bodenabfertigungsdienstleister*) may only be admitted by the airport if they prove holding liability insurance, §§ 3, 8, Annex 3 n° 2 B (6) Decree on Ground Services at Airports.

1.3.2.1.1.2. A more recent obligation to insure – at least what concerns the federal level – is that imposed on **railway companies and railway network operators**. Until the year 1994 the railway system was operated and kept up by public enterprise making it seem redundant to request for mandatory insurance – only some Bundesländer provided for a specific mandatory insurance for private railway companies (Art. 14 Bayerisches Eisenbahn- und Bergbahngesetz old version; § 15 Baden-Württembergisches Landeseisenbahngesetz old version). In 1994 the railway system was liberalised making it possible for the railway network operator to be a different company than the railway company and for both to be private companies. To remedy this perceived risk the Verordnung über die Haftpflichtversicherung der Eisenbahnen (Decree on Liability Insurance for Railways) was passed. Said companies must now insure against being held liable for losses caused by an accident linked with the operation of a railway (see *Morscheid, Pflicht-Haftpflichtversicherung im gewerblichen Land- und Luftverkehr*, Karlsruhe 2008, pp. 87 et seqq.).

1.3.2.1.1.3. Regional laws that serve to transpose EC directive 2000/09 into national law, most often provide for an obligation to insure for **cableway operators** and operators of similar contraptions against damages caused to persons or goods or other economic losses in relation to the operation of a cableway (see e.g. Art. 31 Bayerisches Eisenbahn- und Seilbahngesetz, § 14 SeilbG Hessen; § 12 LandesSeilbG Sachsen; § 3 III n° 3 SeilbG Hamburg).

1.3.2.1.1.4. In the **shipping industry** – be it maritime, be it fluvial – obligatory insurance is rather seldom found. For example the obligation to insure under the Athens Convention of 2002 is only an obligation *sensu lato*, since the obligation may be fulfilled with other means such as a bank guarantee. The same is true for the mandatory insurance imposed on certain foreign vessels by virtue of § 2 I Ölschadengesetz (Oil Spill Act) if they want to enter German waters. Again a bank guarantee is regarded as an equivalent. For fluvial shipping there once were regional mandatory insurances for some activities (e.g. in Bavaria § 3 II Bayerische Binnenschiffahrtsordnung – the new Bayerische Schifffahrtsordnung does no longer provide for such). At present only few such obligation could be discerned (cp. e.g. § 4 I n° 8 Thüringer Verordnung zur Regelung der Schiff- und Floßfahrt). On federal level one pseudo mandatory insurance exists for **commercial sport boat rentals**. If the lessor wants to let specific sport boats to people which do not possess the necessary certificate to steer said boat, he may under specific circumstances lend them the boat with a charter certificate. In that case the sport boat, it's owner and its operator have to be covered by a liability insurance (§ 9 Verordnung über

die gewerbsmäßige Vermietung von Sportbooten sowie deren Benutzung auf den Binnenschiffahrtsstraßen in connection with Annex 7 n° 1 to said decree).

1.3.2.1.1.5. The **Atomic Energy Act** (AtomG) in connection with the Paris Convention also indirectly provides for an obligation to insure for such companies involved in the handling of atomic energy resources. The obligation is indirect as it is usually the supervisory authority that will substantiate the method and comprehension by which the companies in question are to provide for cover against the liability risks in question, cp. § 13 AtomG. Other methods of protection may also be admitted by the supervisory authority, though (see also Deckungsvorsorgeverordnung zum AtomG).

1.3.2.1.1.6. The operator of certain **facilities** – potentially **harmful to the environment** – and the operator of **genetic engineering facilities** (as well as he who releases genetically engineered organisms) are under a duty to provide for sufficient cover. This cover may foremost be provided by taking out liability insurance, cp. § 19 I, II n° 1 Umwelthaftungsgesetz (Environmental Liability Act); § 36 I, II n° 1 Gentechnikgesetz (Genetic Engineering Act). Pursuant to § 20 UmwelthaftungsG and § 36 I GenTG government is empowered to pass implementing decrees concerning cover. Such decrees have not yet been passed, making it questionable if a duty is incumbent on these operators.

1.3.2.1.1.7. The operators of **firing ranges** must take out liability insurance (covering persons and objects) in order to be certified, § 27 I Waffengesetz (Weapons Act). They must furthermore seek an accident insurance covering all employed to operate the shooting range (see infra 1.3.3.2.1.). In a similar field, organisers of seminars on **explosives** intended for the formation of licensed blasters, must provide for liability insurance for their seminar to be admitted, § 33 First Decree on the Explosives Act.

1.3.2.1.1.8. **Carnies** that operate specific fun rides or the like (involving weapons, animals, dangerous contraptions etc.) must conclude liability insurance covering his actions and omissions and that of his personal, § 55 f GewO, § 1 Decree on Carny Liability Insurance.

1.3.2.1.1.9. The operator of **nursing schools** must conclude for his apprentice nurses [supposedly in the form of a group contract] a liability insurance contract, § 8 III First Decree on Nursing and Nursing Schools.

1.3.2.1.2. Product Liability

There is no general obligation to insure against the risk of product liability as in some other countries. Only **pharmaceutical companies** are held to insure against such a risk. They are, however, given the opportunity to supplement insurance by a bank guarantee, cp. §§ 88 I, 94 Pharmaceutical Act (AMG).

1.3.2.1.3. Professional Liability

Several professions may only be pursued if the person holds adequate professional liability insurance.

1.3.2.1.3.1. Pursuant to § 54 Public Accountant Act (Wirtschaftsprüferordnung) **auditors and accounting companies** must hold professional liability insurance, the adequate minimal cover etc. of which is determined by the chamber of accountants. For **tax accountants** such an obligation also exists, but here the legislator set more rigid standards on the minimal requirements, cp. §§ 67, 158 n° 6 Tax Advisory Act (Steuerberatungsgesetz), §§ 51 et seqq.

Decree on Tax Accountants (Durchführungsverordnung Steuerberater). An obligation also applies to so-called **income tax assistance associations** (*Lohnsteuerhilfsvereine*), i.e. small self-help association formed by employees to assist in tax matters. Here the obligation does not go into detail, but only request adequate cover, § 25 II Tax Advisory Act.

1.3.2.1.3.2. § 19a Federal Notary Public Act (Bundesnotarordnung) provides for an obligation to insure for **notary publics**, which quite resembles the one incumbent on tax accountants.

1.3.2.1.3.3. **Lawyers** also require a professional liability insurance to cover damages resulting in the course of their professional activities, § 51 Bundesrechtsanwaltsordnung (BRAO). Foreign **European lawyers** must not hold the specifically required liability cover but they must provide for a cover (insurance or other) that is equivalent, § 7 European Lawyers Act (EuRAG). **Patent lawyers** are also required to carry professional liability insurance, § 45 Patentanwaltsordnung.

1.3.2.1.3.4. Companies in the business of **road haulage** are also required to provide for professional liability insurance to cover damages caused to the goods or by delay, § 7a Güterkraftverkehrsgesetz (Road Haulage Act).

1.3.2.1.3.5. **Companies** that want to **transport waste** (by vehicle) within Germany, need other than the normal automotive third party liability insurance an environmental liability cover, § 7 II Transportgenehmigungsverordnung. For **Trans-European transport of waste**, regulation 1013/2006/EC applies and the disposal company needs to provide a security for the costs of transport, costs of recovery or disposal and 90 days of storage. Here, however, insurance is but one of the alternatives that may provide the necessary security. **Waste disposal companies** in general, whether they transport the waste or not, need to provide for “sufficient” insurance cover, § 6 Entsorgungsfachbetriebsverordnung (Decree on Licensed Waste Disposal Companies).

1.3.2.1.3.6. Commercial **realtors** and **property developers** must provide their clients with security in the same amount as the assets they received or over which they may dispose by proxy in order to fulfil their mandate. To provide such security said persons may – amongst other – conclude an insurance contract, as long as the contract includes fidelity guarantee claims (*Vertrauensschäden*), § 2 Verordnung über die Pflichten der Makler, Darlehens- und Anlagenvermittler, Anlageberater, Bauträger und Baubetreuer. The same rule also applies to **commercial brokers, loan brokers** and **investment consultants**. But since other securities may be offered one may not call this a mandatory insurance *stricto sensu*.

1.3.2.1.3.7. Not by any federal but only by regional obligations to insure are covered **architects, structural engineers** and other authors of structural designs. Almost all if not all Bundesländer provide for such an obligation to insure.

1.3.2.1.3.8. In order to be accredited a company that wishes to serve as a private **supervisory agency for occupational safety** needs to hold liability insurance, § 21 II n° 1 Betriebssicherheitsverordnung (Decree on Occupational Safety). Differently for private **supervisory agencies for calibration** (Prüfstelle Eichwesen) where it is in the discretion of the competent administrative body to require liability insurance or not for admission, § 63 II Eichordnung (Decree on Calibration). In most cases such insurance cover will be requested. Private **supervisory agencies concerning boilers and construction products** must signal

sufficient liability insurance to be certified, § 7 I Decree on the Bringing into Circulation of Boilers and Construction Products. Private **supervisory authorities** regarding the supervision of certain facilities regarding **appliance and product safety** must also take out liability insurance: § 17 V n° 5 Appliance and Product Safety Law (GPSG).

1.3.2.1.3.9. A company resp. person that wants to be certified to administer general **inspection** (HU), exhaust inspection (AU) and security inspection (SU) on motorised road **vehicles** must provide for sufficient liability insurance, Annex VIIIb n° 2.6 StVZO. Furthermore, if a car repair shop wants to be admitted to administer **liquid petroleum gas checks** it must also confirm that it has sufficient liability insurance cover, Annex VIIa n° 2.8 StVZO.

1.3.2.1.3.10. Commercial **security service companies** must hold professional liability insurance to cover damages caused in the course of the execution of the surveillance contract, § 34a II n° 3 lit. c Trade Regulations (*Gewerbeordnung*, hereinafter referred to as GewO), § 6 Decree on Security Service Companies.

1.3.2.1.3.11. **Development aid companies** must take out liability insurance for their employees and their families that covers their professional and private actions while being stationed abroad, § 6 Development Aid Workers Act (*Entwicklungshelfergesetz*). The private health insurance that must also be concluded is described in more detail below (see infra 1.3.3.2.2.).

1.3.2.1.3.12. So-called **certification companies**, i.e. companies that certify an **electronic signature** for e-commerce, must provide for cover. Other than liability insurance bank guarantees are also permitted, § 12 Signaturgesetz, § 9 Signaturverordnung.

1.3.2.1.3.13 A pseudo professional obligation to insure is that imposed on the **administrative receiver** (*Zwangsverwalter*), which is not a profession but a person named by the court to administer a property or the like. He must conclude a pecuniary damage liability insurance to cover this office, § 1 IV *Zwangsverwalterverordnung*.

1.3.2.2. Liability in Private Life

There is only a limited number of mandatory liability insurances forced on persons concerning their private activities and the like.

1.3.2.2.1. The first mandatory liability insurance that did not attach to a professional activity was the one imposed on **hunters**. Pursuant to § 17 I n° 4 a Federal Hunting Act (*BJagdG*) hunting permits may – amongst other strict requirements – only be attained by demonstrating sufficient insurance cover under a hunter's liability insurance. Furthermore everybody wanting to attain a **licence to carry firearms** must conclude a liability insurance contract, § 4 I n° 5 *WaffenG* (*Weapons Act*).

1.3.2.2.2. The most prominent example of a mandatory (liability) insurance and in fact the most common insurance product (concerning its number) is the **automotive third person liability insurance**. The Obligatory Car Insurance Act [*PfIVG*] makes incumbent on all person to conclude such an insurance in order to register a car or other kind of motorised vehicle in Germany and to keep such an insurance if the general location of the vehicle is in Germany (but there is also an obligation to carry such insurance for every foreign car that participates in German traffic, cp. § 1 Obligatory Foreign Car Insurance Act [*AusPfIVG*]).

Considering that this mandatory insurance is common to all European countries and probably to most other developed countries one must not go into further details.

1.3.2.2.3. Other than that, no federal private liability insurances could be found. One possibility that has, however, been advanced several times in the past, was the introduction of **mandatory liability insurance for children**, i.e. some authors proposed to force parents to seek cover against damages caused by their children (*Schwintowski* [2003] ZRP 391). For the moment this idea has not found any support by the legislator, supposedly due to the fact that it is perceived as *kinderfeindlich* (not child-friendly), while it is official public policy to create a favourable situation for parents.

1.3.2.2.4. Yet there are some mandatory private liability insurances on the Länder-level. Following long discussions in 2000 – in the wake of some rather gruesome dog attacks – several Länder introduced a **mandatory dog owner liability insurance** (see e.g. § 12 Hamburger Hundegesetz; § 4 II Rheinland-Pfalz Hundegesetz; § 71a II HSOG in connection with § 3 I n° 7 Hessische Hundeverordnung). In several of the Länder this obligation to insure exists only for dogs that are perceived as dangerous (“*gefährliche Hunde*”).

1.3.3. Personal Insurance

1.3.3.1. Life Insurance

The only known (indirectly) mandatory life insurance is that imposed on master chimney sweepers, who have to be member of a specific pension fund institution that also uses fees to provide for a life insurance (cp. *Prölss*, in: *Prölss/Martin* (eds.), VVG, 27th ed., Munich 2004, Vorbem. IV, para. 1). Due to the liberalisation of the German market concerning chimney sweepers, this monopoly will fall in 2013 and thus terminate the only obligatory life insurance in Germany (the so-called *Schornsteinfegergesetz* will be repealed on 01.01.2013).

1.3.3.2. Health and/or Accident Insurance

1.3.3.2.1. There are/were, however, three mandatory insurances which are in a way also risk life insurances but may better be described as accident insurances. The first one – now abrogated – regarded the obligation imposed on aviation companies to take out insurance for the benefit of their passengers. *In concreto* was the cover to be taken in such a way that the passenger or his heirs had a direct claim against the insurer even if nobody was liable for the damages (see § 50 Luftverkehrsgesetz old version, § 106 Luftverkehrszulassungsverordnung old version, cp. *Morscheid*, *Pflicht-Haftpflichtversicherung im gewerblichen Land- und Luftverkehr*, Karlsruhe 2008, p. 196). Today there still exists a mandatory insurance for air carriers but it is limited to mandatory liability insurance (see above). The second one is the insurance that is necessary for **medical tests** to be conducted in Germany, which is to grant the **probands** a claim for damages caused by death, disease or health impairments against the insurer even if no one is liable for the damages (§ 40 I n° 8, III German Pharmaceuticals Act [AMG]). Thirdly, operators of a **firing range**, which also have to take out a liability insurance (see supra 1.3.2.1.1.7.) must conclude an accident insurance for the persons employed in operating the facility, § 27 I Waffengesetz (Weapons Act). Fourthly the state of Hesse – this may apply to other Bundesländer as well – requires the institution (usually the township or city) responsible for the **voluntary fire brigade**, to take out sufficient cover for their volunteers in excess of statutory accident insurance, cp. § 11 X Hessisches Gesetz über den Brandschutz, die Allgemeine Hilfe und den Katastrophenschutz.

1.3.3.2.2. An obligation to conclude **health insurance** is imposed on foreign aid organisations. Every **development aid organisation** has to take out health insurance for their employees and their families to cover their stay abroad in the form of a group insurance contract (§§ 6 et seq. Development Aid Workers Act [Entwicklungshelfergesetz]). For the liability insurance that must be concluded for the development aid worker see supra 1.3.2.1.3.11.

1.3.3.2.3. Since January 1st 2009 every person residing in Germany is obligated to take out **medical expenses insurance** (*Krankheitskostenversicherung*), § 193 III VVG. This mandatory insurance was introduced as – notwithstanding the still existing system of mandatory public health care and parallel the system of private health insurance (for those who opt out of public health care, for those that are not legally included into public health care and those who wish for additional cover) – it was perceived that some people that were not legally included into public health care were under risk of not being able to receive appropriate treatment in the case of sickness or the like, if they were not coerced in providing at least for minimal coverage (see *Kalis*, in: Langheid/Wandt (eds.), *Münchener Kommentar VVG*, § 193, paras. 16 et seqq.).

1.3.3.2.4. Every person that is not covered by public health care but is a policy holder of a health care insurer is obligated to conclude with the same insurer (or under certain circumstances with another insurer a **private long term care insurance** (*Pflegeversicherung*), § 23 I Social Security Act XI (SBG).

1.3.3.3. Other

One rather extraordinary type of mandatory insurance is that imposed on **package holiday operators** (*[Pauschal-]Reiseveranstalter*), who must provide travellers with a so-called travel costs guarantee certificate, i.e. a document demonstrating that the operator has taken out insurance for the case that it should become insolvent, in order for the traveller to be reimbursed by the insurer. This is especially to guarantee a safe passage home, should an operator become insolvent while the traveller is abroad (as had occurred on a larger level in several cases in the 1990s in all of Europe). However § 651k BGB also offers the possibility to fulfil the obligation by seeking a bank guarantee. Insofar this is no mandatory insurance *stricto sensu*.

1.4. Exclusions

The variety of mandatory requirements concerning coverage is almost as big as the variety of fields which provide for a mandatory insurance. There are such mandatory insurances, where the only requirement is that any insurance exists (e.g. § 17 V n° 5 Appliance and Product Safety Law [GPSG] for private supervisory agencies in this sector, see supra 1.3.2.1.3.8.), while others only require sufficient insurance cover (e.g. § 6 Decree on Licensed Waste Disposal Companies, see supra 1.3.2.1.3.5.) and again others make rather detailed requirements on what specifications the insurance contract has to fulfil. Insofar it is impossible to make any general statements. Only the last category potentially permits, prohibits and imposes certain exclusions. However, on a case by case basis certain exclusions would also be prohibited to policy holders only under a duty to provide for “sufficient” insurance cover – as certain exclusions would turn the cover for certain policy holders and situations insufficient.

1.4.1. Permitted Exclusions

Some provisions explicitly mention exclusions that are permitted. One example can be seen in § 51 III BRAO concerning mandatory professional liability insurance of lawyers (see supra.

1.3.2.1.3.3.). Are allowed to be excluded claims concerning a) consciously negligent conduct, b) tasks performed from and for an office or a law firm situated in another country, c) tasks relating to advice given on or occupation with Extra-European Law, d) tasks performed before an Extra-European Court and e) embezzlement by personal, family members or partners. Another example would be § 7a III Road Haulage Act (see supra 1.3.2.1.3.4.) which allows to be excluded claims concerning a) damages caused with intent by the entrepreneur or his representatives, b) damages caused by war, atomic disaster, civil unrest or the like, and c) damages concerning freight contract involving the transportation of noble metals, jewels, legal tender and the like.

1.4.2. Prohibited Exclusions

The above examples (see supra 1.4.1.) give a good example of how the German legislator indirectly prohibits exclusions. § 51 III BRAO and § 7a III Road Haulage Act are put in a way to make clear that these exceptions form a *numerus clauses* of exclusions, thus prohibiting all other exclusions. No example comes to mind where the legislator would have taken the opposite route, i.e. in a first step allowing all exclusions and in a second step disallowing specific exclusions.

1.4.3. Imposed Exclusions

There are some imposed exclusions for cover, which are, however, usually rather self explanatory and are most often but a reflex to general insurance contract law. For instance does § 7 Obligatory Car Insurance Act (see supra 1.3.2.2.2.) provide that the violation of an *Obliegenheit* [functional German equivalent to the Anglo-American warranty] if done in fraudulent behaviour always results in the loss of cover. Insofar fraudulent behaviour is mandatorily excluded.

1.5. Penalties for Lack of Insurance

Germany, what concerns many but not all mandatory insurances, has a double tracked approach to assure that the obligation to insure is properly fulfilled: Control via a duty to disclose on the insurer and penalties. The most efficient types of mandatory insurances are those that require the insurer to inform a certain authority or agency about the inception of cover, but also about the suspension of cover and the termination of the contract (cp. e.g. § 19a III Bundesnotarordnung [see supra 1.3.2.1.3.2.] which provides for professional liability insurance contracts of notary publics to include a clause by which the insurer must inform the regional administration of justice and the chamber of notary publics about inception and termination of cover – a similar rule applies to lawyer’s liability insurances, § 51 VI BRAO, see supra 1.3.2.1.3.3.). In Germany all mandatory liability insurances (at least indirectly) provide for a duty to disclose the termination of the contract. Pursuant to § 117 II VVG a circumstance, from which the non-existence or the termination of the insurance relationship follows, may only be relied upon against a third party’s claim (which is only possible under strict circumstances except when concerned with a mandatory third party automotive liability insurance were it is always possible) if the damaging event occurred later than one month after the moment at which the insurer notified the competent authority about this circumstance. By this disclosure model the authority in question is put into a position to quickly act when cover has been terminated and has not been renewed with another insurer to take action against the person in question. Whether the administrative expenses and the encroachment on the policy holder’s privacy are appropriate in comparison to the success of this model must be decided for every insurance type that provides for such a duty on the insurer’s side. As a general rule one could say that the more dramatic the results on society, or on individual citizens if an insured event were to occur without there being cover, the higher

the likelihood of damages, the more appropriate does it seem to install such a disclosure system. Since in principle only a severe risk warrants the creation of an obligation to insure in the first place, most of the time it should also warrant a duty to disclose. Such a disclosure system does, however, still require that the non-fulfilment of the duty to insure has negative consequences, as there would otherwise be no incentive to fulfil the obligation.

1.5.1. Criminal Penalties

Criminal penalties are a rather untypical penalty for the non-observance of an obligation to insure but they do exist. The best known example would be § 6 Obligatory Car Insurance Act (see supra 1.3.2.2.2.) which imposes on anyone who operates a vehicle or allows a vehicle to be operated without it having the necessary insurance coverage a pecuniary fine or imprisonment of up to one year (reduced if only negligently breached). In other cases the non-fulfilment is regarded as an *Ordnungswidrigkeit* (administrative offence), thus entailing similar results as would a criminal offence, see infra 1.5.2.2. Such is for example the case if a carny does not conclude the requested insurance (§ 3 Decree on Carny Liability Insurance, see supra 1.3.2.1.1.8.).

1.5.2. Administrative Penalties

Most commonly the non-observance of an obligation to insure entails an administrative penalty of some sorts.

1.5.2.1. Disqualification from Practising or Carrying on a Profession, Occupation, Trade or Business

The most common (administrative) penalty is that a license, accreditation, qualification may be withdrawn or revoked. In some cases it is not an administrative authority but a chamber or a court of professional conduct that is to decide on the consequences. It is to be noted that the withdrawal may in some cases be supplemented or accompanied by other measures such as a reprimand, a fine a temporary ban from the profession and the like. More importantly in many cases it is in the discretion of the assigned body whether it deems it necessary to withdraw the license. While in other cases no discretion exists (such seems for example to be the case if a hunter went on a chivvy without the necessary insurance [§ 18 Federal Hunting Act, see supra 1.3.2.2.1.]).

1.5.2.2. Other Penalties

As mentioned above there are some mandatory insurances for which a non-conclusion is regarded as an *Ordnungswidrigkeit* (administrative offence). Other than the example of the carny given above (see supra 1.5.1.) such is for instance the case for security service companies (§ 16 I n° 1 Decree on Security Service Companies, see supra 1.3.2.1.3.10) and for pawn brokers (13a n° 5 Decree on Commercial Pawn Brokers, see supra 1.3.1.3.). As for criminal offences, to be punishable an administrative offence must be committed with either intent or negligence.

1.5.3. Civil Penalties

Statutes do not (usually) prescribe civil penalties for the violation of the obligation to insure, as this obligation is a public obligation. There have, however, been several instances where courts attached liability to the fact that insurance had not been taken out. The cases, where this jurisprudence may apply, are of the kind that the third party's damage in and of itself was not culpably caused by the person having an obligation to insure (thus no claim against him was possible). Some courts chose to interpret the duty to conclude insurance as being (other than a public duty) a contractual duty, the non-fulfilment of which resulted in the third party

being left without recourse. It was thus that the person being obligated to insure when acting with fault concerning non-insurance was treated as if he had had proper insurance and had collected the benefits in question. These hypothetical benefits now could be claimed by the third party (cp. *OLG Hamm* [2001] VersR 376 with note by *Wandt*).

2. Methods of Effecting Mandatory Insurance

Mandatory insurance is understood in Germany to be a limitation of the contractual freedom on the side of the policy holder. It, however, only limits his freedom in the sense of his decision whether or not to take out insurance and in some cases what amount of minimum cover to contract for.

2.1. Taking out of a Contract Covering the Risk

2.1.1. No

In light of the above said there is no mandatory insurance, for which it would be unnecessary for the policy holder to seek out an insurer and actually conclude a contract. Today there is **no automatic inclusion** into any insurance in the field of private insurance. Such a mechanism that a person is entered into an insurance scheme by the mere fact that he fulfils certain criteria without there being a necessity for consent only exists in the field of social security (e.g. public health insurance).

2.1.2. Yes

It is rather the rule, that the policy holder has an obligation to conclude an insurance contract, yet he may freely decide with whom to contract and under which conditions. Policy holder and insurance undertaking **need to consent** to the conclusion of a specific insurance contract. This is of paramount importance as the policy holder shall at least be left to decide which insurer he wants to consult, he shall be able to shop for good conditions. But also the policy holder shall be put in a position to determine whether or not he needs cover exceeding the one required by legal provision – such want can be best ascertained, if the policy holder is not included automatically, but must meet up with an insurer. Furthermore the person obligated is theoretically at complete liberty to decide whether or not to conclude a contract at all – he must, however, live with the administrative consequences that may attach to not concluding or not carrying insurance (see supra 1.5.).

2.1.2.1. Under an Individual Contract

There is but one legal provision that, at least concerning its wording, explicitly requires for insurance to be taken out in the form of group insurance: The health insurance of development aid workers and their families, §§ 6 et seq. Development Aid Workers Act (see supra 1.3.3.2.2.). In all other cases there is no apparent reason why policy holders should not be allowed to fulfil their obligation by concluding individual insurance contracts. Concluding the contract as a group insurance may, however, not be effected in a way to undermine the obligation to insure in question. *In concreto* there may not be any annual aggregates applicable to the whole group instead of the individual risk to counteract the minimum requirements of said obligation to insure. To give an example a lawyer's liability insurance (see supra 1.3.2.1.3.3. and infra 3.1.1.2.) taken out as a group insurance may not contain such a global annual aggregate that would counteract the maximum annual aggregate of €1,000,000.- as provided by § 51 IV 2 BRAO.

2.1.2.2. Under a Group Contract

In many cases it would be economically inane to conclude for every person that must be covered a single contract. To give an example, carnies operating specific rides must conclude liability insurance for themselves and for every person aiding in the operation process (see supra 1.3.2.1.1.8.). Knowing the fluctuation of people working at carnivals, it would be a rather futile undertaking to always conclude a new individual contract for every new arrival. Insofar the person in question would be better off to conclude a group insurance contract for his own account and for whoseever account helping in operating the funride. In other instances it is not necessity, but a money saving technique. For example will many lawyers (grouped together in a certain way) instead of taking out individual contracts conclude a group insurance contract. In international law firms it is often the company that concludes the professional liability insurance which covers its lawyers – which also has other reasons than mere savings on the premium. There are, however, some mandatory insurances that disallow for group insurances. One example would be the liability insurance for air carriers, aircraft suppliers and other airplane owner's (see supra 1.3.2.1.1.1.). Here § 102 III LuftVZO allows for group insurance contracts to be concluded for sport kites, motorised model airplanes and non-motorised sport aircrafts and thus – *argumentum e contrario* – disallows group insurance for all other aircrafts (cp. *Morscheid*, Pflicht-Haftpflichtversicherung im gewerblichen Land- und Luftverkehr, Karlsruhe 2008, p. 163).

2.1.3. Selection of the Risk by the Insurer: Given that the Insurance is Mandatory for the Insured, is There any Way of Compelling the Insurer to Contract?

2.1.3.1. For the vast majority of mandatory insurances, statutes do **not provide for an obligation to contract** on the insurer's part. Despite the increased number of mandatory insurances and thus the increased number of policy holders forced to take out insurance, it has been stated that no cases (or at the very least no significant number of cases) are known, of applicants unable to attain insurance cover on the market. It is also held that if (more) cases were to surface, in which no insurer could be found, such would create a noticeable political problem, as the whole concept of mandatory insurance presupposes that every person submitted to the obligation to seek insurance is able to do so (if only at more elevated premiums) (cp. *Lorenz*, in: Beckmann/Matusche-Beckmann (eds.), *Versicherungsrechts-Hdb*, 2nd ed., Munich 2009, § 1, para. 103). Should ever an increased number of people submitted to an obligation to take out insurance be unable to do so, one of two political consequences would most likely be drawn. First, which is less likely, legislature could repeal the obligation to seek insurance, as insurance is unattainable to many citizens or undertakings. Secondly, government would push for an adaptation of the respective statute to include an obligation of the insurer to accept every application. This prospect of being forced by law to accept every applicant and, if worst comes to worst, to accept him under more favourable conditions than he warrants, may have served as a disincentive for insurers to turn away applicants that they might have otherwise not insured. Whatever the reasons, thus far no negative results may be perceived in Germany resulting from the lack of an obligation to contract.

2.1.3.2. There are, however, some very important **exceptions**, in which the policy holder's legal duty to take out insurance correlates with the insurer's duty to underwrite an individual risk. Such an obligation to contract on the insurer's part exists for example for automobile third party liability insurance (cp. § 5 II Obligatory Car Insurance Act [PflVG], there are some exceptions, though), for mandatory (basic) private health care insurance (this obligation is limited to the so-called *Basistarif* [a base rate/condition contract], § 12 Ia Insurance Supervisory Act [VAG], cp. § 193 V VVG; *Kalis*, in: Langheid/Wandt (eds.), *Münchener Kommentar VVG*, § 193, paras. 22 et seqq.) and for obligatory private long term care

insurance (cp. § 110 Social Security Act XI [SBG XI]). An obligation to contract (in German *Kontrahierungszwang*) also exists concerning dependent coverage under a private health care insurance where a new born child of a policy holder is concerned. Here an insurer is obligated to retroactively grant cover to any policy holder's child as long as said policy holder applies for the child's inclusion into the cover within two months of its birth (§ 198 I VVG).

2.1.3.3. Next to those obligations to contract imposed on insurers by statute, the term *Kontrahierungszwang* is sometimes used in a larger sense to also include such situations where an insurer has **contractually** taken on the **obligation to accept** the application of every person belonging to a certain group. To give an example: the Deutsche Ärzte-Versicherung has concluded an agreement with a Regional Chamber of Physicians that it will grant every member of the chamber cover under its professional liability insurance (which is mandatory for physicians). If one should really speak of *Kontrahierungszwang* in such situations is dubious, as the obligation was brought into existence by the insurer's own choosing, the result, however, quite resembles that of those cases in which a statutory obligation to contract exists.

2.2. Coverage Automatically Included in a Freely Effected Contract

To our knowledge there is no mandatory insurance that would operate in such a way that the cover would be automatically included into a contract consented to by the parties that did not include such cover.

3. Financial Aspects

3.1. Amount of Cover

3.1.1. Limit of Cover

It is widely regarded as an undue hardship – which would go beyond what is necessary and would thus endanger the whole obligation to insure as being declared unconstitutional – to require persons to insure without any substantiation as to the financial amount that needs to be covered. It is insofar the most common qualification in statutes providing for an obligation to insure that they specify what sum needs to be insured as a minimum. Unlimited cover is furthermore rather seldom as § 114 VVG sets the insured sum for all mandatory liability insurances that do not provide for a specific minimum sum in the respective statute to be at €250,000.- per insured event and the minimum annual aggregate at €1,000,000.- (on § 114 VVG cp. *Dallwig* [2009] ZVersWiss 47 esp. at 56 et seqq.).

3.1.1.1. Unlimited Cover

Unlimited cover is insofar rather the exception than the rule. There are, however, several statutes which might be taken to disallow for a limitation of cover. This question especially arises where the person is but obligated “to take out insurance” or to take out “sufficient” insurance (see supra 1.4.pr.). At least the obligations that request any kind of insurance cover to be provided cannot be understood in and of itself to mean that unlimited cover must be provided. Rather the silence of the legislator must usually be understood to mean that it is for the policy holder to decide whether or not to limit the cover. A more nuanced answer must be given where sufficient cover is required. If one is to appreciate what is sufficient on a case by case basis, it is conceivable that some extra-ordinary cases might warrant an unlimited cover. Such would, however, be an extreme exception. A mandatory unlimited cover would insofar only exist where the legislator explicitly disallowed for a limitation to be included. Such a legal provision could not be found.

3.1.1.2. Legally Required Minimum Cover

It is a tendency of the German legislator to accompany every obligation to insure with a fixation of the minimum cover. This limitation may operate on two levels: Firstly the statute may set a minimum insured sum for the individual insured event; secondly it may set a minimum yearly aggregate. To give an example, § 51 IV BRAO (see supra 1.3.2.1.3.3.) provides for lawyer's liability insurance: "The minimum insured sum for each insured event is €250,000.-. The insurer's performances for all damages caused in the course of an insurance year may be limited to the quadruple amount of the minimum insured sum." Some mandatory insurances furthermore set different minimum insured sums for different kinds of damages. Such a technique is for instance employed in Annex to § 4 II Obligatory Car Insurance Act (see supra 1.3.2.2.2.). Here the minimum insured sum for physical injury is set at €7,500,000.-, for property damage at €1,000,000.- and for pure economic loss at €50,000.-. This act also gives an example that the insured sum may differ for certain risks, since the insured sum for a vehicle must be increased for every seat surpassing nine (Annex to § 4 II, n° 2 Obligatory Car Insurance Act). Another method is demonstrated by § 102 Decree on the Admission to Air Travel (LuftVZO) which does not stipulate a minimum insured sum, but states that the minimum insured sum coincides with the maximum limit of liability as provided by § 37 I Air Travel Act (LuftVG). The latter provision in turn provides for nuanced limits of liability depending on the weight of the airplane and also depending on the type of damage. By reference this also becomes the minimum requirement concerning the insurance cover.

3.1.2. Deductible

In principle a deductible or franchise is believed to also serve to influence the behaviour of the policy holder or the insured. Insofar the legislator should usually not hold any reservation for such a deductible to be included. A problem would only arise where the deductible would reach such a proportion as to endanger the liquidity of the policy holder. Only were the deductible would endanger the full restitution of the policy holder towards the injured party (because the received insurance benefits are significantly lower than the actual damage) public policy might dictate a deductible to be disallowed. Another reason to disallow would be that it would seem undue that the insurer could deny performance towards the injured person in the amount of the deductible where the injured person has a direct claim against the insurer. German law has – concerning mandatory liability insurance – remedied this risk by disallowing the insurer to raise the existence of a deductible of the policy holder against a third party's direct claim (were such is admissible) pursuant to Sec. 115 subsection 1 in connection with Sec. 117 subsection 1 (but the insurer may object if the insured sum is exceeded). There is, however, an ongoing discussion whether or not a deductible that is specifically allowed (and specified as to its maximum amount) by the statute providing for the obligation to insure in question could not be made in the form to be raised also against the injured party (see *Dallwig* [2009] *ZVersWiss* 47 at 53 et seqq.).

3.1.2.1. Prohibited

After a cursory inspection of all mandatory insurances, no such product could be found that would systematically and on principle disallow the inclusion of a deductible (at least what concerns the internal relationship between policy holder and insurer). There are, however, several provisions that provide what the maximum amount of deductible can be, thus prohibiting any deductible exceeding said amount. § 51 V BRAO for example determines for lawyer's liability insurance (see supra 1.3.2.1.3.3.) that the deductible is only permissible if it does not exceed 1 percent of the maximum insured sum.

3.1.2.2. Mandatory

As much as can be said, there is no provision that calls for a deductible to be mandatorily included into a mandatory insurance. For most cases a deductible, while acceptable up to a certain amount, still runs counter the legislative intent to provide the broadest protection possible. To force policy holders and insurers against their will to contract for a deductible could thus only rarely be justified. Yet, momentarily mandatory deductibles are very much in public discussion, as the legislator has made it incumbent for all *Aktiengesellschaften* to take out D&O-Insurance (which is however not a mandatory insurance) only in the form including a minimum deductible. Whether this discussion could spread to any of the mandatory insurances is rather dubious.

3.1.2.3. Optional

It is thus by far the predominant rule that policy holder and insurer may contract in a deductible (even though said deductible may in many cases not have any effect towards third parties, see supra 3.1.2.). The option will, however, often be limited to the question if to include or if to leave out a deductible, as the provision in question will provide for a maximum level the deductible may reach, leaving the contractual parties only a more limited spectrum in which to set the deductible (see supra 3.1.2.1.). A more recent and rather untypical example would be that of mandatory private medical expenses insurance (1.3.3.2.3.) where the deductible may not result in exposing the policy holder to an annual amount exceeding €5,000.- (see *Kalis*, in: Langheid/Wandt (eds.), *Münchener Kommentar VVG*, § 193, para. 18).

3.2. Amount of the Premium

3.2.1. Fixed by the state

3.2.1.1. No, never

Since 1994 Germany has abandoned its previous supervisory system under which all general terms and conditions and tariffs had to be reviewed and accepted by the insurance supervisory authority before being put on the market. Since this radical change it is (not regarding some very limited exceptions) exclusively the insurer that sets the tariff and the premium. For some insurance contracts (in the field of commercial insurance) there is certainly a corridor in which insurer and policy holder will bargain for the specific premium.

3.2.1.2. Yes

See supra 3.2.1.1.

3.2.1.2.1. **No** example of a mandatory insurance could be found for which the premium is linked to the premium for another product in a way to be a **percentage** of said products rate, as is for example the case in France concerning the 9%-markup for the mandatory inclusion of natural hazard cover into home insurance contracts.

3.2.1.2.2. Under ordinary circumstances the amount of **premium is not the same for all** policyholders. The premium will usually differ concerning to the specific risk in question. Of course there may be certain insurers that provide for some mandatory insurance types a “one-premium-fits-all-policy”. This could, however, only be envisioned for products in which the differences in the risk are only marginal. In most cases one of the most important rules of the insurance industry applies that it is its business to distinguish risks (necessity of risk

allocation). This is also the supposed reason why the legislator has not made it incumbent on insurers concerning any mandatory insurance to apply the same premium to every risk.

3.2.2. Freely Fixed by the Parties

3.2.2.1. No, never

The answer to the question whether the premiums are freely fixed depends largely on the definition of freely. The insurer is quite free to fix its tariff as it chooses – premiums are held low by competition. However there may be reasons for which the insurer – for a mandatory or any other insurance – is by supervisory law disallowed to significantly deflect from the tariff by compromise with the applicant. Here the general insurance rule against granting special privileges (*Begünstigungsverbot*) might apply.

3.2.2.2. Yes

In the limits pointed out above (see supra 3.2.1.1. and 3.2.2.1.) the parties are at liberty to contract freely for a premium.

3.2.3. Bonus-Malus System (Premium Reduction or Increase According to the Policyholder's Individual Claim History During the Previous Year)

3.2.3.1. Unregulated

The implementation of a bonus-malus system is not foreign to German insurers – also what concerns some of the aforementioned mandatory insurances. Yet, insurers are under no legal obligation to put such a system into operation.

3.2.3.2. Regulated

There are or were some bonus-malus systems which the law prescribed – such as for example the one applicable to physicians that prescribed especially costly pharmaceuticals (malus) or especially cost reduced ones (bonus). No such system could, however, be found that applied *ex lege* to any mandatory insurance.

3.2.4. Do Policyholders Consider the Premiums Charged for Mandatory Insurance

3.2.4.1. Acceptable?

Whilst every coin forced to spend will without fail entail some bickering, the general level of acceptance of the amount of premium charged is satisfactory. In most cases competition has helped to keep premiums down. In the case of mandatory automotive third party liability insurance even to such an extent that the premium remains so low that the yearly benefits of the average insurer continuously exceed the premiums collected – simplified, the insurers pay more than they collect, so that it becomes very important for the insurer to effectively invest in order to make a profit.

3.2.4.2. Unacceptable?

There have been cases where some policy holders have voiced stronger objection to the premium level in one mandatory insurance or another. Such objection has to our recollection never reached a degree where one could say that premiums are held to be unacceptable.

3.2.5. If the Insurance were not Mandatory, Would the Premium Charged for it be

3.2.5.1. The Same?

No general statement can be given befitting all mandatory insurances. There are some obligations to insure that require persons taking out a type of insurance that they would have concluded even without there being a legal obligation. One example would be lawyer's liability insurance. It would be expected that almost the entirety of lawyers would take out such an insurance even if they were not forced to do so (such is at least suggested by legal comparison; cp. *Rogers et al., Liability of Lawyers and Indemnity Insurance*, London et al. 1995; *Gal, Die Haftung des Schiedsrichters in der internationalen Schiedsgerichtsbarkeit*, Tübingen 2009, pp. 370 et seq.). In such an environment it could be expected that premiums would not considerably change, were the obligation to insure to be lifted.

3.2.5.2. Significantly Higher?

Other areas might on the contrary see a significant increase of premium. Such would be the case if no sufficient number of policy holders could be found. Here the problems involved with the fact that the application of the law of large numbers would be impeded might easily result in increased premium or even in the decision that a certain risk is uninsurable. One classical text book example where such a risk would exist was the atomic plant insurance (see supra 1.3.2.1.1.5.). Whether any insurance is in reality – i.e. outside of a textbook – at risk for such an effect to occur if the obligation to insure were lifted may only be guessed. At least what concerns commercial insurance most companies would conclude the insurances whether legally obliged or not.

3.3. Financial Data: Are There Studies Making it Possible to Know:

3.3.1. The Profit or Loss Generated by Mandatory Insurance (Premiums Received/Claims Paid)?

At least in legal literature no comprehensive study to assess the financial implications mandatory insurance has for insurers seems to exist.

3.3.1.1. Profit

Taking into account that insurers (and policy holders) are largely free in setting the premium (see supra 3.2.1. and 3.2.2.), one would expect most insurers to be able to generate a profit on mandatory insurance products as well. However some mandatory insurances have seen strong competition (this especially applies to automotive third party liability insurance) having led to keeping the premiums at a very base level.

3.3.1.2. Loss

The steep competition described above (see supra 3.3.1.2.) has at least in the automotive sector resulted in paid benefits surpassing in amount the premiums collected. If one were to regard this as a loss, than insurers in this sector would be generating a loss. This, however, neglects the fact that the insurer may invest the premium during the timeframe between its collection and its being used to pay out claims. In order to generate a profit, insurers must in this sector thus be especially effective in investing its premiums, as the returns on the investments must (leaving aside the possibility of cross-subsidisation, which is especially important in this sector as motor vehicle insurance is often the door into the insurance portfolio of policy holders) pay off the overhead, compensate inflation and leave some profits.

3.3.2. Whether the Risk in Question Would be Insurable if it Were not Mandatory?

Again it is difficult if not impossible to give a general answer encompassing the totality of mandatory insurances.

3.3.2.1. Insurable

In most cases the *ratio legis* behind installing an obligation to insure was not to force all persons of a specific group into insurance in order to create a sufficient community at risk and thus to turn a previously uninsurable risk into an insurable one. Rather, the legal rationale was to protect the person in question against being submitted to claims threatening their economic existence and to protect injured parties by putting up a system that guarantees them a solvent debtor. For cases where such is true, insurability is not the focal point, as a large enough group of policy holders would remain notwithstanding a hypothetical repeal of the obligation to insure.

3.3.2.2. Uninsurable

It is rather questionable if any German obligation to insure has turned a previously uninsurable risk into an insurable one. If some have forwarded the obligation to insure atomic plants (see supra 1.3.2.1.1.5., which is not a strict obligation to insure) to be a case where a previously uninsurable risk became insurable, such an argument seems erroneous or at least misleading. The Atomic Energy Act entered into force in 1960, yet already in 1957 the German insurance pool for atomic plant insurers (Deutsche Kernreaktor Versicherungsgemeinschaft) was formed, proving that even though the insurance of such a new and difficult to assess risk called for special solutions but was nevertheless possible. In today's world uninsurable risks dwindle and such is not necessarily caused by the increased propagation of mandatory insurance.

3.3.2.3. Insurable, but at a Higher Premium or with Less Extensive Cover

For several individual risks an increase of premium or a reduced cover might be a possible effect if the obligation to insure were to fall. If such is very likely to occur in a multitude of cases is rather dubious.

3.3.3. Whether Persons Exposed to a Given Risk (e.g. Hurricane, Flood or other Natural Disaster) Would Voluntarily take out Insurance Against it if it were not Mandatory?

3.3.3.1. Few Persons Would take out the Insurance

There are some kinds of mandatory insurances where the obligation has brought a significant increase of policy holders. If the repeal of the obligation would bring an adverse effect is unclear. For example has the fact that fire insurance is no longer legally required of house owners not resulted in any exodus. Rather the repeal of the obligation has opened up the market for more competition and supposedly better fitted insurances for the policy holders. It is to be noted, that many times the same events that give rise to a discussion whether or not to make insurance mandatory also give the persons in question pause and make them take up insurance without being forced to. For example was the Oder Flood of 2002 the starting point of an on-going discussion whether or not insurance against natural disasters should be made mandatory. Since 2002 there has, however, been a clear trend for house owners to conclude such contracts or increase their coverage. Insofar the oft-repeated evaluation that the obligation to insure is necessary, for otherwise people would not insure, seems to be based on a rather questionable idea of human nature. In most cases the persons submitted would freely insure a specific risk, if such is in their own interest and they are made to know that. Insofar a very significant decrease in insurance could only be expected where people are involved with a very tight budget (such might, for instance, be the case for the mandatory insurance of some car or dog owners), who might convince themselves that they simply cannot afford insurance,

or where taking out insurance is almost exclusively in the interest of a third party and not of the policy holder.

3.3.3.2. Many Persons Would take out the Insurance

As illustrated above, most insurances would not see too significant a change, even if the obligation to insure were to be repealed.

4. Reinsurance

4.1. Mandatory Reinsurance

4.1.1. Obligation for a Private Reinsurer

As far as may be said, there is but one legal provision that would explicitly require an insurer to “reinsure” a specific risk that relates to a mandatory insurance. The formerly voluntary security fund Mediator AG, formed by private health insurers, was turned into a mandatory one in 2004, making it incumbent for every private health insurer (hence the connection to mandatory medical expenses insurance, see supra 1.3.3.2.3.) to become its member and pay fees. It should, however, be noted that this is not reinsurance in a strict sense, but rather a guarantee scheme. That aside, there is no legal obligation to reinsure. The supervisory obligation to reinsure is rather an indirect one. It is for insurers to provide for sufficient risk management etc. One of the tools, and certainly one that all German insurers are very familiar with, is reinsuring certain risks. *En passant* it should be noted – though this is not a classical reinsurance nor is there a legal obligation – that there is also a number of mandatory insurances that are concluded with the policy holder on one side and an insurer on the other side, which has formed with other insurers an insurance pool due to the high risk or the high insurance sums involved. Such exist for example for nuclear energy (Deutsche Kernreaktor Versicherungsgemeinschaft), for pharmaceutical product liability (Pharma-Rückversicherungs-Gemeinschaft) or for air-travel insurances (Deutscher Luftpool).

4.1.2. Obligation for a Public Reinsurer

4.1.2.1. In the Form of Classic Reinsurance

The German private reinsurance industry is very well established and many of the actors belong to the most notable reinsurers in the world. In view of this, there is no need and there are no intentions for the state to act as a reinsurer. One example where the state acts as a sort of reinsurer is when it grants a government guarantee (e.g. the guarantee granted to EXTREMUS, the insurance pool for terror risks – which, however, concerns neither a mandatory insurance nor a mandatory reinsurance). The one field in which there has been some discussion whether or not the state should provide for some sort of reinsurance mechanism is that of insurance against natural disasters (storms, floods etc.). The idea was forwarded in reaction to some discussion whether or not this insurance should be turned mandatory and the insurer should be obligated to underwrite suboptimal risks as well as others. In view that to impose such high risks on insurers would to a large degree go counter the very idea of contractual freedom, it has been forwarded that the state in order to compensate the fact that the insurers to a degree provide for a social service should than put into place a kind of public reinsurance open to those insurers in order to diversify their risk (see *Hübner/Müller*, in: *Bruns/Grobenski* (eds.), *Die Versicherung von Umweltrisiken*, Karlsruhe 2007, pp. 89 et seqq. at 113; see also *Bogenrieder*, *ibidem*, pp. 121 et seqq. at 14

4.1.2.2. In the Form of a State Guarantee Fund

There is only the one example mentioned above (see supra 4.1.1.), but Medicator AG is not a state guarantee fund but a private fund to which the state has delegated certain powers and which in turn is under the supervision of BaFin [the German supervisory authority].

4.2. Attitude Adopted by Private Insurers in Your Country

Whilst German insurance industry – including direct insurers and reinsurers – have a tendency to be opposed to the creation of new obligations to insure (cp. *Pohlhausen*, in: *Hamburger Gesellschaft zur Förderung des Versicherungswesens* (ed.), *Pflichtversicherung – Segnung oder Sündenfall*, Karlsruhe 2005, p. 75) as it encroaches on their freedom to construct contracts and products more freely, such opposition does not go so far as to undermine said mandatory insurance once the obligation is enacted. On the contrary, there are several mandatory insurances that the insurance industry has welcomed quite warmly.

4.2.1. Refusal to Reinsure Mandatory Insurance

There are no known cases where reinsurers have systematically declined to underwrite risks pertaining to German mandatory insurances. If specific risks were to be declined, it would be but for the nature of the risk and not the fact that mandatory insurance was involved. The only reason other than that would be that the mandatory insurance makes conditions so unfavourable for the insurer (be it by disallowing risk exclusions or by setting a maximum amount of premium). Since such is not the case in Germany, not finding reinsurance does not pose a significant problem. This might be otherwise for foreign insurers wanting to diversify their risk under a foreign mandatory insurance. However, no specific cases come to mind, where the German reinsurers had categorically declined to cover such risks, because of their nature of mandatory cover but only for the reason that the risks involved were unfavourable (esp. concerning the risk of accumulated losses).

4.2.2. Agreement to Reinsure Mandatory Insurance

See supra 4.2.1.

4.3. Economic Aspects

A quick perusal of the available literature did not uncover any concrete numbers of what percentage reinsuring mandatory cover makes up for the reinsurance business.

5. International Aspects

In view of the complexity only a very rough overview may be given

5.1. Does Your Country have any Law that Deals with the Issue of Mandatory Insurance in an International Context?

There is no general law dealing with all international situations that touch upon mandatory insurance. Some obligations to insure do provide for specific rules, though, where the person regarded does not have close ties to Germany. Furthermore there are legal provisions that cover the private international law of contracts (with special rules concerning mandatory insurance contracts) and the question of which courts have jurisdiction.

5.1.1. National Legislation

National legislation from time to time sets specific requirements for foreign actors. For example must a foreign lawyer giving legal advice in Germany or pleading before her courts not take out the same kind of liability insurance as must a German lawyer in order to be

admitted to the bar (see supra 1.3.2.1.3.3.). In order to work in Germany as a lawyer or to be admitted to the bar, the foreign European lawyer must however furnish proof of having concluded an insurance contract in their state of origin that fulfils the mandatory requirements of that country and is equivalent to the German mandatory requirements. If the equivalence test fails, excess liability insurance must be sought, cp. § 7 Foreign Lawyers Act. In car insurance also special rules are applicable. No motorised vehicle is to take part in German traffic without being insured. Insofar a duty to insure applies to foreign vehicles as well (see supra 1.3.2.2.2.). The system is, however, much more complicated, and we will not venture to go into detail, cp. §§ 1 et seqq. Obligatory Foreign Car Insurance Act.

5.1.2. International Treaty

Some obligations to insure stemming from European legislation will allow for a mechanism that insurances taken from foreign insurers having their seat in a member state is to be regarded sufficient as long as the risk situated (temporarily) in Germany is covered under conditions that are comparable to the ones prescribed by the obligation to insure. In some other cases (e.g. air carrier insurance, see supra 1.3.2.1.1.1.) the regulation does not differentiate between the seat or the residence of the person in question but simply sets clear universally applicable requirements that may, however, be fulfilled by a contract concluded with any insurer be its seat within the European Community or not.

5.2. Where Insurance is Mandatory in your Country for a Given Activity, are Foreign Persons Required to Carry such Insurance in order to Engage in that Activity in your Country?

5.2.1. Yes, and they must take out the Insurance Locally

In principle mandatory insurance must be taken out locally with an insurer that has been authorised by BaFin to transact insurance business in Germany (be it with a German insurer or a German subsidiary of a foreign insurer). For foreigners that do not have their habitual residence in Germany there are, however, usually specific rules as to how their foreign insurance cover may be regarded as sufficient.

5.2.2. Yes, but they may Carry the Insurance by Taking it out in their Home Country

See supra 5.2.1.

5.2.3. No, they do not need to Carry the Insurance to Engage in the Activity

There are some obligations to insure that specifically attach to residence or seat in Germany and are not regarded as being triggered by the risk passing through Germany. Such obligations are rather the exception, though.

5.3. Is it legal to take out Mandatory Insurance with a Foreign Insurer?

5.3.1. No

See infra 5.3.2.

5.3.2. Yes

For most cases (the exceptions are very rare) Germany allows for non-admittance insurance to be taken out, where the freedom of service of European insurance companies is concerned. Mandatory insurance makes no exception. The most notable exception to this rule is laid down in § 193 III VVG, which provides that the medical expenses insurance (see supra

1.3.3.2.3.) must be taken from an insurance undertaking admitted in Germany to conduct business, without providing for any exceptions for insurers admitted in another European Member State. This obligation, however, may violate EU law (*Boetius* [2007] VersR 431 at 434 et seq.) and might thus be repealed in the near future.

5.3.2.1. In the Event of Litigation Between the Insurer and the Policyholder, what Law Would the Court Apply?

German international private law on insurance contracts is rather complicated what concerns contracts concluded until 17.12.2009 as there are three regimes of conflict law that may apply (cp. *Wandt*, *Versicherungsrecht*, 5th ed., Cologne et al. 2009, paras. 161 et seqq.). For more recently concluded insurance contracts the entering into force of the Rome I Regulation (Reg. 593/2008/EC) has brought about a simplified system (for a good overview see *Looschelders*, in: *Langheid/Wandt* (eds.), *Münchener Kommentar VVG*, vol. 1, *Internationales Versicherungsvertragsrecht*).

5.3.2.1.1. Under the Rome I Regulation insurance contracts covering large risks, whether or not the risk is situated in a Member State, and other insurance contracts (in the sense of mass risks) are generally submitted to the **law of the seat of the insurer**. One needs to take into account that this rule does not encompass all insurance contracts (some are covered by the general rules of the Rome I Reg., some by the national German regime) and that choice of law remains a possibility (limited, however, where mass risks are involved and especially where the policy holder is a consumer). Furthermore the Rome I Regulation provides for a specific rule where an obligation to insure of a European Member State is involved, cp. Art. 7 (4). Germany has passed a specific rule, as empowered by Art. 7 (4) lit. b, that it is exclusively the law of the Member State that has laid down the obligation to insure that applies as long as said Member State requires the application of its law, § 46c I EGBGB. If the contract fulfils a German obligation to insure, German law is to apply exclusively, § 46c II EGBGB. This rule will in many cases result in the applicable law not being that of the insurer but that of the risk, which in most cases coincides with that of the policy holder.

5.3.2.1.2. While it was the general German law of conflicts rule of what concerns insurance contracts to apply the **law of the policy holder** (contrary to the general international contract law rule that it is the law of the party providing the specific performance), such has significantly changed under the application of the Rome I Regulation (for the other regimes it remains unaltered). Notwithstanding this dogmatic shift, mandatory insurance will often be submitted to a different regime than the one of the insurer (see supra 5.3.2.1.1.).

5.4. Particular Case of Mandatory Coverage Included in an Optional Contract: Where the Optional Contract is Taken out Abroad,

Not applicable in Germany, as no such mechanism exists (see supra 2.2.).

6. Assessment and Recommendations

In view of the very different risks that are subject to obligations to insure it is difficult if not impossible to make any assessments or recommendations that would do justice to all mandatory insurances. The following must thus be taken with a grain of salt, as there might exist insurance types where the opposite solution might be better fitting than the one advanced.

6.1. The System of Mandatory Insurance (or Coverage) Should be Prohibited?

The objections that can be invoked against mandatory insurance are legion. However there are some mandatory insurances for which the positive effects are such as to outbalance and overcome any rejection. As a general remark states should, however, grow more hesitant to create new mandatory insurances, instead of regarding them as the remedy for every perceived wrong. A free society is also defined by its freedom of its members to provide for financial security in the way they see fit. To force ones citizens and companies to insure against every possible risk (up to a certain amount), is also to drain them of resources that might in individual cases be used more efficiently in other ways. It is insofar that an obligation should only be implemented where such seems indispensable for overwriting public policy reasons. Furthermore the obligation should be constructed in a way to impede the least possible the free market and its principles as listed in the questionnaire.

6.2. The Current Mandatory Insurance Should be Repealed?

In general the system of mandatory insurances in Germany, while not being the most coherent of systems, seems to be quite effective. Notwithstanding the rather unsystematic approach of enacting obligations to insure on a case by case basis and the fact that often it seems to be questionable that one situation remedies an obligation to insure while a very comparable situation does not the system seems to have proven itself. Furthermore at least for mandatory liability insurances the German legislator has set out to set some general rules, thus creating a more consistent system, cp. §§ 113 et seqq. VVG. Nevertheless there are several mandatory insurances that might or even should be revisited – be it concerning their very existence or their details.

6.2. Mandatory Insurance Should be Confined to Certain Specific Risks?

As mentioned before the creation of mandatory insurance may only be justified by a very strong public policy reason that cannot be implemented by other means less intrusive to the persons involved. This said, it is evident that mandatory insurance should be limited to certain specific risks. The question is to identify those risks. In a way it is likely that no universally valid answer can be given as to what risks that might be, as every society in place and time will afford different purposes different import. What should, however, be prevented is a modern tendency of legislators to use mandatory insurance as a panacea for every societal problem. Mandatory insurance should not be introduced for the mere fact that one case having received public attention would have had a different outcome. One should keep in mind that hard cases make for bad law. Only after strict scrutiny of the pros and cons should a specific mandatory insurance be set up.

6.3. Some Types of Mandatory Insurance Should be Developed?

There are several on-going discussions about the creation of new mandatory insurances (e.g. liability insurance for children, terror cover, and house insurance against natural hazards).

Whether any of these insurances passes the threshold as described above – that the creation of mandatory insurance must be imperative for the greater good – is food for thought.

6.4. If you Agree with the Principle of Mandatory Insurance, do you Think:

6.4.1. Mandatory Insurance Should be Effected

As already noted, mandatory insurance should be constructed to be the least invasive as possible. Hence, the general rule should be that statutes should only regulate such circumstances that would otherwise potentially endanger the whole concept behind the obligation to insure.

6.4.1.1. By Taking out a Specific Insurance Contract?

The obligation to insure should be limited to exactly that and it should be for the person concerned to decide when and with whom and under what conditions to take out insurance (and to live with the consequences if by that way he breaches the obligation to insure).

6.4.1.2. By Automatic Inclusion in an Existing Insurance Contract?

Automatic inclusion seems to be too invasive into the principle of contractual freedom and should as a principle be limited to public security schemes.

6.5.1.3 By Developing Group Insurance Contracts?

Group insurance contracts are a very efficient way to handle certain risks in certain environments. It is also a tool for reducing costs on the side of the insurer (as the administration of the contract is eased), which will result in reduced costs for the insured. Insofar it should be fully left for the persons involved to decide whether they wish to cover their risk by an individual policy or via a group contract. If such group contracts are applied they must, however, meet the threshold set by statute as to the minimum requirements of cover etc. (cp. supra 2.1.2.1.).

6.5.1.4. By Obliging Insurers to Provide Insurance?

Undertaking such a drastic step as to impose on insurers an obligation to contract should be reserved for the direst of situations. Such an impediment to the free market may only be justified where otherwise basic needs of the persons involved would be put into danger. One should especially keep in mind that in most cases there is a reason behind a person being unable to secure insurance. To give an example: A notoriously unsafe airline might be unable to find cover on the market, thus being forced to cease operations until new insurance cover is obtained. In order to be able to do so, it would have to ameliorate its safety compliance. If, on the contrary, there were an obligation to contract on the insurer's side, such might take away the incentive for improvements, at least if the airline was situated in a country with lax supervision.

6.4.2. A Rate of Premium Should be

6.4.2.1. Fixed by Law?

In general, to fix premiums by law seems to be an idea that goes counter the very idea of insurance. Such is especially true if the fixation of the premium does not distinguish the different natures of the risks involved. To fix the premium and to (what is usually accompanying such a premium fixation) oblige the insurer to underwrite bad risks at insufficient amounts of premium disallows insurers to work efficient risk allocation. It turns

insurance into social welfare. In order to countermand this effect one would also need to provide for a state sponsored reinsurance scheme, where the state would at the very least act as a last-layer reinsurer. This whole system would turn uninsurable risks into insurable ones and bad risks into average ones. By this way, said system runs the risk of setting very counter-productive incentives. For example has such a system intended to keep premiums low for hurricane insurance in Florida resulted in the continuous construction on Florida's shoreline notwithstanding the ever increasing hurricane risk. If insurance is turned into an instrument that encourages people to build next to a volcano, it becomes rather questionable.

6.4.2.2. Fixed Freely?

As an almost universal rule, premiums should be fixed freely. Insurers are in a much better position to appreciate what kind of premium is necessary to cover what risk than is the state. If a certain risk can only be covered by paying substantial premiums – despite a multitude of insurers competing on the market – there usually is a reason for that other than the perceived greed of insurers.

6.4.3. A Bonus-Malus System (Premium Reduction or Increase According to the Policyholder's Loss Experience) Should Apply?

There is no need to make the implementation of a bonus-malus system a legal obligation incumbent on insurers. The current state of the law in Germany seems to be quite appropriate, where it is for the insurer to structure its product in a way it regards most efficient.

6.4.4. The Limit of Cover Should be

6.5.4.1. The Same for Everyone?

There is no reason, why one should disallow for policy holders to contract for more extensive cover. Such would be an unwarranted intrusion into a person's liberty to provide for financial security. The only reason to disallow for additional cover would be if said cover would counteract the legal intention behind the obligation to insure. It is difficult to imagine cases where this might come into play. One example would be, if a mandatory insurance, intended to provide protection to injured parties, would include a cover for damages caused with intent. Such a cover of intent, which is generally forbidden in Germany, might be viewed as putting into danger the persons supposed to be protected, as the insurance might serve as an incentive to act in a scrupulous manner. Other than such rather scholarly remarks, there should be generally no need to hinder a person from doing more than is necessary.

6.5.4.2. Subject to a Minimum?

Depending on the risk involved, and if mandatory insurance is deemed absolutely necessary, it is only reasonable to provide for a minimum coverage. Such a minimum cover requirement will have double effect: Firstly it will guarantee that the person to be protected – be it the policy holder or third parties – receive that protection that is regarded as indispensable to achieve the legislative goal. Secondly such a minimum requirement will also limit the cover requirement as it *argumentum e contrario* makes clear that no unlimited cover is needed. Here it becomes the policy holder's free choice if he wants to take precautionary measures going beyond what is obligatory or not.

6.5.4.3. Freely Determined by the Parties?

It is difficult to see, how on one hand the protection of any person could be so important as to warrant the creation of the obligation to insure but on the other hand so insignificant as to allow the parties to contract as they wish. If one were to completely leave it to the parties they

could in principle conclude an insurance contract to cover damages up to €1.00. Such a contract would obey the letter of the law but certainly not its spirit. Insofar any situation that truly warrants the creation of an obligation to insure also calls for some minimum requirements that said insurance must fulfil in order for the policy holder to be regarded as having fulfilled his obligation.

6.5.5. Clauses Defining the Risks Covered and the Exclusions Should be Imposed by Law?

It is difficult to see, how one were to impose an obligation to insure a certain risk without defining the risk. This should, however, not be understood to mean that the market should be hindered to redefine the risk. Yet, for the policy holder to have fulfilled his obligation to insure the risk definition of the contract must be congruent with or broader than the risk definition of the statute. What concerns exclusions, it seems a good idea not to make certain risk exclusions binding but rather to allow for certain risks to be excluded if the parties chose so. Here the legislator should allow all such exclusions that seem possible without jeopardising the legislative goal behind the obligation to insure (on this subject cp. supra 6.5.4.1.).

6.5.6. Reinsurers Operating in the Relevant Domestic Market Should be Required to Provide Reinsurance?

To force reinsurers to take over certain risks is as questionable as forcing insurers to take over certain risks. It would hinder effective risk selection, would counteract free competition on the world market and would turn (re-)insurance into an instrument of public welfare. Insofar such an obligation to reinsure would have to be backed by some kind of public recompensation, that takes on the additional risks that would otherwise not have been covered. If such were not done, reinsurers being unable to do their proper work, i.e. allocating risks, would be left only one option: abandoning a market. As for insurers, one should not lightly opt for the adoption of such a system as it would counteract market forces and thus set a disincentive for behavioural change that would otherwise be brought about by high premiums or the inability to find insurance cover.

6.5.7. The State Should act as Last-Layer Reinsurer?

If the state were to decide to make mandatory the insurance of a specific risk, which is widely regarded as uninsurable, or to set premiums (see supra 6.5.2.1.) at an insufficient level in order to make insurance available to everyone there seems to be no other possibility for the state but to act as a last-layer reinsurer or to provide for another scheme to take on some of the excess risk. Otherwise the market would be unable to absorb such risks, as insurers would be forced to work *pro bono*. It is, however, a rather dubious idea in the first place to shift the state's responsibility of providing social welfare to those that are unable to provide for themselves, to insurers and the community at risk. Insofar, where such is not done, there is also no need for the state to act as a last-layer-reinsurer.

6.5.8. A Guarantee Fund System Should be Established?

A Guarantee fund, to cover the risk of the insurer becoming unable to pay out on claims, should be established at least to ensure that policy holders are not overly threatened in their economic existence. Whether such applies to the majority of mandatory insurances is rather questionable. Importantly a guarantee fund should not be set up in a way to guarantee the

German National Report – AIDA World Congress 2010

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entirety of the interest the policy holder has in the insurer remaining solvent. Otherwise such a fund would set an incentive for policy holders to conclude with financially unstable insurers, which are able or rather willing to offer better conditions and premiums since their calculation is in disarray. Furthermore the installation of a guarantee fund should not be taken to excuse the state from setting up an effective system of insurance supervision that does not primarily deal with the handling of insurers having become insolvent but with providing mechanisms to hinder them becoming insolvent in the first place.