

Meinrad Dreher

Treatises on Solvency II

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Preface

“Treatises on Solvency II” collects 13 articles on the new European insurance supervisory regime under the Solvency II Directive and the EIOPA Regulation, viewed predominantly from a legal standpoint. The articles treat the basis of the European insurance supervisory regime and its three pillars of solvency, governance, and disclosure. As background and by way of example, the treatise describes the German insurance supervisory regime and the efforts of the German legislator to implement the Solvency II system into this German insurance supervisory regime.

These articles were written in the period from 2009 to 2014, the time frame within which the Solvency II system was being created. They were first published in German and reflect the states and stages of the European and German insurance supervision at the time of their particular publication.

Although the insurance supervisory system is now definitively marked by European standards, there has been no thoroughgoing debate and consideration of this system with respect to theory and practice. In only a few Member States has there been public discussion of the issues implicated by the new European insurance supervisory regime. This book is intended to contribute to such a European debate by making the collected articles accessible in English. The intended addressees consist of, i.a., European and national insurance supervisory authorities, insurance undertakings, legislators dealing with insurance supervision, interested associations, financial auditors, courts, and above all insurance academics.

This book would not have been possible without contributions from various persons. First of all, the articles rendered from German into English by specialized translators had to be refined and harmonized. In this regard, my thanks go to attorney-at-law Ms. Julia Körner, research assistant to my academic chair at Mainz University, for her commitment, dedication, and input. For their dedicated support in producing, editing, and finalizing the indexes, I gratefully acknowledge my assistants: Ms. Judith Kreher, law clerk; Mr. Benjamin Franz, law clerk; Mr. Tobias Gerigk, cand. jur.; and Ms. Sarah Gillenberg, stud. jur. Significant contribution in the form of generous financial support for translating and printing was provided by the Dr. Paul-Otto Faßbender Stiftung für Bildung und

Wissenschaft [Foundation for Education and Science] of Düsseldorf, and I take this opportunity to express my particular thanks to the Foundation. Finally, I thank the publishers, editors, and co-authors involved with the initial appearance in print of these articles for their permission to publish these writings in English in the form of this book.

Mainz, Germany
1 October 2014

Meinrad Dreher

List of Abbreviations

AG	Die Aktiengesellschaft (Zeitschrift), The Journal of Corporation Law
AktG	Aktiengesetz, German Stock Corporation Act
ALM	Asset-Liability Management
art.	Article
BaFin	Bundesanstalt für Finanzdienstleistungsaufsicht, Federal Financial Supervisory Authority
BaFin-Journal	Bundesanstalt für Finanzdienstleistungsaufsicht-Journal, Federal Financial Supervisory Authority-Journal
BB	Betriebs-Berater (Zeitschrift), The Journal of Management Consultant, Law, Tax & Economics
BDSG	Bundesdatenschutzgesetz, German Federal Data Protection Act
BGB	Bürgerliches Gesetzbuch, German Civil Code
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen, Decisions of the Federal Court of Justice in Civil Matters
BGBI.	Bundesgesetzblatt, German Federal Law Gazette
BJR	Business Judgement Rule
BR-Drucks.	Bundesrat-Drucksache, Document of the German Bundesrat
BT-Drucks.	Bundestag-Drucksache, Document of the German Bundestag
BVerwG	Bundesverwaltungsgericht, Federal Administrative Court
BVerwGE	Bundesverwaltungsgerichts-entscheidungen, Federal Administrative Court Decisions
CCZ	Corporate Compliance (Zeitschrift), Journal of Corporate Compliance
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CFL	Corporate Finance Fachportal (Zeitschrift), Journal of Corporate Finance
CMLRev	Common Market Law Review
COF	Classification of Own Funds

COM	European Commission Documents
DB	Der Betrieb (Zeitschrift), Journal of Business, Tax and Economic Law
DÖV	Die Öffentliche Verwaltung (Zeitschrift), Journal of Public Administration
DCGK	Deutscher Corporate Governance Kodex, German Corporate Governance Code
DRS	Deutsche Rechnungslegungsstandards, German Accounting Standards
DVO	Durchführungsverordnung, Draft Implementing Measures Solvency II
ECB	European Central Bank
ECJ	European Court of Justice
ed	Edition
ed., eds.	Editor, editors
e.g.	Exempli gratia
EIOPA	European Insurance and Occupational Pensions Authority
EOF	Eligibility of Own Funds
EU	European Union
EuR	Europarecht (Zeitschrift), European Law Journal
EuZW	Zeitschrift für Europäisches Wirtschaftsrecht (Zeitschrift), Journal of European Business Law
EWiR	Entscheidungen zum Wirtschaftsrecht – Kurzkomentare (Zeitschrift), Decisions in the Field of Economic Law – short commentaries
FAZ	Frankfurter Allgemeine Zeitung, Frankfurt General Newspaper
f., ff.	Following page, following pages
FMA	Financial Market Authority (Austria)
FinDAG	Gesetz über die Bundesanstalt für Finanzdienstleistungsaufsicht, Financial Services Supervisory Act
FinStabGEG	Gesetz zur Stabilisierung der deutschen Finanzaufsicht, Act to Strengthen German Financial Supervision
FIW	Forschungsinstitut für Wirtschaftsverfassung und Wettbewerb, Research Institute for Economic Constitution and Competition
FS	Festschrift, Publication in Honor
GDV	Gesamtverband der Deutschen Versicherungswirtschaft, German Insurance Association
GenTG	Gentechnikgesetz, Genetic Engineering Act
GG	Grundgesetz, German Constitution
GmbHR	Gesellschaft mit beschränkter Haftung Rundschau (Zeitschrift), Journal of Limited Liability Companies
GWG	Geldwäschegesetz, German Money-Laundering Act
HGB	Handelsgesetzbuch, German Commercial Code

i.a.	Inter alia
IAS	International Accounting Standard
IASB	International Accounting Standards Board
i.e.	Id est
ICS	Internal Control System
id.	Idem
IFRS	International Financial Reporting Standard
Inc.	Incorporation
IR	Implementing Regulation
JECLAP	Journal of European Competition Law and Practice
Jite	Journal of Institutional and Theoretical Economics
JZ	Juristenzeitung (Zeitschrift), Jurists' Journal
KSzW	Kölner Schrift zum Wirtschaftsrecht (Zeitschrift), Cologne Journal of Economic Law
KWG	Kreditwesengesetz, German Credit Service Act
MaComp VA	Mindestanforderungen an die Compliance Funktion (Versicherungsaufsicht), Minimum Requirements for the Compliance Function (Insurance Supervision)
MaComp WA	Mindestanforderungen an die Compliance Funktion (Wertpapieraufsicht), Minimum Requirements for the Compliance Function (Securities Supervision)
MaRisk BA	Mindestanforderungen an das Risikomanagement (Bankenaufsicht), Minimum Requirements for Risk Management (Banking Supervision)
MaRisk VA	Mindestanforderungen an das Risikomanagement (Versicherungsaufsicht), Minimum Requirements for Risk Management (Insurance Supervision)
MCR	Minimum Capital Requirement
n.	Number
no.	Numero
NJW	Neue Juristische Wochenschrift (Zeitschrift), New Weekly Journal of Law
NZBau	Neue Zeitschrift für Baurecht (Zeitschrift), New Journal of Building Law
NZG	Neue Zeitschrift für Gesellschaftsrecht (Zeitschrift), New Journal of Company Law
OECD	Organisation for Economic Cooperation and Development
OFT	Office of Fair Trading
OJEU	Official Journal of the European Union
ORSA	Own Risk and Solvency Assessment
öOGH	Österreichischer Oberster Gerichtshof, Austrian Supreme Court
para.	Paragraph
pp.	Paginae
QIS	Quantitative Impact Study
ref.	Reference

RegE	Regierungsentwurf, Government's Draft
RSR	Regular Supervisory Report
RTS	Report to Supervisors
SCR	Solvency Capital Requirement
sec., secs.	Section, sections
sent.	Sentence
SFCR	Solvency and Financial Condition Report
SGG	Sozialgerichtsgesetz, Social Court Act
SRP	Supervisory Review Process
StGB	Strafgesetzbuch, German Criminal Code
StrlSchV	Strahlenschutzverordnung, German Regulation on Protection against Harm from Ionizing Radiation
subpara.	Subparagraph
TFEU	Treaty on the Function of the European Union
TKG	Telekommunikationsgesetz, Telecommunication Act
TP	Technical Provision
TSIM	Tests and Standards for the Use of an Internal Model
UFR	Ultimate Forward Rate
VAG	Versicherungsaufsichtsgesetz, German Insurance Supervision Act
VersR	Versicherungsrecht (Zeitschrift), Journal of Insurance Law
VersVergV	Versicherungsvergütungsverordnung, German Remuneration Regulation for the Insurance Industry
VGH	Verwaltungsgerichtshof München, Munich High Administrative Court
viz.	Videlicet
VuR	Verbraucher und Recht (Zeitschrift), Journal of Consumer and Law
VVG	Versicherungsvertragsgesetz, Insurance Contracts Act
VW	Versicherungswirtschaft (Zeitschrift), Journal of Insurance and Economy
VwGO	Verwaltungsgerichtsordnung, Code of Administrative Court Procedure
WiSt	Wirtschaftswissenschaftliches Studium (Zeitschrift), Journal of Economic Studies
WM	Wertpapiermitteilungen – Zeitschrift für Wirtschafts- und Bankenrecht (Zeitschrift), Securities Review – Journal of Commercial and Banking Law
WpDVerOV	Verordnung zur Konkretisierung der Verhaltensregeln und Organisationsanforderungen für Wertpapierdienstleistungsunternehmen, German Investment Services Conduct of Business and Organization Regulation
WPg	Die Wirtschaftsprüfung (Zeitschrift), Journal of Accounting
WpHG	Wertpapierhandelsgesetz, German Securities Trading Act

WuW	Wirtschaft und Wettbewerb (Zeitschrift), Journal of German and European Competition Law
WuW/E	Wirtschaft und Wettbewerb – Entscheidungssammlung, Decisions collected in the Journal of German and European Competition Law
ZBB	Zeitschrift für Bankrecht und Bankwirtschaft (Zeitschrift), Journal of Banking Law and Finance
ZfV	Zeitschrift für Verwaltung (Zeitschrift), Journal of Administrative Law
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (Zeitschrift), Journal of Business and Company Law
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (Zeitschrift), Comprehensive Journal of Commercial and Economic Law
ZIP	Zeitschrift für Wirtschaftsrecht (Zeitschrift), Journal of Economic Law
ZIR	Zeitschrift Interne Revision (Zeitschrift), Journal of Internal Revision
ZVersWiss	Zeitschrift für die gesamte Versicherungswissenschaft (Zeitschrift), German Journal of Risk and Insurance
ZWeR	Zeitschrift für Wettbewerbsrecht (Zeitschrift), Journal of Competition Law

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Part I

Basics

Chapter 1

Harmonization of Insurance Supervisory Law

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Abstract This chapter addresses the fundamental issue of what degree of harmonization applies in the Solvency II system. Distinguishing among the several degrees of harmonization—minimum harmonization, maximum harmonization, and full harmonization—leads to the conclusion that the Solvency II Directive has full harmonization as its objective. This has two important ramifications: First, the Solvency II Directive requires that any insurance supervisory regime implementation by the respective national legislators must completely align with the European insurance supervisory regime. Second, a system of full harmonization prohibits national legislators from unilaterally enacting additional measures not provided for in European law. A pertinent example in the German insurance

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supervisory regime is the previously extant general supervision according to the principle of abusiveness, where now the Solvency II system allows only supervision of legality.

1.1 Introduction

The adoption of the Solvency II Framework Directive,¹ the impending passage of the implementing regulations, and the implementation of these European law provisions in the national supervisory systems of EU Member States together constitute decided progress toward fully establishing the internal insurance markets of the European Union. Decades have gone into integrating the internal insurance market; and these efforts have reached their highest point yet, placing the insurance supervisory regime on radically changed footing. Solvency II will consolidate and expand the previously existing EU directives in the area of insurance² and align that policy more clearly with the goal of creating a regulatory framework for primary insurance and reinsurance that achieves the greatest possible uniformity throughout Europe. Consequently, the Solvency II Framework Directive demands the creation of uniform conditions in the conduct of the insurance business throughout the internal market. This uniformity is to be achieved by eliminating the most extreme differences among the supervisory systems of EU Member States. In setting this demand, the Directive enunciates the fundamental legislative objective of Solvency II for Europe.³

Against the background of this goal, however, there still remain to be settled the issues of the degree of the intended pan-European harmonization of the insurance supervisory regime and of the practical implications flowing from changes to the existing supervisory system.⁴ This article addresses these issues. At the outset, this

¹ Directive 2009/138/C of the European Parliament and of the Council of 25 Nov. 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJEU L 335, 17 Dec. 2009, 1 ff.

² For an overview of the European directive policy to this point, see *Rittner/Dreher*, *Europäisches und deutsches Wirtschaftsrecht* [in English: *European and German Economic Law*] (3rd ed. 2008), sec. 31, ref. 4 ff.

³ On this point, see Recital 2 of Directive 2009/138/EU, n. 1 above and also in further detail below, at [1.3.1.2](#).

⁴ The only examination and discussion found on the subject are in *Bürkle*, “Die aufsichtsbehördlichen Eingriffsbefugnisse nach Solvency II” [in English: *Supervisory Intervention Powers under Solvency II*] in: *Dreher/Wandt*, eds., *Solvency II in der Rechtsanwendung* [in English: *Solvency II in Legal Application*] (2009), 191 (208 ff.) on the issue of continuing the prevailing practice in supervision according to the principle of abusiveness; see on this point in further detail [1.4.2.2](#) below; further, there are merely apodictic references that the Solvency II legislation presupposes full harmonization – see, e. g., *Wandt/Sehrbrock*, “Solvency II – Rechtsrahmen und Rechtsetzung” [in English: *Solvency II – Legal Framework and Legislation*] in: *Dreher/Wandt*,

article looks at the classification of harmonization methods under European law (1.2, below). Next, the European provisions of Solvency II legislation are examined with regard to the intensity of the intended harmonization within the insurance supervisory regime (1.3, below). Finally, this article discusses basic issues of European law in consideration of the preexisting design of insurance supervision in Germany, draws conclusions about how the supervisory system will be configured in the wake of Solvency II, and illustrates outcomes using particular real-world areas of supervision (1.4, below).

1.2 The Typology of Harmonization Methods

The methods of legal harmonization across Europe via secondary law directives can be divided into three variants, identified under the criterion of how much discretionary power is left to the national legislator in the field of implementation. The three variants are generally distinguished as minimum harmonization, maximum harmonization, and full harmonization.

In the case of minimum harmonization, the Directive by law sets a minimum level of regulatory intensity, which the national legislator must at least meet but is allowed to exceed. Thus, the minimum harmonization scheme allows a higher degree of regulatory intensity and stricter legal requirements than designated in the Directive. On the other hand, implementation as national law must at least meet the minimum level of harmonization. Accordingly, an implementation that exceeds the stated minimum level under European law does not violate the secondary law provisions of the given directive, even if the implementation should contribute to a fragmentation of the law. A supererogatory implementation, however, must be evaluated against the criterion of possible restrictions on fundamental European economic freedoms in cross-border commerce and the concomitant distortions of competition.⁵ In addition, the provisions of national constitutional law, particularly those provisions relating to basic rights of the persons affected, can set limits on reverse discrimination implicit in stricter treatment of nationals. Over the course of a long period, minimum harmonization by means of directives has been the established method in the European legal harmonization process.⁶

eds., *id.*, n. above, at 1, 23; likewise in the publications of practitioners, as, e.g., *Reorganisation and Sitzverlagerung in der europäischen Versicherungswirtschaft* [in English: *Reorganization and Relocation in the European Insurance Industry*] (KPMG: 2008), 17, downloadable at www.kpmg.de/docs/Reorganisation.pdf.

⁵ Of many relevant voices on the point of the regularly attendant blocking effect of European directives when applied to basic rights, see *Riesenhuber*, “System und Prinzipien des Europäischen Vertragsrechts” [in English: *System and Principles of European Contract Law*] (2003), 222 ff.

⁶ Thus, especially in the first consumer protection directives; see Directive 85/577/EEC of the Council of 20 Dec. 1985 to protect the consumer in respect of contracts negotiated away from business premises, OJEEC L 372 of 31 Dec. 1985, 31 ff.; Directive 93/13/EC of 5 Apr. 1993, on abusive terms in consumer contracts, OJEEC L 95 1993, 29 ff.; Directive 97/7/EEC of the

In contrast to minimum harmonization, the standard of maximum harmonization sets the specified harmonization level according to European law at the upper rather than at the lower limit. Consequently, where a directive prescribes a system aimed at maximum harmonization, implementation by the national legislator is not allowed to exceed the degree of harmonization set under European law. The legislator may, however, prescribe a lower standard. Maximum harmonization is rare and primarily occurs when required to prevent distortions of competition in a certain area, where the distortions result from overly broad national regulatory provisions, in the nature, perhaps, of national legislation seeking to outbid with respect to a given level of legal protection and regulation.⁷

We come then to full harmonization, which combines the devices of both minimal and maximum harmonization⁸ and, by virtue of the legal rules contained in the Directive, represents the broadest form of harmonization. Full harmonization has as its object complete legal harmonization. Thus, in implementing a Directive, the national legislator cannot deviate from the Directive, whether up or down, when the Directive is aimed at full harmonization. This is so because full harmonization by legal rules contained in a Directive has as its end absolute sectoral harmonization of national rights among the Member States.⁹ The difference between a directive aimed at full harmonization and a regulation—besides being acts of law in different

European Parliament and of the Council of 20 Apr. 1997, on the protection of consumers in respect of distance contracts, OJEC L 144, 4 Jun. 1997, 19 ff.; 1997 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999, on certain aspects of the sale of consumer goods and associated guarantees, OJEC L 171, 7 Jul. 1999, 12 ff.

⁷ Thus, for example, in the area of deposit insurance in the lending sector, where the level of protection was established by law at a maximum of 100,000 euros in art. 1, no. 3 a of Directive 2009/14/EC of the European Parliament and of the Council of 11 Mar. 2009, amending Directive 94/19/EC on deposit-guarantee schemes as regards the amount insured and payout delay, OJEU L 68, 13 Mar. 2009 at 3 ff. by inserting new paragraph 1 a of art. 7 of the original Directive; see most notably on the point of the otherwise threatened distortions of competition also Recital 3 of Directive 2009/14/EC *ibid*.

⁸ The concept of full harmonization as used here is sometimes designated as maximum harmonization, making it difficult to construct legally rigorous demarcations among the several harmonization tools; see, e.g., *Knops*, “Der Verbraucherkredit zwischen Privatautonomie und Maximalharmonisierung” [in English: Consumer Credit between Private Autonomy and Maximum Harmonization] in: Habersack/Mülbert/Nobbe/Wittig, eds., *Die zivilrechtliche Umsetzung der Zahlungsdiensterichtlinie/Finanzmarktkrise und Umsetzung der Verbraucherkreditrichtlinie – Bankrechtstag 2009 – 2010* [in English: Civil Law Implementation of the Payment Services Directive/Financial Market Crisis and Implementation of the Consumer Credit Directive – Banking Conference 2009 – 2010], 195 ff.; on this point see also *Schürnbrand*, “Vollharmonisierung im Gesellschaftsrecht” [in English: Full Harmonization in the Law of Associations] in: Gsell/Herresthal, eds., *Vollharmonisierung im Privatrecht* [in English: Full Harmonization in Private Law] (2009), 273 (74); *Mülbert*, *ZHR* 172 (2008), 170 (179 ff.).

⁹ On the issue of any discretionary power remaining to the national legislator in implementation, see, e.g., *Riehm*, “Umsetzungsspielräume der Mitgliedstaaten bei vollharmonisierenden Richtlinien” [in English: Member States’ Discretion in Implementation under Directives of Full Harmonization] in: Gsell/Herresthal, eds., *Vollharmonisierung im Privatrecht* [in English: Full Harmonization in Private Law] (2009), 83 ff.

form—is simply that the regulation requires no implementing legislation at the Member State level but is immediately effective. In their legal effect, the methods are interchangeable, distinguished only on the basis of their designations.¹⁰ By different paths, both methods lead to the same result: complete unification of the given areas of law throughout the European Union. Directives intended to bring about full harmonization in given areas thus limit disparate regulatory intensity and by the same token limit distortions of competition among EU Member States. Accordingly, by guaranteeing a level playing field in the legal environment throughout Europe, directives represent the most effective tool for market integration. Directives are thus the most appropriate device—with respect to their given subject-matter—for achieving the completion of the internal markets. It is primarily this characteristic that is occasioning increased application of the Directive as a tool aimed at full harmonization.¹¹

¹⁰ See already *Köndgen*, in: Riesenhuber, ed., *Europäische Methodenlehre* [in English: *European Methodology*] (2nd ed. 2010), sec. 7, ref. 34; *Bast*, in: v. Bogdandy/Bast, eds., *Europäisches Verfassungsrecht* [in English: *European Constitutional Law*] (2nd ed. 2009) 526; thus the problem of a possible abuse of form arises when a directive rather than a regulation is used to establish full harmonization.

¹¹ Above all in the area of consumer protection law; see, e.g., the notice of the Commission on consumer policy strategy of 7 May 2002 (COM (2002) 208 final), OJEU C 137, 8 Jun. 2002, at 2; subsequently, consumer protection provisions were largely reoriented towards full harmonization; for example, the notion of full harmonization is explicit in Recital 10 f. and art. 22 of Directive 2008/48/EC of the European Parliament and of the Council of 23 Apr. 2008, on credit agreements for consumers and repealing Council Directive 87/102/EEC, OJEU L 133 of 22 May 2008, at 66 ff.; see further Recital (EG) 13, Directive 2002/65/EC of the European Parliament and of the Council of 23 Sep. 2002, concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, OJEU L 271, 9 Oct. 2002, at 16 ff. and also RegE [government's draft] of the implementation act, BR-Drucks. [Document of the German Bundesrat] 84/04 at 23 ff.; Directive 2007/64/EC of the European Parliament and of the Council of 13 Nov. 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC, and 2006/48/EC and repealing Directive 97/5/EC, OJEU L 319 of 5 Dec. 2007, at 1 ff.; see also the recommendation of the Commission for a comprehensive directive on consumer rights of 8 Oct. 2008 KOM [Commission] (2008), 614 (final); for a detailed treatment of the entire development, see *Welter*, "Vom Anerkennungsprinzip zur Vollharmonisierung" [in English: From the Principle of Recognition to Full Harmonization] in publication in honor of Uwe H. Schneider (2011), 1412 ff.; *Gsell/Herresthal*, in: Gsell/Herresthal, eds., *Vollharmonisierung im Privatrecht* [in English: Full Harmonization in Private Law] (2009), introduction at 1 ff., *Dickert*, "Politische Implikationen der Vollharmonisierung" [in English: Political Implications of Full Harmonization] in: Gsell/Herresthal, eds., *Vollharmonisierung im Privatrecht* [in English: Full Harmonization in Private Law] (2009), 177 (178 f.).

1.3 The European Law Sources for Harmonization of the Insurance Supervisory Regime

1.3.1 *The Solvency II Framework Directive*

1.3.1.1 The Legislative Process

The overriding determinants in establishing the intensity of the desired pan-European harmonization of the supervisory system are the Framework Directive provisions themselves. Indeed, the entire Solvency II legislation makes use of the legislative process¹² such that the Framework Directive is but the first of altogether four regulatory levels. Further steps will see implementing regulations (Level 2 and Level 3) adopted based on the Framework Directive and greater harmonization undertaken. The Level 2 implementing regulations as well as further measures in the regulation levels will be adopted by the European Commission, which is empowered with their implementation, but without the participation of the primary lawmaking bodies of the EU. Pursuant to the reservation of materiality, initially developed by the European Court of Justice¹³ and codified in art. 290, para. 1, AEUV [Treaty on the functioning of the European Union] since the effective date of the Treaty of Lisbon, fundamental provisions must be already addressed in the Framework Directive. But an express and generally applicable provision for the harmonization level sought is not to be found in the Solvency II Framework Directive legislative text. Thus, to determine what measure of harmonization is intended by the Framework Directive one must look primarily to the provisions of the Directive—not those generally directed to the degree of harmonization—and to their telos and classification.

1.3.1.2 The Recitals

First resort for enlightenment as to the harmonization level sought may be the Solvency II Framework Directive Recitals. Recital 2 of the Directive sets forth as the basic objective: “In order to facilitate the taking-up and pursuit of the activities of insurance and reinsurance, it is necessary to eliminate the most serious differences between the laws of the Member States as regards the rules to which insurance and reinsurance undertakings are subject.”¹⁴ At the same time, the Recital refers to the provision of a “legal framework for insurance and reinsurance

¹² See also *Rittner/Dreher, id.*, n. 2 above, sec. 32 ref. 7, following with further references.

¹³ See already ECJ [European Court of Justice], 17 Dec. 1970, E.C.R. case no. 25/70 Köster (1970), 1161, pnt. 6; 27 Oct. 1992, case no. C-240/90 (Germany/Commission), E.C.R. 1992 I-5383, pnt. 35 ff.; 13 Jul. 1995, case no. 156/93 (Parliament/Commission).

¹⁴ See Recital 2 of Directive 2009/138/EU, n. 1 above, at 3.

undertakings to conduct insurance business throughout the internal market.” Upon first reading, the terminology of Recital 2—especially the use of “most serious differences” and “legal framework”—seems to belie the objective of full legal harmonization and merely to indicate an amelioration of cross-border business activities and removal of serious differences among supervisory systems. The word “eliminate” in reference to “differences between the . . . laws of the Member States” does, however, demonstrate that the Solvency II Directive, even in its first substantive Recital, is asserting the objective of an essentially unitary system of supervisory systems of EU Member States. In like manner, Recital 11, which also refers to the Directive as “an essential instrument for the achievement of the internal market,” expresses the objective “to bring about such harmonization as is required” to realize a consistent country of origin supervision of insurance undertakings.

Relating to certain regulatory sectors, there are further indications for a harmonization as comprehensive and extensive as possible. For example, Recital 16 provides for enhanced harmonization of regulation for evaluation of claims and liabilities with reference to risk management. Also, Recitals 46 and 54 state that insofar as possible valuation standards for supervisory purposes should be compatible with international provisions. Similarly, Recital 75 regards “community-wide harmonization to the extent possible” as “critical” for supervisory assessment of a proposed purchase of shares.

Recital 40 of the Solvency II Framework Directive sets forth a clear indication for the objective of unifying supervisory systems of EU Member States in expressly stating that “supervisory convergence” is an objective of the Directive. Pursuant to the wording of the Recital, convergence is to apply not only to the supervisory rules and tools, but also in like manner to the diverse “supervisory practices” among the Member States. The Committee of European Insurance and Occupational Pensions Supervisors,¹⁵ created in 2009 and since replaced by the European Insurance and Occupational Pensions Authority (EIOPA),¹⁶ is to make key contributions in this area to harmonization and convergence of, above all, the diverse supervisory practices in the Member States. And further, Recitals 113, 114, and 115 provide for the creation of an additional College of Supervisors in the area of group supervision.

¹⁵ Decision 2009/79/EU of the Commission of 23 Jan. 2009 establishing the Committee of European Insurance and Occupational Pensions Supervisors, OJEU L 25 (29 Jan. 2009) 28 ff., abbreviated as AEAVBA in the German version, but uniformly known by the English-language designation CEIOPS.

¹⁶ Therefore in the following only EIOPA will be used; on the establishment of previous committees by EIOPA, see Regulation 1094/2010/EG of 24 Nov. 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC, OJEU L 331 (15 Dec. 2010), 48 ff. The necessary amendments to the Solvency II Framework Directive and insertion of the EIOPA concept will proceed under a provision known as the Omnibus II Directive; see the proposal of the Commission for a Directive amending Directives 2003/71/EC and 2009/138/EC in respect of the powers of the European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority (19 Jan. 2001, COM (2011) 8 (final)).