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In this week's Insurance Bulletin:

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1. REGULATION AND LEGISLATION

EU: EIOPA Chairman speaks about European supervision in a changing environment and EIOPA's priorities

The Chairman of the European Insurance and Occupational Pensions Authority (EIOPA) gave a speech at the CIRSF Annual International Conference on 6 June 2018 on "European supervision in a changing environment".

The Chairman listed the following three "top priorities" of EIOPA:

1. Further enhancing supervisory convergence
2. Reinforcing consumer protection in an era of digital transformation
3. Maintaining financial stability in a changing environment

EIOPA's main objective regarding supervisory convergence is to ensure policyholders benefit from high-quality and consistent supervision and EIOPA recently published its 2018-2019 Supervisory Convergence Plan, which can be found at https://eiopa.europa.eu/Publications/Reports/Supervisory Convergence Plan 2018-2019.pdf. As a result of the Insurance Distribution Directive (IDD) and the Packaged Retail and insurance-based Investments Products (PRIIPs) regulation, EIOPA is now also focusing on conduct of business supervision as a result of the new rules on conflicts of interest, product oversight, and governance and transparency. In EIOPA's view, National Competent Authorities, i.e. Member State regulatory bodies need to take conduct of business supervision more seriously and coordinate with one another more effectively in crisis situations.

The European Supervisory Authorities currently do not intend to legislate to address changes due to "digital transformation" (such as the production of more personalised consumer products and greater efficiencies in the underwriting and claims management processes) arising from new technologies, digitalisation, Big Data and machine learning. The view is that such legislation would be premature and that EIOPA's current role should be to monitor developments and call upon financial firms to develop and implement good practices on the use of Big Data.

Finally, EIOPA is focusing on maintaining financial stability and sees a need for adequate recovery and resolution tools to enable national authorities to intervene in failing institutions and resolve failures. The Chairman also stated that while insurance guarantee schemes can contribute to increasing the overall protection of policyholders, there is currently too much fragmentation in the types of guarantee schemes provided. EIOPA is therefore assessing the need and elements of a minimum harmonised approach to insurance guarantee schemes in the EU and a discussion paper will be published before summer.

EIOPA is also currently working on the final paper of three papers addressing systemic risk and macro-prudential policy in insurance as part of the broader discussion of macro-prudential policy following the financial crisis. The final paper focuses on the assessment of the need for further tools to address identified systemic risks.

The Chairman concluded by saying further enhancing supervisory convergence would mitigate risks and improve protection for policyholders. The Chairman acknowledged that the current "political times are not conducive to European solutions" but ended optimistically by quoting the Portuguese poet, Fernando Pessoa: "Stones in the road? I save every single one, and one day I'll build a castle".

The full speech can be found at: https://eiopa.europa.eu/Publications/Speeches%20and%20presentations/2018-06-06%20CIRSF%20Annual%20International%20Conference%202018%20Lisbon.pdf

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UK: Insurance contract law reform: English and Scottish Law Commissions publish updated draft Bill on insurable interest

On 20 June 2018, the joint Law Commission (Scotland and England & Wales) published an updated draft of the Insurable Interest Bill which focuses on life insurance and other insurances which relate to human life. This is the final part of the lengthy Law Commission review of insurance law which began in 2006 and so far has resulted in the Consumer Insurance (Disclosure and Representations) Act 2012 and the Insurance Act 2015.

An "insurable interest" is the requirement that someone taking out insurance must be at risk of suffering a loss or disadvantage if an insured event occurs. Without insurable interest, an insurance contract is putatively void. The person taking out the insurance must stand to gain a benefit from its preservation, or suffer a disadvantage should it be lost. The draft Bill intends to broaden the concept of insurable interest to cover "life related" insurance, which includes contracts of insurance whether the insured event is "death, injury, ill health or incapacity of an individual". If the Insurable Interest Bill were to be implemented, it would make the law more modern and flexible by allowing people to better protect themselves and their families.

Amendments to the Bill include allowing individuals to have an automatic insurable interest in cohabitants and extending insurance interest to cover children and grandchildren so that they would have coverage under travel or health policies. The draft Bill proposes a broad test as to the meaning of an interest in the life of another person. Another proposed amendment is to allow pension trustees and other administrators of group schemes to have an insurable interest in the lives of members of the group by ensuring employers' life and health policies have the full support of the law. The revised legislation also recognises the important part trusts play in financial planning by allowing trustees of private trusts to purchase life insurance bonds if the settlor or "trustee" of the trust has the necessary insurable interest to do so. In the future, updating and clarifying the law on insurable interest will encourage economic activity among UK insurers, giving individuals and businesses the chance to protect their legitimate interests.

The Law Commissions have asked for comments on the detail of the new draft Bill by 14 September 2018.

The draft Bill and accompanying notes are available on the Law Commission website here: https://www.lawcom.gov.uk/project/insurance-contract-law-insurable-interest/

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2. COURT CASES AND ARBITRATION

EU: ECJ considers what is included in "insurance mediation" under the Insurance Mediation Directive

The Swedish Supreme Court asked the Court of Justice of the EU (ECJ) to consider what is included in "insurance mediation" for the purposes of the Insurance Mediation Directive[1] (IMD) in relation to two disputes where sums intended to be invested in capital life insurance products were lost[2].

In the first case, the insurance intermediary failed to purchase the products and misappropriated the customers' money; in the second sums were invested in an investment certificate which was linked to a capital life insurance product which lost its entire value. Both intermediaries had professional indemnity insurance cover, so when they were declared insolvent, the customers looked to the professional indemnity insurers to make good their losses. In the first case, the professional indemnity insurers

1 Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation

2 Länsförsäkringar Sak Försäkringsaktiebolag and Others v Dödsboet efter Ingvar Mattsson and Strobel and Others v Länsförsäkringar Sak Försäkringsaktiebolag (Case C-542/16) (ECLI:EU:C:2018:369) (31 May 2018)

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"Amendments to the Bill include allowing individuals to have an automatic insurable interest in cohabitants and extending insurance interest to cover children and grandchildren so that they would have coverage under travel or health policies."

argued that, since the products were not purchased, there was no insurance mediation activity; and in the second, that the advice provided concerned the investment certificate linked to the life assurance rather than the life assurance itself and therefore constituted investment advice covered by the Markets in Financial Instruments Directive[3] (MiFID).

The ECJ found that insurance mediation consists not only of proposing insurance contracts but also carrying out other preparatory work, even if the insurance intermediary does not intend to conclude a genuine insurance contract. It stated that financial advice relating to the placement of capital given in the context of insurance mediation constitutes preparatory work, as it forms an integral part of the "insurance contract". Such advice is therefore covered by the IMD, and not by MiFID.

Even though such financial advice could fall within the meaning of "investment advice" under MiFID, Article 2(c) excludes the provision of investment service which is incidental to a professional activity which is separately regulated or subject to a code of professional ethics which does not exclude the provision of that service, such as the professional activity of insurance mediation.

The ECJ gave prevalence to the IMD over MiFID legislation on the basis of the principle of non-duplication, whereby a company should not be subject to two separate sets of rules pursuing similar objectives. In this case, the status of an insurance intermediary is subject to sufficient regulation of its competence and fairness so there is no need to impose additional duties stemming from the MiFID rules.

The ruling of the ECJ is significant because the Court has opted for a broad and objective definition of the scope of the activities covered by banking, financial and insurance EU regulations and directives. This is consistent with the aim of the IMD to enhance consumer protection in insurance mediation.

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3. MARKET DEVELOPMENTS

UK: IUA publishes Brexit continuity clause

There has been considerable concern both in the London market and the EU about the loss of passporting rights for insurance companies after the UK leaves the EU in March 2019 or, if the withdrawal agreement which provides for a transition is agreed, after the transition ends in 31 December 2020.

If a UK-based (re)insurer has EU-based policyholders (and vice versa), it could find itself in a position where it is no longer authorised to conduct (re) insurance business across the UK-EU border and it might therefore be unable to continue to provide cover and/or to pay claims.

In response to these concerns, the IUA's Brexit Working Group asked the IUA Clauses Committee to draft a Brexit Continuity Clause, which has now been published. The clause aims to manage the risk by allowing cover to be placed with a UK-based insurer and with a second EU/EEA-based insurer, which acts as a contingent insurer. The UK-based insurer will perform the policy obligations until a "Brexit event" occurs (e.g. the UK withdrawing from the EU without a deal which maintains the right to conduct cross-border business). At that point, if it is no longer lawful for it to continue to perform the insurance contract, then the contingent insurer will step into its shoes and perform the contract.

The clause and the IUA commentary can be found at https://www.iua.co.uk/IUA_Member/Document_Library/Circulars_2018/Brexit%20Continuity%20Clause.aspx.

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3 (2004/39/EC)