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Jordan Burton
Indiana University, jordburt@indiana.edu

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JORDAN BURTON

INTRODUCTION

Like any other business venture, insurance companies face a possibility of failure. When an insurer does fail, it may be financially unable to meet all of its debts and become “insolvent.”¹ An insolvent insurer is often unable to satisfy its contractual obligations for covered claims,² leaving policyholders and beneficiaries to bear costs that otherwise should have been covered by their insurer.³ Insurance guarantee schemes (IGS) act as a consumer safety net, providing “last-resort protection” by paying claims in full or in part when an insurer cannot or by transferring the insured’s portfolio.⁴

² OXERA CONSULTING LTD., supra note 1, at 5.
³ Id.
⁴ European Commission Memorandum MEMO/10/320, Insurance Guarantee Schemes
Despite the facial appeal of the consumer protection that an IGS offers, consumer protection through IGS varies from country to country within the European Union (EU), and many EU member states do not have any IGS. As of 2007, only thirteen of the then twenty-seven EU member nations had established some sort of IGS.\(^5\) And, as of 2010, only twelve of the then thirty members of the greater European Union-European Economic Area (EU-EEA) operated general IGS.\(^6\) Within the EU-EEA, one-third of the entire insurance market and over half of non-life insurance policies were not covered by any IGS protection.\(^7\) While states are often not prompted to establish IGS until an insurance failure actually occurs,\(^8\) the recent financial crisis has drawn attention to the risk posed by unprotected insurance markets.\(^9\) As a result, in 2010 the European Commission published a White Paper setting forth “a coherent framework for EU action on IGS protection” and recommending the harmonization of EU IGS.\(^10\)

The idea of harmonizing the laws of the EU member nations is in no way new. The banking and securities sectors, for example, are already subject to EU legislation establishing mandatory guidelines.\(^11\) As the economies of the world’s many nations become increasingly entwined,\(^12\) a coordinated approach to legal problems like harmonization has a strong appeal. However, harmonization is far from a panacea, and its costs must be weighed alongside its benefits.

\(^{12}\) https://www.usnews.com/news/business/articles/2017-04-12/world-trade-growth-forecast-to-pick-
Because of their consumer-focused mission, IGS highlight the countervailing interests at tension during harmonization and some of the reasons harmonization may not be palatable to EU member states in all matters. Yet, this Note proposes that IGS within the EU illustrate some of the traits that make an international problem ripe for harmonization.

In Part I, this Note considers the mechanisms of harmonization and the regulatory and fairness policy concerns that harmonization is designed to address. Part II explores some of the problems harmonization can create, with an eye toward how those problems manifest in the IGS context. Finally, Part III discusses how IGS address an urgent and inevitable problem that affects actors in the insurance market at every level. By analyzing comments on the Commission’s White Paper, Part III proposes that these three factors—convergence of stakeholder interest, inevitability, and urgency—are key to understanding when member states, EU citizens, and industry actors may embrace harmonization in spite of its potential pitfalls.

I. HARMONIZATION AS A PROBLEM-SOLVING MECHANISM

A. Mechanics and Function

The EU has a variety of legal mechanisms at its disposal, each of which carries different legal weight. Some of these mechanisms allow the EU to act with binding legal force. A “regulation,” for example, is a binding legislative act that is applied in its entirety across the EU. A “directive” is also a legislative act, but it merely sets out a goal that EU members must achieve. It establishes the ends of the regulation, but leaves the means up to each member nation. Each member must create their own legal framework to comply with the directive’s requirements. A “decision” is binding, but only on those toward whom it is specifically addressed, such as an individual company or member state.

The EU can also influence member states with nonbinding acts. EU institutions can issue a “recommendation,” a nonbinding expression of the institutions’ views...
and suggestions.\textsuperscript{17} Or, they can issue “opinions,” nonbinding comments about a law currently being crafted.\textsuperscript{18} The EU sometimes uses these mechanisms to harmonize legislation across EU member nations. In this context,\textsuperscript{19} harmonization refers to the EU’s use of legislative authority to set uniform standards for all member nations. EU legislation can be designed to achieve “minimum harmonization” or “maximum harmonization.” Minimum harmonization refers to EU-wide standards that set a regulatory “floor,” a minimum set of requirements that must be met by each member state.\textsuperscript{20} Maximum harmonization, on the other hand, establishes a regulatory “floor” and “ceiling.”\textsuperscript{21} In other words, maximum harmonization requires that member states apply the rules established by the EU, but also prevents them from establishing their own additional rules.\textsuperscript{22}

By harmonizing legislation across member nations, the EU aims to achieve a level of efficiency, clarity, and predictability across Europe.\textsuperscript{23} Currently, IGS offer unequal protection to policyholders across the EU.\textsuperscript{24} Because of this inequity, IGS are a good lens through which to examine the possible benefits that a clearer, more efficient, and more predictable regulatory scheme can bring.

\textbf{B. Harmonization in the IGS Context}

There are significant differences between the national guarantee schemes that exist in EU member states,\textsuperscript{25} and less than half of EU member states have any insurance guarantee scheme at all.\textsuperscript{26} This lack of uniformity means, first, that consumers within the EU are unevenly protected from the risks of insurance failure, and, second, that cross-border competition may be distorted\textsuperscript{27} by member states’ varying policies.\textsuperscript{28}

Policyholders are arguably the biggest stakeholders in the creation of an EU-wide guarantee scheme. When an insurer fails in a member nation without an IGS, policyholders may be left to bear costs that would otherwise be paid by their insurers. This,

\begin{itemize}
\item \textsuperscript{17} European Union, supra note 13; see, e.g., Council Recommendation 2015/C 250/01, 2015 O.J. (C 250) 1, 2 (“welcoming” the use of cross-border videoconferencing).
\item \textsuperscript{18} European Union, supra note 13; see, e.g., Opinion of the Committee of the Regions on the Clean Air Policy Package for Europe, 2014 O.J. (C 415) 23 (expressing, inter alia, “regrets” that a proposed clean air policy is not synchronized with an existing directive).
\item \textsuperscript{19} This is in contrast to the broader view used by some commentators. See, e.g., infra note 48.
\item \textsuperscript{20} Stephen Weatherill, Maximum Versus Minimum Harmonization, in From Single Market to Economic Union 176 (Niamh Nic Shuibhne & Laurence W. Gormley eds., 2012).
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{24} See infra Part I.B.
\item \textsuperscript{25} Summary of the Impact Assessment, supra note 11.
\item \textsuperscript{26} See supra note 7 and accompanying text.
\item \textsuperscript{27} See infra notes 36–37 and accompanying text.
\item \textsuperscript{28} Summary of the Impact Assessment, supra note 11.
\end{itemize}
of course, reduces the policyholders’ personal wealth, but the ramifications do not stop there. When consumers are unprotected during an insurance failure, public finances may be weakened. Further, a decrease in consumers’ confidence in the insurance and financial markets may even slow the economy and cause financial disruption. A drop in consumer confidence is particularly problematic in the EU cross-border context because a disturbance in the EU internal market carries the risk of triggering disputes between member states as they try to allocate the failed insurer’s losses among themselves.

The burden placed on policyholders in the event of insurer insolvency also raises questions of fairness. Inaction by the EU would leave uneven levels of policyholder protection in place between the member states. This means that a policyholder in a member state without IGS may be left unprotected, while a policyholder with a similar policy in a neighboring member state would be protected by a guarantee scheme. Policyholders could theoretically choose insurers and policies that gave them the benefit of IGS protection, but a caveat emptor approach would place an unrealistically heavy burden on consumers to make insurance-related decisions based on their knowledge of IGS and the complex insurance market. Leaving EU citizens to wade through these dense regulations and exposed to disparate guarantee scheme protection is puzzling given the EU’s ostensible aim to “boost growth, employment and social cohesion in the EU” and given the right of EU citizens “to study, live, shop, work and retire in any EU country.”

The problem with varying levels of consumer protection is especially clear when considering the cross-border sale of insurance. The modern market can create any number of circumstances that can give rise to cross-border sales. An individual living in one member state may own a second home in another state. An insurer may wish to open a branch in another state or to convert a subsidiary into a branch. The cross-border sale of insurance in an unharmonized EU can create an unusual circumstance where two consumers who have identical contracts with a cross-border insurer end up facing different loss consequences based purely on their country of residence.

A lack of harmonization also allows for possible distortion of competition within the insurance market. Domestic insurers and nondomestic insurers are not on a level

29. Id.
30. Id.
31. Id.
33. Summary of the Impact Assessment, supra note 11.
34. See id. at 3.
35. See id.
36. Citizens’ Summary, supra note 32.
37. OXERA CONSULTING LTD., supra note 1, at iv.
playing field when one may benefit from the existence of IGS in their home country while the other does not. The effects on competition may be twofold. First, consumers may prefer to buy policies covered by IGS.\textsuperscript{38} Second, insurers required to make payments into IGS may be at a competitive disadvantage compared with insurers who are not required to do so.\textsuperscript{39}

Harmonizing IGS presents a possible solution to these problems. Consumers in member nations with no guarantee scheme or a weak guarantee scheme stand to gain a minimum level of protection,\textsuperscript{40} and a loss of confidence in the market due to an insurance failure would thereby be avoided. A minimum level of protection would also eliminate the largest roadblocks to fair cross-border competition by minimizing the impact of any consumer preference for IGS-protected policies and by requiring all insurers to make at least some payments into IGS.\textsuperscript{41}

II. COSTS OF IGS HARMONIZATION

Of course, the rosy picture of harmonization painted in Part I does not capture the entire reality. The implementation of EU-wide regulations is not a simple matter of swapping out unequal protections for fairer, more uniform ones. While harmonization may help achieve a unity of approach across the EU, it comes with its own costs.

A. Democracy Deficit: A By-Product of Harmonization?

One notable cost of harmonization is the loss of local preference. Whenever a decision is taken out of the hands of national legislatures and is instead determined within the EU framework, individual citizens of member states are attenuated from the decision-making process.\textsuperscript{42} The laws of a given group of states are therefore allowed to bleed into and dominate the laws of another sovereign state, which may not

\textsuperscript{38} Id. at 137.

\textsuperscript{39} Id. While it is necessary to acknowledge that these market forces would have opposing effects, the overall impact is not yet known. Analysis of the potential impact is necessarily speculative, as “[t]here is no direct evidence available to date to suggest that the impact on cross-border competition is significant, either from the demand or the supply side.” Id. This is due in part to the relatively limited activity of cross-border insurers. The point is not moot, however, as the impact may become greater as cross-border activity continues to increase. Id.

\textsuperscript{40} Summary of the Impact Assessment, supra note 11, at 5.

\textsuperscript{41} Of course, this would not eliminate all the differences between IGS in member states, and problems would remain as to the amount of coverage, the financial burden on insurers in different countries, etc. Nevertheless, harmonization would at least have the effect of making the differences between countries a mere matter of degree of coverage, rather than the existence or lack of any coverage at all.

\textsuperscript{42} The “main decision-making procedure used for adopting EU legislation,” known as the ordinary legislative procedure, requires that both the European Parliament and the Council of the European Union agree on legislative proposals, which are offered by the European Commission. The Ordinary Legislative Procedure, EUR. COUNCIL EUR. UNION, http://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure [https://perma.cc/QKH5-4QG7].
feel the new regulation is in its best interest. Harmonization, therefore, arguably creates a “democracy deficit” that deprives the people of their right to govern their own affairs at the national level.43

This aspect of the democracy deficit is not unexpected. The EU is predicated on the transfer of certain powers from the sovereign governments of member states to a transnational authority.44 In order to enjoy the benefits of European uniformity, member states have granted the EU increasing influence over their domestic affairs.45 The EU’s authority now touches on many aspects of the lives of member states’ citizens.46 As member states expand the authority of the EU and empower the EU to resolve various transnational problems, they necessarily “erode” their own sovereignty as nation states.47 This premise can be seen in harmonization within the EU. Legally binding regulations and directives aimed at harmonizing the laws of the various member states must carry the weight of domestic law, and therefore must remove the power of choice from individual member nations.48 This mechanism arguably allows nations in the legislative majority to export their own laws into other nations on the losing side of the vote. In this sense, harmonization may be characterized as a form of indirect extraterritoriality.49 Indeed, the desire to make the laws of multiple states uniform has even been criticized in some contexts as an extension of colonial attitudes because harmonization can empower stronger, more developed nations to impose legal, political, and cultural norms on less developed nations.50

44. Consolidated Version of the Treaty on European Union art. 10, Oct. 26, 2012, 2012 O.J. (C 326) 13, 20 [hereinafter TEU] (“Citizens are directly represented at Union level in the European Parliament. Member States are represented in the European Council by their Heads of State or Government and in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens.”).
46. Id. at 330.
47. See id. at 328–29.
49. Of course, this exportation of laws through the EU structure is not extraterritoriality in the conventional sense. Tonya L. Putnam, for example, defines extraterritoriality as the claiming by domestic-level institutions of direct regulatory authority over cross-border transactions. Tonya L. Putnam, Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere, 63 INT’L ORG. 459, 459–60 (2009). Under Putnam’s definition, then, indirect extraterritoriality is impossible. For the purposes of this Note, extraterritoriality should be understood to mean the application of one nation’s laws outside its territorial borders.
50. Long, supra note 45, at 316–17. Here, harmonization is defined much differently than should be understood in the rest of this work. Rather than referring to a specific EU mechanism, Long refers to harmonization in the “broader sense of an attempt to achieve agreement on multinationl universal concepts” within the intellectual property context. Id. at 316 n.10. Nevertheless, Long’s observation that colonial or imperialistic attitudes are manifest in the general harmonization of intellectual property regulations suggests that it may be worthwhile to consider the same criticism in the context of the “sovereign concessions” of the EU. Id. at 329.
Similar criticism has also been levied against the EU based on a perceived lack of transparency in EU procedure and the lack of opportunity for citizens to engage with the development of the EU legislative acts that will ultimately affect them.\(^{51}\) Importantly, the EU has made efforts to increase transparency\(^{52}\) and has embraced language emphasizing the importance of openness\(^{53}\) in keeping with the Treaty on European Union’s (TEU) guarantee of citizen participation in EU affairs.\(^{54}\) The EU’s multilingual website is one way EU matters are made accessible to the general public.\(^{55}\) Citizens can stream videos of meetings, access legislative and prelegislative documents, and download a wide variety of literature—from white papers to press releases—that explores and explains EU issues.\(^{56}\) Even candidly published information, however, may not reach EU citizens in practice. It can be difficult for individuals to parse the huge volume of publications relating to EU policymaking.\(^{57}\) Even more importantly, some policy issues may be more “visible” to the public than others, and the way in which EU institutions frame policy issues can have a major impact on those issues’ visibility.\(^{58}\) With this reality always at work in the background, the EU solicits comments from EU players—including private citizens—on matters of policy.\(^{59}\) However, it is not clear that citizens’ contributions are as influential on policymaking as those of commercial and governmental actors.\(^{60}\)

Ultimately, this Note does not intend to debate the adequacy of the EU’s efforts to increase transparency or to fully engage with the body of scholarship exploring the EU democracy deficit. Rather, by highlighting one of the problems inherent in European harmonization, the democracy deficit, this Note acknowledges that there are reasons EU member states may choose to resist harmonization and offers an analysis of the countervailing factors that may nevertheless encourage member states to embrace it.

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52. See id. at 1176–82.
53. See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union art. 15, Oct. 26, 2012, 2012 O.J. (C 326) 47, 54 [hereinafter TFEU] (“In order to promote good governance and ensure the participation of civil society, the Union’s institutions, bodies, offices and agencies shall conduct their work as openly as possible . . . . Any citizen of the Union . . . shall have a right of access to documents of the Union’s institutions, bodies, offices and agencies . . . .”).
54. TEU, supra note 44, art. 10, § 3 (“Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen.”).
57. Id. at 1179.
58. Id. at 1179–80.
60. See id. (“All citizens and organisations are welcome to contribute to this consultation. Contributions are particularly sought from market participants, national governments and national competent authorities.”).
It should also be noted that the surrender of some sovereignty is not necessarily a negative consequence of harmonization; it brings benefits as well. Where an EU regulation or directive harmonizes the law pertaining to a legal protection, harmonization can compel a member nation with nonexistent or weak laws to increase protection—as is the case with IGS. The individuals, corporations, or other entities that benefit from that legal protection are “winners” in the sovereignty-uniformity tradeoff.

Still, harmonization can implicate closely related issues of national and cultural identity that may not be overcome by a detached analysis of harmonization’s empirical benefits. Like any effort to increase uniformity, harmonization can create the perception that an unwanted homogenizing is taking place. This perception, paired with the perceived democracy deficit discussed above, has led the Commission of the European Communities to acknowledge that the EU is seen both as too “remote and at the same time too intrusive.” Individuals who perceive that they must sacrifice cultural identity in order to participate more fully in a global market may resist processes that contribute to that market.

Of course, any discussion of national or cultural identity must acknowledge that members of the European Union are voluntarily associated. Where a government has relinquished part of its sovereign power through a fair, noncoercive process—such as the adoption of a treaty—the democratic process may not be circumvented at all. Rather, the sovereign chooses to accept the authority of an international forum, and its powers are not usurped.

B. Harmonization’s Administrative Challenges

Harmonization can present a serious administrative challenge to member states as they work to implement and comply with EU legislative acts. As EU regulations increase, the inevitable consequence is that national regulations perish. And when it is necessary to dismantle a large swatch of extant policies within a member state the “simpler” EU regulation can be quite burdensome to individual member states.

In other words, “the more ‘coherent’ the EU regime, the less coherent national systems may become.” This is especially true where maximum harmonization is employed. The onus falls on the legal system of the member states to vet the entire corpus of law to determine which of their local regulations are affected by the EU.
regulations and must be eliminated or reworked.\textsuperscript{69} In addition to being a presumably work-intensive process, such dismantling of domestic law “radically shifts the pattern of European law-making away from a cooperative model towards a more hierarchical pattern.”\textsuperscript{70} These changes could be viewed as the very type of dereliction of national identity discussed above,\textsuperscript{71} a concern that “has particular resonance in the context of the cherished but imperiled ‘integrity’ of domestic legal systems.”\textsuperscript{72}

These problems can be expected in the IGS context as well. Minimum harmonization of IGS would mean creating a floor for consumer protection,\textsuperscript{73} a rule that would require the operation of IGS in each member state. Maximum harmonization, on the other hand, would establish the upper and lower limit of consumer protection. Both methods of harmonization stand to implicate the more emotional, identity-based problems of homogenization.\textsuperscript{74} The result of a more drastic change to maximum harmonization would be that, in member states where guarantee scheme protections are especially strong, those states might be required to offer less protection to consumers to avoid violating an EU directive.\textsuperscript{75} EU IGS therefore illustrate how increased regulation can act as a double-edged sword for consumers. While many would benefit from a directive requiring the operation of a guarantee scheme in each member state, excessive regulation could harm other consumers who currently enjoy a higher degree of protection.

\textbf{C. Monetary Costs of Harmonization in the IGS Context}

Finally, harmonization can carry monetary costs for member states that must comply with EU regulations. By way of example, harmonized IGS would impose monetary costs on member states without a guarantee scheme—or at least on insurers within those states—once a guarantee scheme was implemented. Because of the varying IGS structures, the differing scopes of coverage offered under IGS, and the number and nature of failures handled by a scheme, the estimated expense of operating a guarantee scheme is difficult to predict.\textsuperscript{76} Regardless, the costs imposed on insurers to fund and administer IGS are likely to be passed on to consumers.\textsuperscript{77}

\textbf{III. THE ATTRACTION OF HARMONIZATION IN THE IGS CONTEXT}

As illustrated in Part I, the harmonization of IGS in the EU stands to bring a number of benefits to consumers and insurers alike. Nevertheless, harmonization carries its own challenges, as discussed in Part II. Despite these challenges, many of the comments submitted to the EU by the various players in the international insurance market—discussed throughout this Part—expressed openness to harmonization. By

\textsuperscript{69} Id.
\textsuperscript{70} Id. at 188.
\textsuperscript{71} See supra Part II.A.
\textsuperscript{72} Weatherill, supra note 20, at 187.
\textsuperscript{73} See id. at 176.
\textsuperscript{74} See supra notes 61–63 and accompanying text.
\textsuperscript{75} Weatherill, supra note 20.
\textsuperscript{76} OXERA CONSULTING LTD., supra note 1, at 13–14.
\textsuperscript{77} Id. at iv.
analyzing these comments, this Note proposes harmonization may be palatable in the
IGS context because differences in consumer protection in various member states
exacerbate an inevitable, urgent problem that affects a wide range of actors in the
insurance market.

A. Background: Synopsis of the EU White Paper on Insurance Guarantee Schemes

In December of 2010, the European Commission issued a White Paper outlining
its position on the need for harmonized regulation of IGS within the EU. 78 Making
special note of the impact of the financial crisis on the insurance industry, 79 the
Commission recognized that policyholder protection in the EU is insufficient or un-
even in many member states. 80 The Commission decried the existing EU guarantee
scheme landscape’s negative effect on market stability and the uneven playing field
it creates for insurers competing across borders. 81 The Commission recommended a
binding directive achieving minimum harmonization across EU member states. 82 In
closing, the Commission “call[ed] upon all interested parties to provide their views,”
so that any feedback could be incorporated into an eventual legislative proposal. 83
The Commission received sixty-four responses to this public call for comment. 84
Responses were received from six categories of respondents: citizens, national and
European interests groups, industry, public authorities, national insurance guarantee
schemes, and others. 85 While acknowledging that responses to an EU white paper
cannot possibly represent the viewpoints of all stakeholders in the harmonization
debate, 86 this Note posits that stakeholder comments can provide insight into what
considerations actors in cross-border markets find important and what legal problems
may be ripe for harmonization as a result.

B. The Interests of Each of the Major Stakeholders in Insurance Guarantee Scheme
Harmonization Coincide

While the borders of nation-states impose an artificial sort of heterogeneity on the
insurance market, the reality is that the insurance market operates with little regard
for geographical boundaries. One insurer or consumer may have a legal interest in
more than one state’s guarantee scheme and the ever-increasing ease of travel, com-
munication, and cross-border business can create and complicate conflicts in the in-
surance market. Indeed, the sale of cross-border insurance is on the steady rise. 87 As

79. Id. at 3.
80. Id. at 4.
81. Id. at 5.
82. Id. at 8.
83. Id. at 13.
84. Commission Summary of Responses to the Consultation on the White Paper on
85. Id.
86. As an interesting illustration, “citizens” submitted only two of the sixty-four total re-
sponses. Id.
87. Oxera Consulting Ltd., supra note 1.
such, a wide range of actors is implicated when consumers of insurance are inadequately insulated from the risk of insurer insolvency.

The motive for EU harmonization is primarily to protect the individual consumer who has entered into a contract with the expectation that he will be protected from certain risks, but consumer protection comes with the additional benefit of building (or maintaining) market confidence. Harmonization also creates conditions that foster a single market in insurance. The result is that actors whose interests would typically be at odds—for example, an insurer and a policyholder or a business and government regulators—actually have a shared interest in establishing IGS.

The individual’s interest in well-functioning IGS is clear. Individual consumers are the end beneficiaries of payments made by IGS, and it is their policies and claims that are at issue when IGS is triggered. They are also affected by any change in premiums that may result from the existence or lack of IGS in a given market. It is unsurprising, then, that one of the two responses received from citizens lambasted the unequal coverage currently provided by European IGS. More interesting is the fact that this citizen was not alone in clamoring for greater consumer protection.

International insurers and other commercial entities are stockholders in the success of an EU guarantee scheme because they stand to benefit from a level playing field as they compete with other insurers in European markets. For example, an insurer that must pay ex ante into IGS may feel disadvantaged relative to a similarly situated insurer that does not have to pay into IGS. Conversely, an insurer in a state with strong IGS protection may have an advantage over an insurer writing business without IGS because consumers perceive that IGS make the insurer-insured relationship less risky. As a result, in addition to lauding harmonization’s benefit to consumers, insurers supported the proposals in the White Paper because of the anticipated increase in market stability and in order to encourage a level playing field in the single market.

88. Id. at vi.
89. Id. at vii.
90. Id.
92. Comments from a Citizen on Insurance Guarantee Schemes, CIRCABC (Nov. 24, 2010), https://circabc.europa.eu/sd/a/642f999b-c978-4e8f-94be-7c7f4df965f/12.%20Comments%20from%20a%20citizen%20on%20insurance%20guarantee%20schemes%20201112010.pdf [https://perma.cc/7CAK-7VG3].
93. See Oxera Consulting Ltd., supra note 1, at viii.
Finally, government actors also have reason to be concerned with inequities in insurance-consumer protection from state to state. Of course, IGS release national governments from any obligation to step in in the event of insolvency or to shift the cost of unfulfilled claims to taxpayers.95 Still, government actors expressed concerns for more than the “bottom line” of insurer insolvency. Government commenters acknowledged the weighty implications of international financial regulation on the insurance industry and the potential impact not only on individual consumers of insurance, but also on society as a whole.96 Government interests therefore represent the intersection of the interests of both the consumer and the insurance provider. Internationally, the EU’s aims as a driver of the European economy97 are served by increased confidence in international financial institutions, which encourages economic growth.

These comments illustrate that, although consumer protection is at the root of efforts to harmonize EU IGS, increased consumer protection is not in the interest of the consumer alone. Rather, interest in harmonization reaches “vertically” in scale from the individual consumer all the way to international governing bodies and stretches “horizontally” in scale to encompass both commercial and governmental entities.98 This unusual convergence of interests paves the way for international harmonization. Each actor is further tied to the others by their shared fate under the single market philosophy of the European Union.

95. See OXERA CONSULTING LTD., supra note 1, at 111.


98. For an interesting discussion of the concept of scale in a jurisdictional context, see Mariana Valverde, Jurisdiction and Scale, 18 SOC. & LEGAL STUD. 139 (2009).
C. Commenters Noted the Inevitable Consequences of a Lack of Harmonized IGS

An additional aspect of the appeal of harmonization in the EU IGS context is that IGS address an inevitable problem. Experts agree that no amount of insurance regulation can completely remove the risk that an insurer will fail.99 Regulators therefore face the challenge of preparing to protect consumers when—not merely if—an insurer insolvency occurs. In its White Paper, the Commission made clear that “[t]he importance of introducing an IGS depends on the risk that insurance companies will go bankrupt, and the potential impact of such bankruptcies on consumers.”100

Both insurers and public agencies identified this rationale as an important factor in their endorsements of IGS harmonization. The Ministry of Finance of the Slovak Republic, for example, explicitly stated that the impossibility of a zero-failure system was “consider[ed] highly important” in its analysis.101 Similarly, providing an insurer’s perspective, MetLife noted in its comments that the EU’s most recent regulatory scheme aimed at preventing insurer insolvency “in [no] way negates the need to look again at the provision of IGS across Europe and how they can help contribute to policy-holder protection.”102

D. Commenters Analyzed the Urgency of Problems Created by Differing EU IGS

Commenters’ rationale for accepting IGS harmonization often concerned the immediacy and seriousness of potential consequences from an insurance failure—concepts that together I have termed “urgency.”

Some commenters’ sense of urgency seemed to stem from a sense that unequal IGS protection across the EU is unfair to consumers and that consumer protection should be afforded where possible.103 For example, even while suggesting that IGS would only be necessary to protect consumers in the rarest of circumstances, the Swedish Ministry of Finance stated that a policyholder’s financial burden in such a circumstance would be “untenable.”104 A citizen commenter lamented “inequality in [IGS] protection in Europe,” and praised the Commission’s White Paper for offering a “long overdue” solution.105 Other commenters were concerned with the financial risk and potential destabilizing effect of insurer insolvency.106 This concern seems well rooted in fact, as insurer insolvency may pose up to €46.5 billion in potential costs to policyholders in a single year.107 The Financial Services Consumer Panel

100. Id. at 5.
103. E.g., Fed. Ministry of Fin. of Ger., supra note 96, at 1 (“[T]he lack of guarantee schemes holds serious, long-term dangers . . . that must be averted.”).
106. See supra note 71 and accompanying text.
observed in its comments that a “wait-and-see” approach was unlikely to satisfactorily address the problem because neither policyholders nor insurers were likely to self-regulate the market. While consumer choice could theoretically pressure insurers into markets with IGS or to innovate new ways of mitigating the risk of insurer insolvency, such a solution appears unlikely. For a market-driven solution to materialize, consumers would need access to the facts of IGS and the markets in which they function. However, IGS work quietly in the background of the insurance industry, and there is a notable lack of transparency for consumers.

Comments submitted by actors that rejected the notion of a harmonized guarantee scheme also show that a problem must be urgent to be considered for harmonization. For example, one rationale given by public authorities that rejected the guarantee scheme directive proposed in the White Paper was that, unlike a deposit guarantee scheme, IGS is not necessary to protect financial stability. Another rationale given for rejecting IGS harmonization was the existence of other domestic procedures used to address insurance failures. We see, then, that public authorities that do not see a need for harmonized IGS are skeptical of the impact of an insurance failure or are confident that existing procedures can adequately cope with any failures—in other words, they do not perceive that the variety of approaches to IGS presents an urgent problem.

These factors—coinciding interests of various actors, urgency, and inevitability—go a long way toward explaining why harmonization is an attractive option in the IGS context. While this Note proposes that these three characteristics, which are identifiable themes of the comments of actors within the insurance market on the EU’s White Paper on Insurance Guarantee Schemes, are important to the success of any effort to harmonize, it does not suggest that those three criteria are in and of themselves sufficient to guarantee successful harmonization. Each instance of harmonization must be considered in its own context.

It is important, therefore, to briefly note that the policy best suited for the harmonization of IGS is one of minimum harmonization enforced by a directive. This is, in fact, the policy suggested in the European Commission’s White Paper. A minimum harmonization directive would establish a consumer-friendly “floor” of protection while giving the people of each member nation some degree of autonomy. Each member state could enhance protections or create protection caps as it sees fit, so

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109. See supra Part II.A.

110. Ministry of Fin. of the Slovak Republic, supra note 96, at 1.


112. Id.

long as national regulations comply with the bottom line of the EU directive. In this way, a minimum harmonization approach would also prevent the concerns implicated by overzealous regulation, specifically that too much regulation could actually decrease consumer protection in some states. In this way, the directive would provide the consumer protection that is needed in so many cases without agitating more than is necessary the domestic concerns of each member state.

CONCLUSION

The image of the “long arm of the law” is a familiar one. But as travel and communication become easier and our world becomes ever more connected, the question has become whether that arm can reach across borders, across cultures, and across legal systems—and perhaps more importantly, whether it should. Within the EU, efforts to harmonize certain areas of law have aimed to bring efficiency, predictability, and clarity to the legal landscape of Europe.

However, it is not enough that a given policy might be more efficient, more predictable, or more clear. Where questions of identity, matters of national sovereignty, and notions of fairness enter the calculus, it is not sufficient to simply calculate the empirical benefits, subtract the costs, and see what remains. Comments on proposed EU action in IGS regulation illustrate that stakeholders are concerned with whether a problem is urgent and whether that problem has inevitable consequences. Where industry players’ interests converge and a particular legal solution offers benefits to actors at every level—from consumer to corporation and from individuals to international governments—an international solution is more likely to be palatable.