



Appendix 3.5

Conditions for greater mutual recognition of construction insurance regimes

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1.1 Conditions for greater mutual recognition of construction insurances regimes

This section analyses the conditions for a greater mutual recognition of construction insurance regimes, and possible convergence paths, basis for the development of a set of guidelines for a policy formulation.

Following previous sections, we will first extend the analysis on recognition paths toward its “vertical”, regime integration, point of view.

We will then briefly see how mutual recognition may concern a wide range of stakeholders and how regulation, and more specifically “freedom to provide service” regulation impacts the organization of the insurance market.

Finally, we will see how “policy convergence” literature could clarify possible pathways toward better market practices.

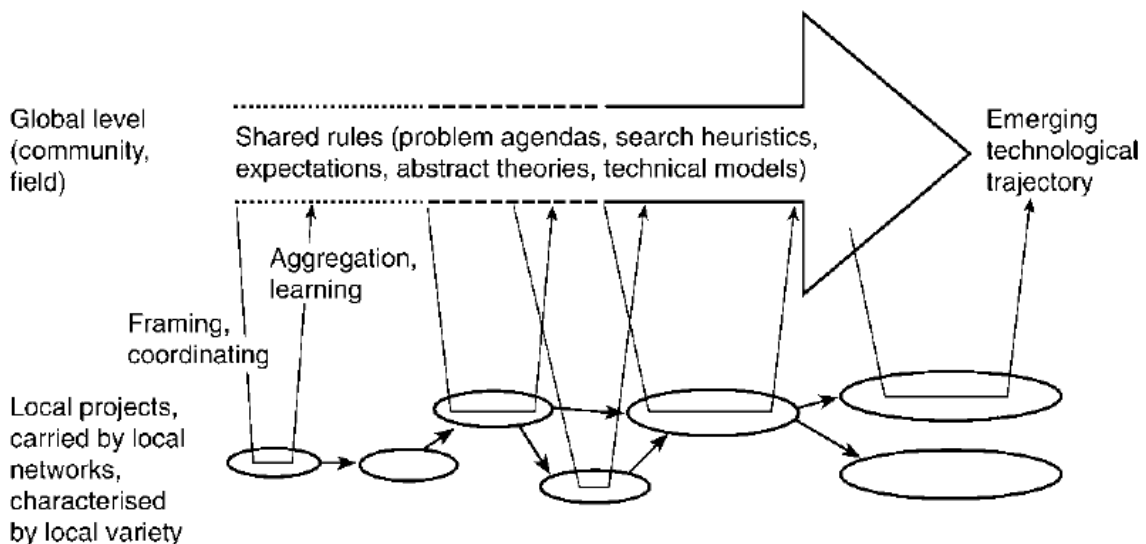
1.1.1 Impacts of national strategies on construction insurance

Previous regimes development and transformation analysis illustrate that it is not conducive to talk about an insurance regime respectively a construction regime, as these elements are intertwined to a wide extent and have co-developed over the decades.

Furthermore, we have also seen that national regimes are not homogenous entities. Rather, findings indicate that it may be more useful to understand and analyse the emergence of a new technological trajectory from the point of view of local multiplicity.

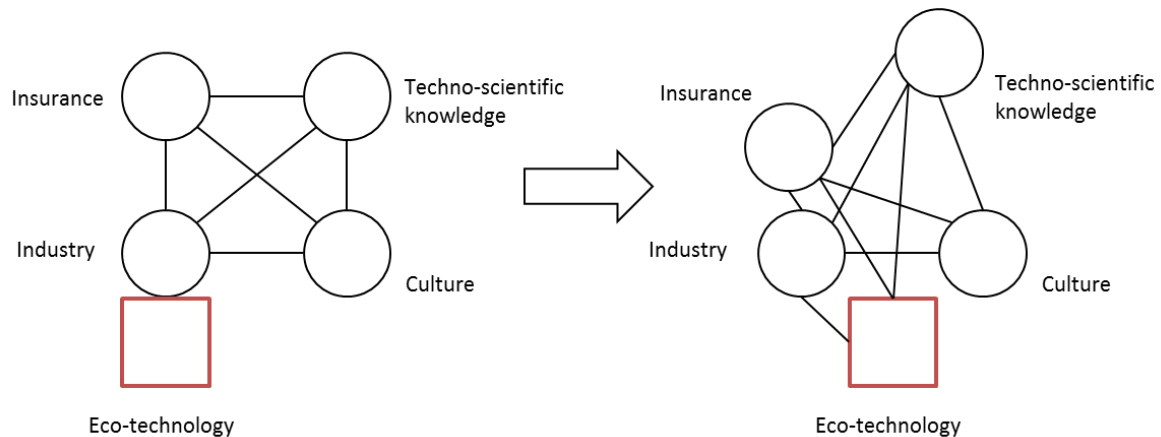
What this entails is a shift of focus from the individual technological niche to multiple localised projects that exist simultaneously and build on each other over time in such a way that sequences of local projects gradually add up to a technological trajectory at a global level as illustrated Figure 1.

Figure 1: Technological trajectory carried by local projects



This further means that introduction of new elements in a socio-technical context implies changes in linkages between the elements through configuration and reconfiguration processes, as illustrated hereafter:

Figure 2 : Socio-technical configuring and reconfiguring



Therefore, the governance of policy implementation, e.g. new in relation to EU legislation on the topic of sustainable building, is constituted as a prime unit of analysis in the further project progress.

The reason for this being that it is not possible under such varying and even contradictory circumstances to implement and enforce a single solution or governance scheme across all nations. Instead, new policy (insurance) schemes have to be designed and applied differently in different nations acknowledging that a single, uniform solution might not be possible to implement.

1.1.2 Transition pathways and convergence

Geels and Schot (2007) have developed a typology of transition pathways based on different multi-level interactions. In order to distinguish between different transition pathways, they combine two criteria, being (i) the timing of interactions; and (ii) the nature of interaction. With this, they attempt to counter an assumed bottom-up, niche-driven bias in the understanding of transitions.

On the timing of interactions, the argument is that different timings of multi-level interactions have different outcomes. And particularly important is the timing of landscape pressure on regimes with regard to the state of niche-developments. Geels and Schot (2007: 405). Thus if landscape pressure occurs at a time when niche-innovations are not yet fully developed, the transition path will be different than when they are fully developed.

Furthermore, on the nature of interaction, Geels and Schot pose the question, whether niche-innovations and landscape developments have reinforcing relationships with the regime or disruptive relationships through pressure or competition. The essence of the argument is that reinforcing landscape developments have stabilizing effects on regime and form no driver for transitions. On the other hand, disruptive landscape developments exert pressure on the regime, creating impulses for change.

Moreover, Geels and Schot (2007: 406) suggest that niche-innovations have a competitive relationship with the existing regime, when they aim to replace it, whereas a symbiotic relationship

exists if the niche-innovations can be adopted as competence-enhancing add-on in the existing regime to solve problems and improve performance.

Geels and Schot (2007) distinguish between four different transition pathways: (i) transformation, (ii) reconfiguration, (iii) technological substitution; and (iv) de-alignment and re-alignment. In essence they entail (Table 1):

Table 1: Transitions pathways (Geels and Schot, 2007)

Transition pathway	Description
Transformation path	If there is moderate landscape pressure ('disruptive change') at a moment when niche-innovations have not yet been sufficiently developed, then regime actors will respond by modifying the direction of development paths and innovation activities.
De-alignment and re-alignment path	If landscape change is divergent, large and sudden ('avalanche change'), then increasing regime problems may cause regime actors to lose faith. This leads to de-alignment and erosion of the regime. If niche-innovations are not sufficiently developed, then there is no clear substitute. This creates space for the emergence of multiple niche-innovations that co-exist and compete for attention and resources. Eventually, one niche-innovation becomes dominant, forming the core for re-alignment of a new regime.
Technological substitution	If there is much landscape pressure ('specific shock', 'avalanche change', 'disruptive change') at a moment when niche innovations have developed sufficiently, the latter will break through and replace the existing regime.
Reconfiguration pathway	Symbiotic innovations, which developed in niches, are initially adopted in the regime to solve local problems. They subsequently trigger further adjustments in the basic architecture of the regime.

Under current conditions characterizing the different national insurance regimes, this leaves open the question how, and by which processes, convergence of insurance schemes can be implemented at a supra-national level across different highly institutionalized construction regimes.

1.1.3 General financial protection requirements and regulatory framework influence

Depending on the type of stakeholder the answer to the question "what are the expectations or fears that are implied or understood behind the idea of recognition?" may be regarded very differently.

Considering feedback from insurers, we will see how Freedom to Provide Services (FPS) raises questions about the cross-border activities.

1.1.3.1 Financial protection requirements

We previously noted that the necessity of information on financial protection touches all the actors of the market:

- The insured, regarding the risk of default of his insurer, notably the owner, who must ask for information on his insurer. Note that this category also includes contractors and designers in general.
- The insurance broker who bears a “duty to advise” and is liable according to European Directive 2002/92 on insurance mediation (European Parliament and of the Council 2003).
- The insurer regarding its own “financial exposure”. This is notably the case for an insurer which is used to work on an unfunded / pay as you go basis and wants to deliver guarantees on a funded / capitalized basis like decennial covers.
- The reinsurer, also regarding its own exposure. This is the case for example if he participates to the cover on a quota-share basis. The asymmetry of information between the parties may also lead to an inadequate use of the treaties (for example use of a general liability treaty instead of specific decennial treaty).
- The financial public authorities which deliver the FPS authorizations, which may not have the knowledge on the financial exposure of foreign guarantees (such as decennial covers). In order to verify and validate the financial security of an insurance activity, the authority must have a thorough knowledge on the insurance product structure.

Once again it appears that access to information is a key element in the global financial protection requirements hence in insurance underwriting process.

1.1.3.2 Regulatory framework influence

Among insurers interviewed, cross-border activity of insurance seems to raise a concern of equal treatment for all European actors in terms of application of the regulatory framework. In other words, what are the applicable rules in terms of financial protection in case of cross border insurance and who is supposed to verify their compliance?

Regarding insurance undertakings, the Interpretative Communication on “freedom to provide services and the general good in the insurance sector” (European Commission - Commission Interpretative Communication 2000) states:

*“The Third Council Directives 92/49/EEC and 92/96/EEC(1) completed the establishment of the single market in the insurance sector. They introduced a single system for the authorisation and financial supervision of insurance undertakings by the Member State in which they have their head office (the home Member State). Such authorisation issued by the home Member State enables an insurance undertaking to carry on its insurance business anywhere in the European Community, either on the rules on establishment, i.e. by opening agencies or branches in all the Member States, or under the rules on the freedom to provide services. Where it carries on business in another Member State, the insurance undertaking must comply with the conditions in which, **for reasons of the general good, such business must be conducted in the host Member State.** Under the system set up by the Directives, the financial supervision of the business carried on by the insurance undertaking, including business carried on under the rules on establishment or on the freedom to provide services, is always a matter only for that insurance undertaking's home Member State”.*

Where the concept of the general good is expressed as:

“The concept of the general good is based in the Court's case law. [...] However, the Court has never given a definition of “the general good”, preferring to maintain its

evolving nature. [...]The Court requires that a national provision must satisfy the following requirements if it is validly to obstruct or limit exercise of the right of establishment and the freedom to provide services:

- it must come within a field which has not been harmonised,*
- it must pursue an objective of the general good,*
- it must be non-discriminatory,*
- it must be objectively necessary,*
- it must be proportionate to the objective pursued,*
- it is also necessary for the general-good objective not to be safeguarded by rules to which the provider of services is already subject in the Member State where he is established.*

These conditions are cumulative. A national measure which is claimed to be compatible with the principle of the freedom of movement must satisfy all the conditions. If a national measure does not meet one or other condition, it is not compatible with Community law.[...]

*The harmonisation directives define the minimum level of the general good within the Community. Measures relating, for example, to the calculation of technical provisions and the solvency margin, **the conditions for taking up insurance business, and financial and prudential supervision may no longer be covered by the general good of a Member State.**[...]*

The Court has so far acknowledged that, in the absence of harmonisation, the following areas could fall within the scope of the interest of the general good: the professional rules designed to protect the recipient of services, protection of workers, consumer protection, etc.”

Therefore, since harmonized minimum provision rules exist at European level, and that financial and prudential supervision do not fall under “the general good” concept, a Member State that decides to impose, on its own, insurance undertakings stricter enforcement rules than those laid down in the Directives, cannot impose those standards to a foreign State.

In other words, the directive establishes a framework for cross border competition, with different prudential supervision rules, and therefore consumer protection, depending on the insurer’s home Member State.

As a consequence, insurers are apparently taking a competitive advantage from providing insurance from Member States with less restrictive prudential rules. This situation seems to be especially the case for Inherent Defect Insurance, which implies financial protection up to construction costs, for periods of up to 14 years according to prudential regulations of the countries where the risks are located.

1.1.4 Conditions for handling incompatibility of national insurance regimes

Considering the previously exposed inter-connection of elements that makes up the construction regime systems and the variability of situations, we will further develop the possible theoretical paths toward “policy convergence” at a European level.

While various and numerous literature explore the topic of policy convergence, the following discussion will be essentially based on the framework presented by Christoph Knill in his synthetic,

nonetheless very complete, comparative articles (Knill Christoph 2005 ; Holzinger Katharina and Knill Christoph 2005). The overview made in this article encompasses all policy convergence mechanisms we could find in literature.

1.1.4.1 What causes policy convergence

Even though causal factors of policy convergence vary among authors, Knill identifies five main categories of causes. As summarized in the following table, each mechanism combines a stimulus and a corresponding response, i.e. the behaviour leading to convergence.

Table 2 : Mechanisms of policy convergence :

Mechanism	Stimulus	Response
Imposition	Political demand or pressure	Submission
International harmonization	Legal obligation through international law	Compliance
Regulatory competition	Competitive pressure	Mutual adjustment
Transnational communication		
- Lesson-drawing	Problem pressure	Transfer of model found elsewhere
- Transnational problem-solving	Parallel problem pressure	Adoption of commonly developed model
- Emulation	Desire for conformity	Copying of widely used model
- International policy promotion	Legitimacy pressure	Adoption of recommended model
Independent problem-solving	Parallel problem pressure	Independent similar response

Overview of the different mechanisms:

- **Imposition**
 “Convergence through imposition occurs whenever an external political actor forces a government to adopt a certain policy”. We can regard this coercive mechanism as not desirable considering the variety and complexity of the systems and situations described in the previous discussion. It also faces two major critic: legal systems differ from one country to another, and insurers are free actors on the insurance market. Firstly, common imposed legislation as to suit both common law and civil code legal systems. Secondly, if legal requirements are to be imposed, it cannot be on insurance legislation but only on liabilities, leaving the adequacy of the insurance and financial associated protections unclear.
- **International harmonization**
 International harmonization occurs when the different countries involved in the process comply with uniform legal obligations defined in supranational law. It is a voluntary co-operative process. We can in our case categorize it as a “negotiated” imposition. It therefore faces the same hurdles.

- **Regulatory competition**
In this mechanism, “countries facing competitive pressure, mutually adjust their policies, [...] they redesign their market regulations in order to avoid regulatory burdens restricting the competitiveness of domestic industries”. In summary it is a race to bottom mechanism that is not desirable in our case, considering once again the importance of level of protection existing in the different countries.
- **Transnational communication**
This category includes different related mechanisms: lesson drawing, transnational problem solving, emulation and transnational promotion of policy models.

“In contrast to other mechanisms, they are purely based on communication among countries.”
In summary:

- Lesson drawing utilize available experience elsewhere, it is an experience-based policy learning.
- Transnational problem learning is a rational joint development of common solutions to similar domestic problems.
- Emulation of policies is driven by a desire of conformity with other countries. It is function of the number of countries that already adopted a certain policy, trying to increase social legitimacy, and not being left behind. Its adoption also depends on the perception of its urgency. Considering the increasing number of countries carrying out IDI covers and the general sustainable development trend this mechanism seems to fit greatly to our problematic.
- International policy promotion is a comparable rational learning mechanism but driven by the active role of international institutions promoting the spread of distinctive policy approaches they consider particularly promising. It is here again a definition that corresponds to our situation, the European Commission being the promoting institution.

- **Independent problem solving**
In this mechanism, the convergence of policies between several countries arise as a result of similar but independent responses to parallel problem pressures. Actors do not behave in response to each other’s actions. Therefore, this mechanism is out of the scope of our means.

A preliminary conclusion of the description of those mechanisms is that “transnational communication” seems to be a preferable path to follow as it allows convergence by pulling upwards the standards without interfering in national regulations and construction systems’ balance.

1.1.4.2 When does policy convergence occur

For each casual mechanism Knill further develops theoretical framework of conditions of their operation. As summarized in Table 3 he shows that “*the conditions and effects of convergence vary strongly across the different convergence mechanisms*”. He also states that “*it is hardly surprising that empirical findings on policy convergence and on races to the top or bottom are rather ambiguous.*”

Table 3: Theoretical expectations on scope, degree and direction of convergence

Mechanism	Factors affecting convergence scope	Factors affecting convergence degree	Expected convergence direction
Imposition	Reach of the imposing actor (individual country vs. international institution)	(by definition full convergence to imposed model)	No prediction possible
International harmonization	Number of member countries	Degree of legal specification	Upward shift for minimum harmonization
Regulatory competition	Market economy Trade-related policies	Capacity to enforce compliance	Persistence for total harmonization
		Trade dependence	Upward or downward shift for product standards
			Downward shift for process standards
Transnational communication	Apart from information about policy choices of other countries no particular restrictions apply	Degree of existing similarity (number of adopters)	Upward shift in case of policy promotion For other mechanisms no prediction possible
		Cultural linkages	
		Degree of model specification	
		Similarity of policy legacies	
		Degree of inter-linkage into transnational networks	
Independent problem-solving	Number of countries that recognize similar problem	Degree of existing similarity across countries	No prediction possible

Consequently, if the theoretical framework may clarify the mechanisms of convergence, it doesn't give any simple answer to the efficiency of those mechanisms. Nonetheless, we can already conclude from our previous discussion, that policy convergence of construction insurance regimes seems preferable through "transnational communication" mechanisms, in order to improve voluntary dissemination of the insurance offer, adapted to each specific sociologic, economic, technic, cultural and regulatory context of the construction systems.

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