

AIDA XI WORLD CONGRESS - New York City

Questionnaire prepared for the AIDA XI World Congress, 20–24 October 2002, New York

This questionnaire consists of two parts.

The first part (A) is a general introduction to the subject of the study and on the limitations of the questionnaire.

In the second part (B), you are asked to describe the voluntary as well as compulsory compensation schemes for third party damages as referred to in the introduction which exist in your country. Please answer the questions for each of the relevant alternative schemes in force or being developed. Make a copy of the questionnaire for each separate scheme you describe. If possible, add the text or a Dutch, English, French, German or Swedish version of the law or contractual document on which it is based.

A. Introduction

The subjects for the study are the alternative mechanisms for the compensation of third party damages which have emerged as a complement or an alternative to liability and liability insurance in areas other than automobile accidents.

Damages caused by automobile accidents, however, can be taken as a point of departure. In many countries, indeed, compensation mechanisms have developed with respect to automobile accidents, which are not based on traditional liability or liability insurance. *If a country has in this area something else than only an individual liability insurance, it might also have compensation systems going in the same direction for other kinds of accidents.* The general reporters want to focus more particularly on industrial and medical accidents and environmental damages, without excluding interesting developments in other areas.

The study is limited to the compensation of third party damages which could conceivably also be dealt with by liability law. The cost of obligations towards the government, e.g., with respect to the clean-up of one's own property is to be dealt with. First party insurance is not considered, except as a point of reference.

The questionnaire is further limited to schemes in which private insurers play or can play a role. Social security is not examined.

Types of alternative compensation schemes

There is a broad range of compensation mechanisms other than liability and liability insurance. They can be of a voluntary or compulsory, public or private nature. With respect to the functions they fulfil, the following distinctions can be made.

(a) Some mechanisms *replace or complement liability insurance* by providing a guarantee for the payment of compensation due on the basis of liability law.

In some cases liability insurance is *backed up* by a mechanism to which the victim can have recourse in the event that compulsory liability insurance has not been taken out or in the event that the liability insurer is insolvent (compare the function of automobile compensation funds in a number of countries).

In areas where liability insurance is not available, *depository funds* may be used to accumulate the assets necessary to cover certain, often predictable, future liabilities. Private insurers offer *funding* contracts which make available to the policyholder the amounts needed to live up to certain future obligations.

Compensation may also be provided by *guarantee funds* financed by levies paid by a group of persons who create a more or less similar risk. In some events private insurers fulfil a similar role. An insurance for a third party beneficiary can provide compensation in the event of insolvency of the person taking out the policy. An example is the Swedish Pollution Victims Insurance which is to be taken out for the benefit of potential pollution victims by certain categories of industrial enterprises.

(b) Other compensation schemes constitute an *alternative or complement to the liability system* itself. Their intervention is *not based on the prior establishment of liability*. Whether or not compensation can be obtained is directly determined by the rules governing the distribution of the contributions (premiums, levies, taxes) accumulated by the participants to the scheme.

Here again, automobile funds can serve as an example in so far as they provide compensation in the event that no liability arises because a driver who caused an accident is exempted from liability by *force majeure* or has not been identified.

There exist comparable compensation schemes in other areas than automobile accidents. In certain cases, accident insurance is taken out by the operator of a dangerous activity for the benefit of the potential victims of his activities as yet unknown third party beneficiaries. An example is to be found in the Belgian industrial accident law under which the employer is granted a large degree of immunity under liability law but has the obligation to take out a (direct) insurance for the benefit of the employees. The Swedish patient insurance provides, without prior individual liability having been established, compensation for medical injuries and is (primarily) financed by the providers of medical services (nearly all public authorities). Especially in the environmental area, various *compensation funds* financed by levies on products or activities provide compensation, more particularly where the limits of individual liability are exceeded or where causation cannot be established. Private insurance can play a role here as well. The Swedish Pollution Victims Insurance, for example, provides compensation for environmental damages in the event that no liability arises by reason of the statute of limitation or because the enterprise which caused the damage has not been identified.

The above classification, although useful in describing the functions of the alternative compensation schemes, does not fully reflect reality. In practice, several compensation schemes will fulfil various functions at the same time and may remain closely linked to liability law.

A further theoretical description of alternative and complementary compensation mechanisms can be found in the paper "Alternatives to liability and liability insurance" which was presented by H. Bocken at the plenary meeting of the General Liability Insurance Committee of the Comité Européen des Assurances on 12 June 1997. The paper can be sent on request and will be made available through the AIDA website.

B. Questions

Please answer the following questions for each of the relevant alternative compensation systems you describe. Make yourself the necessary copies of the questionnaire.

1. Name of the alternative compensation scheme.
2. Describe in general the compensation mechanism and indicate its function, taking into account the indications given in the introduction. What are the policy objectives of the scheme?
3. Is the operation of the scheme the result of a voluntary undertaking or does it result from legislation? Please provide further information on its statutory or contractual basis. If possible, add the text or a Dutch, English, French, German or Swedish version of the law or contractual document on which it is based.

4. What is the area of application of the compensation scheme? Describe the type of operation covered, the nature of the incidents giving rise to damages and the type of damage covered.
5. What are the (other) substantive conditions under which compensation can be obtained from the scheme?
6. What benefits are available to the beneficiaries? If monetary compensation is provided for, is the amount of the compensation *limited* by a maximum payment per incident, or a maximum per victim individually?
7. Does the victim have to establish that he has exhausted his remedies under tort law before having access to the compensation scheme?
8. Does the victim maintain the right to sue a tortfeasor on the basis of liability law rather than having recourse to the compensation scheme?
9. Can the victim, after having had recourse to the compensation scheme, sue a tortfeasor on the basis of liability law for the damages exceeding the benefits received from the scheme.
10. Can the operator of the compensation scheme exercise recourse on the basis of liability law against any party contributing to the scheme whose operations have caused the damage compensated by the scheme?
11. Can the operator of the compensation scheme exercise recourse on the basis of liability law against other parties than those mentioned in 10?
12. By whom and according to which procedural rules are claims for benefits payable by the compensation scheme decided upon? Can a victim bring suit against the operator of the compensation scheme before the ordinary courts?
13. How is the compensation scheme financed? Who is contributing to the scheme? Is contribution compulsory or voluntary? On what basis are the premiums or other contributions determined?
14. What is the actual importance of the scheme? Please provide information on the number and type of cases in which it actually provided compensation and on the amounts distributed.
15. Please make any policy comments on the scheme you deem relevant and which have not been dealt with in the previous questions. You may want to comment on elements such as the ultimate allocation of the losses, the preventive effect of the system, its potentiality to provide protection for the public at large or to allow potentially liable parties to limit their liabilities.

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