

## CEA contribution to the Conference on medical liability Council of Europe, 2-3 June 2008

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### | Introductory remarks

The CEA, the European insurance and reinsurance federation, attended the Conference organised by the Council of Europe on medical liability and would like to thank the organisers for allowing the Council of Europe's members and all stakeholders, including the insurance industry, the opportunity to hold a first exchange views on this topic of increasing importance in Europe and to try to identify specific topics that should be given greater attention in the future.

In this debate, the CEA wishes to outline four key elements for reflection/action:

- **A holistic approach:** Any suggested options should only be envisaged in strict connection with the specific social, economic, cultural and policy parameters in each Council of Europe country, taking into consideration the objectives of their governments in terms of the control and reduction of the financial resources assigned by the state to the healthcare system
- **A cooperative approach:** The number of participants at the Conference and the lively discussions strongly suggest that discussions at Member State level with stakeholders should occur on a more permanent basis, i.e. a Council of Europe's platform. It also shows that various possible partnerships between the main players should be properly assessed and worked out
- **Any policy options should be based on sound prior assessment and research – no "one-size-fits-all" option:** As far as medical malpractice compensation systems are concerned, it is important to acknowledge the insurability issue: long-tail risks; increasing unpredictability of claims, spiralling premiums and the lack of availability of insurance cover for certain professions. There seems to be a consensus among Member States with regard to the analysis of the state of the medical liability insurance markets in Europe and the fact that there is no "one-size-fits-all" solution to handle it
- **Areas for improvements to ensure greater insurability of medical risks at macro-economic level:** It seems that a broad consensus emerges as regards the need to focus on these initiatives aiming at preventing and minimising adverse events as a consequence of medical and clinical treatment. Likewise, the complex relationship between patients, healthcare professionals, healthcare institutions and the main parties involved in the financing of the compensation system requires further research to be carried out in this area, in particular into the development of tools that could respond to the scarcity of information/data and make them widely available in order to better assess medical risks and improve patient safety/the risk profile of healthcare professionals and medical institutions.

## |The state of the medical liability insurance market

In line with the OECD report<sup>1</sup>, the CEA wishes to outline the consensus among Member States as regards the analysis of the state of the medical liability insurance markets in Europe. The significant increase in the number of cases and in the price of insurance coverage for medical malpractice, due notably to the increase in the amount of damages for medical malpractice, and the poor history of profitability in this branch, which is unattractive to many insurers are features commonly reported in many markets.

As clearly outlined in the report of Mr. Jürgen Simon prepared for the Conference<sup>2</sup>, the medical liability insurance market in Europe, still remains fragile. It is slowly recovering from the medical malpractice crises of the early 1990s. For instance, as rightly pointed out in Simon's report, loss ratios were around 190 in Austria and 250 in Italy in 2003 on average and 112 in Greece. While many medical professionals can currently obtain insurance or other forms of protection, there are serious difficulties in some Member States finding cover for hospitals and special medical practitioners, such as midwives and surgeons. Many insurance companies have withdrawn from the market, since the number of claims is high and the awards from the courts can be substantial. Consequently this has led to increased premiums and the introduction of very high deductibles. The now relatively small numbers of insurers offering this cover will continue to do so, but on restricted terms for some risks.

It is important that everyone agrees on the current insurability issue and to acknowledge that if it is essential for the rights of patients to be properly defended, it remains equally important in the search for proper and sustainable solutions to strike a reasonable balance between the legitimate expectations of the patients/consumers of healthcare services, for instance to be promptly compensated, and a more secure environment for healthcare providers and their insurers, for instance by making losses more predictable. In that respect, expanding liabilities in this area means greater uncertainty/instability for healthcare providers and their insurers.

## |The holistic approach

The CEA supports the approach promoted by the Council of Europe to compare the variety of ways in which Council of Europe Member States have approached the problem and not to isolate one component of one system as opposed to the others. The comparison of good practices and mechanisms has proved to be valuable in the search for sustainable solutions. This unique overview/holistic approach of medical liability in Europe is welcome. In doing so, though, it is important to bear in mind that various options might be given different priorities in different countries depending on their healthcare provision as well as their specific cultural, legal, historical, social, economic and political background.

Against this background, the legal approach to medical liability should also be placed in a wider context. The CEA stresses that when considering a single component of a liability regime (concepts of fault and burden of proof for instance), it is easy to reach some incorrect conclusions about the possible effect of changing that component (from "fault based" to "non fault" for instance). It remains essential to consider the regime as a whole and how the various components interact with each other and to understand that to change a component means, in effect, that the balance of the whole regime is changed. Furthermore, it is important to outline here the impact of liability insurance in tort law. In some jurisdictions, judges, in their attempts to implement new rulings to deliver a "modern" concept of justice and being heavily influenced by the "unjust" nature of a medical malpractice case, will ensure that compensation is paid; this will result in insurance policies paying the damages awarded in any case.

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<sup>1</sup> OECD: "Coverage of medical malpractice in OECD countries"; May 2006

<sup>2</sup> «Economic implications of medical liability claims: Insurance and compensation schemes", Jürg Simon; pages 3 and 8

Finally, the CEA wishes to underline the fact that the various issues in the Conference's agenda are all too familiar to liability insurers in Europe and unfortunately not restricted solely to medical liability. Many of the problems identified during the conference are raised in other areas of liability insurance business and there is no point trying to address them for medical risks alone since there will be liability crises more widely due to the interdependencies of the various liability lines. A holistic approach to liability insurance is also needed and trying to deal with these issues for medical liability alone will only transfer these problems to other trades or lines of liability insurers' business.

## | The cooperation approach: search for partnerships

The CEA welcomes the assumption that some options to deal with the complex medical liability crisis, both in countries that are facing some problems and in countries that could be in the future, can be through concerted action involving the various private and public parties concerned: governments, patients, insurers, healthcare establishments and professionals.

Indeed, the successful outcome of the Conference strongly suggests that future exchange on this complex subject is highly desirable and the CEA would support the creation of a platform within the Council of Europe framework that enables the participation of all the key stakeholders, including insurers as key funding and risk-transfer institutions.

## | Sound prior assessment and research

The CEA stresses that any policy option should be discussed and assessed in advance with all the relevant parties, according to a costs/benefits analysis on patients, health professionals (including all those involved in the medical process) and risk-transfer institutions. In that respect, as it was acknowledged during the conference, substantial statistics are missing in a lot of countries and any call for further research, especially in the area of the funding of medical liability claims, is highly welcome. A preliminary stage could well be data collection and information pooling.

## | Ways to increase the insurability of medical risks

The CEA is keen to contribute to the discussions on medical liability launched at the Council of Europe level. In the search for solutions and to identify areas for further research, the CEA would like to outline the following topics:

- **Sharing of information/further research:** There seems to be a consensus on the scarcity of data and information on medical liability which makes it difficult from an insurer's perspective to assess and reduce the risk of malpractice and consequently to insure patients and health professionals. An area for further research could well be data collection and information pooling
- **Focus on prevention of adverse events as a consequence of medical and clinical treatment:** The importance of adopting standard codes, implementing risk management approaches for loss prevention/mitigation in healthcare institutions and enhancing better dialogue between patients, healthcare professionals and medical institutions
- **Performance improvement in healthcare institutions:** The importance of defining minimum patient safety standards for healthcare organisations/professions and widening the external assessment rules to all subjects involved in the medical process

- **Development of public-private partnerships:** Necessary in markets facing huge difficulties in assessing and covering medical malpractice risks in the long term
- **Alternative dispute resolutions:** It is important to reverse some of the litigation trends in recent years by enhancing greater stability and predictability via fault-based legal schemes, and developing alternative dispute resolutions, particularly for less complex claims

The CEA believes that these actions, if properly implemented, could minimise the harm to patients from adverse events associated with healthcare, improve the insurability of such risks and restore the insurance market capacity and competitiveness in this line of insurance.

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## | About the CEA

The CEA is the European insurance and reinsurance federation. Through its 33 member bodies, the national insurance associations, the CEA represents all types of insurance and reinsurance undertakings, e.g. pan-European companies, monoliners, mutuals and SMEs. The CEA, which is based in Brussels, represents undertakings that account for approximately 94% of total European premium income. Insurance makes a major contribution to Europe's economic growth and development. European insurers generate premium income of €1 110bn, employ over one million people and invest more than €7 200bn in the economy.