Insurance/
Reinsurance

23 April
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INSURANCE BULLETIN





Welcome to HFW's Insurance Bulletin, which is a summary of the key insurance and reinsurance regulatory announcements, market developments, court cases and legislative changes of the week.

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Should you require any further information or assistance on any of the issues dealt with here, please do not hesitate to contact any of the contributors to this Bulletin, or your usual contact at HFW.

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1. Regulation and legislation

England and Wales: Financial advisers promoting aggressive tax avoidance to face prosecution – MPs call for new legislation

The Public Accounts Committee has examined the role of the Big 4 and other accountancy practices in relation to the use of tax mitigation products, producing a Parliamentary report on their findings and recommendations.

Broadly, the report recommends that HMRC must:

- Be more robust in challenging advice being given by accountancy firms.
- Work closely with the CPS to increase the number of prosecutions.
- Work with the Government to set out how they will tackle tax avoidance more effectively, including by introducing new strict liability offences to penalise those involved in advising or helping companies and individuals avoid or evade tax.
- Introduce a new code of conduct for all tax advisers.

These recommendations have been prompted by, amongst other things, significant criticism of HMRC's lack of progress in tackling tax evasion, including in the wake of the HSBC scandal out of which HMRC has made only one conviction since receiving the relevant data in 2010.

According to the report, the UK reputedly has the most complex tax code in the world which the committee believes creates greater opportunities for tax avoidance. The Report also calls for:

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- Less complexity between what it describes as acceptable tax planning and 'aggressive' or 'artificial' tax avoidance.
- Greater consistency in approach to treatment of corporations where tax incentives are concerned.

This is the second time the committee has examined the role of large accountancy firms advising multinational companies on complex strategies and structures which the committee believes are designed to avoid tax. For some years now avoidance has been stigmatised in Parliament and in public, even though it may be entirely legitimate and properly explored by companies that already pay substantial amounts of tax which their directors do not seek to avoid. In this regard, the report does not seem to reflect on the responsibility of Parliament for providing byzantine tax legislation and for not having got to grips with the extent to which corporates and individuals can legitimately avoid tax. Without a more precise formulation as to what is aggressive avoidance, accountancy firms providing tax planning advice might be at a loss to know where they stand, but might at least be considering tax planning advice and strategies which will be 'passive' and less likely to offend new rules or legislation.

A full copy of the Parliamentary report can be found here: http://www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/974/974.pdf.

For more information, please contact Josianne El Antoury, Associate, on +44 (0)20 7264 8012, or josianne.elantoury@hfw.com, or your usual contact at HFW.

UK: PRA consults on the application of UK GAAP principles under Solvency II

On 10 April 2015, the PRA issued a consultation paper on a draft supervisory statement relating to the right for firms to recognise assets and liabilities valued under UK GAAP principles for the purposes of Solvency II, where the two are consistent.

Article 9 of the Solvency II regulation permits a firm to recognise and value assets and liabilities under UK GAAP for Solvency II purposes if:

...the PRA expects firms to provide supporting evidence that the requirements of Article 9 are satisfied. The draft supervisory statement lists those UK GAAP treatments that the PRA considers to be consistent with Article 75 of Solvency II.

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- UK GAAP is consistent with Article 75 of Solvency II.
- The valuation method is proportionate to the nature, scale and complexity inherent in the business of the undertaking.
- The process of valuing the assets and liabilities using international accounting standards (IRFS) would impose costs that are disproportionate with respect to the total administrative expenses of the firm.

The draft supervisory statement sets out the PRA's expectations of firms that wish to apply the Article 9 derogation. In particular, the PRA expects firms to provide supporting evidence that the requirements of Article 9 are satisfied. The draft supervisory statement lists those UK GAAP treatments that the PRA considers to be consistent with Article 75 of Solvency II.

A copy of the consultation paper can be found here: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2015/cp1615.pdf.

The deadline for comments on the draft supervisory statement is 10 July 2015.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

UK: FCA imposes largest ever fine for PPI failings

The Financial Conduct Authority (FCA) has fined Clydesdale Bank Plc (Clydesdale) £20,678,300 for serious failings in its Payment Protection Insurance (PPI) complaint handling processes between May 2011 and July 2013. This is the largest ever fine imposed by the FCA for failings relating to PPI.

The FCA found that in mid-2011 Clydesdale had implemented inappropriate policies which meant that its PPI complaint handlers were not taking into account all relevant documents when deciding how to deal with complaints.

In addition, between May 2012 and June 2013, Clydesdale provided false information to the Financial Ombudsman Service in response to requests for evidence of the records Clydesdale held on PPI policies sold to individual customers. A team within Clydesdale's PPI complaint handling operation altered certain system print outs (in a small number of cases) to make it look as if Clydesdale held no relevant documents and deleted all PPI information from a separate print out listing the products sold to the customer. These practices were not known to, or authorised by, Clydesdale's PPI leadership team or more senior management.

As a result of Clydesdale's conduct, of the 126,600 PPI complaints decided between May 2011 and July 2013, up to 42,200 may have been rejected unfairly and up to 50,900 upheld complaints may have resulted in inadequate redress for customers.

The FCA also found that complaint handlers were failing to identify cases where the PPI policy sold was unsuitable for the customer, and found deficiencies in the training and monitoring of complaint handlers.

Clydesdale agreed to settle at an early stage of the FCA's investigation and therefore qualified for a 30% stage 1 discount. Were it not for this, the financial penalty imposed by the FCA would have been £29,540,500.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

2. Court cases and arbitration

France: Prudential transfer of an insurance company portfolio declared unconstitutional

The French Constitutional Court, in a decision dated 6 February 2015, found that Article L 612-33 §5 of the Monetary and Financial Code (CMF) was contrary to the constitutional principle of protection of property, insofar as it granted the prudential and financial regulatory authority (ACPR) the right to order the transfer of all or some of the insurance contracts of a company facing severe difficulties.

Under Article L 612-33 CMF, the ACPR, when it determines that the solvency or the liquidity of a company, or the interests of its assured, are – or are likely to be – compromised, may take various measures to supervise or even control and limit this company's business. Among these measures is the option of arranging for the transfer of a portfolio without consultation or compensation for the insurance company.

The ACPR took such a measure in relation to a French professional indemnity insurer with a negative net income and a decrease in equity. Before the Constitutional Court the insurance company contended that the transfer amounted to a deprivation of property without compensation, which is contrary to Article 17 of the 1789 Declaration of the Rights of Man.

The Constitutional Court agreed with the company and declared that the power vested in the ACPR to transfer all or some of the insurance contracts under Article L 612-33 §5 CMF was unconstitutional. As a consequence of this ruling, the ACPR no longer has the right to order the transfer of a company's portfolio.

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England and Wales: Claim against Spanish insurer could not be brought in English Courts

In this case an English court held that a claimant (W) could not pursue before it an insurance claim arising out of an injury which she had suffered whilst on holiday in Spain. This was because, on a true construction of the territorial scope clause in the relevant policy, there was no indemnity for claims brought outside of Spain.

W was injured whilst staying at a hotel insured by M, an insurer domiciled in Spain. On her return W issued proceedings in the English court for damages naming M as defendant.

M challenged the claimant's right to pursue her claim in the English Court, on the basis of a clause in the relevant public liability policy providing that coverage would only extend to *"claims submitted within Spanish jurisdiction for events that have taken place in Spain"*.

M argued that the effect of this clause was that only claims brought in Spain were indemnifiable under the policy.

It was common ground between the parties that Spanish law was the applicable law. An issue arose as to whether or not the clause relied upon by M was rendered invalid by certain provisions of Spanish insurance legislation. Spanish legal experts testified to the effect that if the clause in question was determined to be a 'definition' clause, it would be considered valid. If it was an 'exemption' clause, it would be considered invalid.

Having considered the Spanish law evidence, the Court held that the territorial scope clause defined the scope of the indemnity under the policy, rather than operating as an exemption clause. The clause was therefore valid.

As there was no indemnity under the policy for claims brought outside of Spain, the claimant could not pursue her claim in the English courts.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or your usual contact at HFW.

3. HFW events

Legal Professional Privilege is under attack: what can we expect and what can we do?
On Tuesday 21 April, HFW Partners James Clibbon and Pierre-Olivier Leblanc, Senior Associate Iris Vögeding and Associate Josianne El Antoury presented a seminar on legal professional privilege under attack. The seminar was well received and attendees found it both insightful and topical.

IRLA Congress
Brighton, UK
6-8 May 2015
Attending: Costas Frangeskides and Andrew Bandurka

Reinsurance Seminar
HFW London
12 May 2015
Presenting: Costas Frangeskides, Andrew Bandurka, Andrew Dunn and Olivier Purcell.

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