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Compulsory Liability Insurance and Constitutional Law

All national reports show that compulsory liability insurance has not been a constitutional problem so far. There are just a few cases, mostly dealing with details, and academic literature is sparse.

The duty to take out insurance interferes with fundamental freedoms under national constitutions, the European Convention on Human Rights and, where imposed by or in implementation of EU law, under the EU Charter of Fundamental Rights. The duty limits the freedom to contract,¹ the freedom of economic activities (where the insurance is a requirement to do business),² and property rights (where the insurance is a condition for a certain use of property, where the freedom to contract is qualified as a property right or where all public law duties leading to obligations to pay money are held to affect the right to property),³ and it may be a question of equal treatment.⁴

Although constitutions differ in many respects, there is a common general European standard for restrictions of fundamental rights. On this basis the duty to take out insurance must be provided for by law. Whereas the European Court of Human Rights (ECtHR) is satisfied in this respect with an accessible and clear legal basis including executive-made and case law,⁵ some constitutions are

1 *R Koch*, Compulsory Liability Insurance in Germany (in this book) no 76: the freedom to conclude and to agree on the content of a contract that is protected by art 2 para 1 Basic Law.

2 Eg for Austria art 6 of The Law on the Fundamental Rights of the Citizens of 1867; *Koch*, Report: Germany (fn 1) no 76: the freedom to pursue an occupation (art 12 para 1 Basic Law), *A Stäubli*, Compulsory Liability Insurance in Switzerland (in this book) no 98: economic freedom (art 27 of the Federal Constitution); the freedom to conduct a business under art 16 of the EU Charter of Fundamental Rights.

3 Eg for Austria art 5 of The Law on the Fundamental Rights of Citizens of 1867; see *B Raschauer*, Die Pflichthaftpflichtversicherung aus verfassungsrechtlicher Sicht, *Versicherungsrundschau* (VR) 2005, 35, 37 f; *Koch*, Report: Germany (fn 1) no 76: art 14 para 1 Basic Law; art 1 of Protocol 1 to the European Convention on Human Rights (ECHR); cf *Ö Gürses*, Compulsory Liability Insurance in the United Kingdom (in this book) no 85; art 17 of the EU Charter of Fundamental Rights.

4 *P Dobiáš*, Compulsory Liability Insurance in the Czech Republic (in this book) no 81: art 1 (principle of equality) Charter of the Basic Rights and Freedoms; *Koch*, Report: Germany (fn 1) no 76: art 3 para 1 Basic Law.

5 Eg ECtHR *Şahin v Turkey* [GC], 10.11.2005, no 44774/98, § 88: ‘[T]he Court observes that it has always understood the term “law” in its “substantive” sense, not its “formal” one; it has included both “written law”, encompassing enactments of lower ranking statutes (see *De Wilde*,

stricter and require a *parliamentary* statute.⁶ The statute may entrust administrative authorities or professional bodies with the duty to impose an obligation to take out insurance, but it has to make clear the purpose of the delegation and must specify the essential conditions such as the risks to be insured.⁷

- 4 From a substantive perspective, a duty of insurance, like any limitation of a basic freedom, may be imposed only if it serves a legitimate purpose and is compatible with the principle of proportionality.⁸ The legislation enjoys a wide margin of appreciation, though. There is no doubt that the standard reasons for compulsory liability insurance such as protection of victims and insurance holders or the internalisation of costs for society are legitimate purposes.⁹ The proportionality of respective regulations has not been seriously questioned in court so far.¹⁰ In academic writing, compulsory insurance is held disproportionate if coverage is not available on the market.¹¹
- 5 Equality of treatment demands that there is an objective reason for imposing a duty to take out insurance, eg the seriousness and size of the risk and the inability of the liable entity to pay damages. In this respect equality, as a prohibition of arbitrary burdens, to some extent duplicates the protection afforded by

Ooms and Versyp v. Belgium, judgment of 18 June 1971, Series A no. 12, pp. 45–46, § 93) and regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament (see *Barthold v. Germany*, judgment of 25 March 1985, Series A no. 90, pp. 21–22, § 46), and unwritten law. “Law” must be understood to include both statutory law and judge-made “law” (see, among other authorities, *The Sunday Times v. the United Kingdom (no. 1)*, judgment of 26 April 1979, Series A no. 30, p. 30, § 47; *Kruslin*, cited above, pp. 21–22, § 29 *in fine*; and *Casado Coca v. Spain*, judgment of 24 February 1994, Series A no. 285-A, p. 18, § 43).’

6 Eg *J Norio-Timonen*, Compulsory Liability Insurance in Finland (in this book) no 98.

7 Eg *Koch*, Report: Germany (fn 1) no 77. The cases cited there are the only ones in which a duty of insurance has been voided. For dubious cases under Austrian law, see *Raschauer*, VR 2005, 35, 37.

8 Eg *Koch*, Report: Germany (fn 1) no 79; *Stäubli*, Report: Switzerland (fn 2) no 98; *Gürses*, Report: United Kingdom (fn 3) no 86; *C Grabenwarter*, European Convention on Human Rights (2014) art 1 of Protocol 1 no 20 for the jurisprudence of the ECtHR; art 52 para 1 of the EU Charter of Fundamental Rights.

9 *D Rubin*, Compulsory Liability Insurance in Austria (in this book) no 87; see also Collection of cases of the Austrian Constitutional Court (Verfassungssammlung, VfSlg) 13.327/1993 for the protection of investors in securities, VfSlg 16.202/2001 for the protection of air passengers, and VfSlg 19.588/2011 for ensuring the confidence in the profession of private attorneys; *Koch*, Report: Germany (fn 1) no 79; *Gürses*, Report: United Kingdom (fn 3) no 86.

10 For an unsuccessful attempt in regard of the intensity of financial burden, see VfSlg 16.202/2001 (Austria).

11 *Koch*, Report: Germany (fn 1) no 81; for examples, but also for a detailed analysis of proportionality under German law, see *K Hedderich*, *Pflichtversicherung* (2011) 184, 158 f.

the basic freedoms. As for comparative equality, constitutional courts do not ask for coherence of the entire legal system: They are unlikely to question an insurance duty just because there is no such duty in a situation of comparable or even greater risk in another field of law. They rather focus on the equality of treatment of the concerned persons and entities within a given system of insurance or in the same business. So, to give an example, the equal treatment in insurance law of dog owners (depending on the dangerousness of their dogs) is a constitutional question whereas the equal treatment of cars and sports utilities is not (irrespective of the relative dangerousness of their use).¹² As a result there is a wide margin of appreciation for the legislator.

Some of the reported cases concerned not the duty to take out insurance as such but questions of its design. Courts held that special rules on the opposability of defences against the injured party in compulsory liability insurance did not violate the right to equal treatment,¹³ that rules on the transfer of liability and insurance in connection with the sale of a car and duties of the insured car owner to inform the insurance company of an accident were compatible with the right to a fair trial and the *nemo tenetur* principle,¹⁴ that compensation covering the full price of new spare parts is required after a car accident,¹⁵ that higher insurance rates for taxis are justified¹⁶ and that insurance rates may depend on the development of damages caused by the insured vehicle (bonus malus system) as long as the character of the insurance is maintained.¹⁷

Compulsory liability insurance also restricts the EU market freedoms of establishment and services under arts 49 and 56 Treaty on the Functioning of the European Union (TFEU) if it is liable to prohibit, impede or render less advantageous commercial activities in another Member State. Secondary law notwith-

12 Cf *Dobiáš*, Report: Czech Republic (fn 4) no 81. For Austria, Constitutional Court (Verfassungsgerichtshof, VfGH) 11 June 2012, G 71/11 (compulsory liability insurance for dangerous dogs) and generally *Raschauer*, VR 2005, 35, 39 f. In its decision of 12 July 2007, case 100/2007, <<http://www.const-court.be>>, the Belgian Constitutional Court compared architects who had to take out insurance with other actors in the construction business who did not; the court found discrimination against architects, because as the only group under an obligation to take out insurance they would risk being held liable to a larger extent than other actors in situations of joint liability.

13 *H Cousy/C Van Schoubroeck*, Compulsory Liability Insurance in Belgium (in this book) no 98.

14 *Dobiáš*, Report: Czech Republic (fn 4) nos 81, 84.

15 *Dobiáš*, Report: Czech Republic (fn 4) no 84.

16 VfSlg 10.492/1998 (Austria).

17 VfSlg 8212/1977 (Austria). For the compatibility with EU secondary law, European Court of Justice (ECJ) C-347/02, *Commission v France* [2004] European Court Reports (ECR) I-7557.

standing,¹⁸ a justification is possible under similar conditions to restrictions of fundamental rights: Insurance duties must be applied in a non-discriminatory manner (so an obligation to take out insurance from a provider or body established in the territory of the regulation Member State would not be compatible with the TFEU); they must be justified by imperative requirements in the general interest; they must be suitable to secure the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.¹⁹ On this basis, the ECJ accepted the duty of patent attorneys to take out insurance before offering services in Austria²⁰ and, because of specific problems in Southern Italy to find an insurer, an Italian duty imposing an obligation to contract not only upon car owners but also upon insurance undertakings.²¹

- 8 Although conceivable under certain circumstances,²² the reports do not mention a possible positive obligation of the legislator to introduce compulsory liability insurance as a means to protect fundamental rights of victims. In an Austrian case²³ the Constitutional Court saw compulsory liability insurance as an instrument which the legislator may be required to provide in order to guarantee equal access to certain professional activities such as the scrutiny of public offer prospectuses. Similarly, the ECJ considered compulsory liability insurance a less restrictive measure under the EU freedom of establishment than minimum share capital requirements for private security activities and private vehicle inspection bodies.²⁴

18 See eg Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, Official Journal (OJ) L 376, 27.12.2006, art 14 para 7 (Member States may not introduce a duty to take out insurance from a provider or body established in their territory) and art 23 (specific conditions for professional liability insurance imposed by the legislation of the Member States within the field of application of the Directive).

19 ECJ C-564/07, *Commission v Austria* [2009] ECR I-100, para 31; C-518/06, *Commission v Italy* [2009] ECR I-3491, para 72.

20 ECJ C-564/07, *Commission v Austria* [2009] ECR I-100.

21 ECJ C-518/06, *Commission v Italy* [2009] ECR I-3491.

22 See for Germany *Hedderich* (fn 11) 166 f; for the ECHR see ECtHR *Kotov v Russia* [GC], 3.4.2012, no 54522/00, § 109 ff on positive obligations of the state to set up a minimum legislative framework including a proper forum allowing persons to assert their rights effectively and have them enforced in the case of a person who suffered considerable loss because the private liquidator of an insolvent bank unlawfully distributed its assets (but without reference to compulsory liability insurance of the liquidator which was introduced too late for the applicant).

23 VfSlg 13.327/1993.

24 ECJ C-171/02, *Commission v Portugal* [2004] ECR I-5645, and C-438/08, *Commission v Portugal* [2009] ECR I-10219. For a general comparison of various means to secure the solvency of the liable entity see *Hedderich* (fn 11) 192 f.