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INSURANCE BULLETIN





In this week's Insurance Bulletin:

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1. Regulation and legislation

UK: Brexit – five priorities for insurers

The UK insurance industry has set out five priorities for insurers to make the best of Brexit. The Director General of the Association of British Insurers (ABI), Huw Evans, described how *"our world changed in the early hours of 24th June"* in a blog published on 30 September but added that *"we are determined to get the best possible outcome for the industry"*. In his blog, Mr Evans identified the following five priority areas:

- To secure a new regulatory environment that is appropriate for the UK market.
- To retain the ability to passport into and out of the UK.
- To mirror closely the EU data protection regime in order to avoid great complexity about how data is protected.
- To improve future migration policy that enables the employment of high-skilled professionals from within and outside the EU.
- To put a strong focus on regulatory dialogue and international agreements in overseas financial services markets, especially India and China.

In relation to the new regulatory environment, it appears that insurers plan to push for changes to Solvency II, the EU directive that was introduced at the start of 2016 in order to harmonise insurance regulation across the EU. In comments made separately to the blog, Mr Evans said *"there are certainly changes to Solvency II that could be made...There's an opportunity to improve it in the UK"*. One example of the potential changes is so-called "risk margin", which effectively obliges insurers to hold an extra layer of capital for some long-term business. Another example is the Prudential Regulation Authority's reporting requirements, which Mr Evans described as *"pretty onerous"*.

> Overall, the ABI remained hopeful that the UK insurance industry had an optimistic future in a post-Brexit Britain.
>
> SIMON BANNER, ASSOCIATE

Changes may have to remain fairly measured, however, since the estimated costs of implementing Solvency II in its current form are already £4 billion. It remains to be seen to what extent Solvency II will be modified for the UK after Brexit. Indeed, at the Conservative Party conference, Prime Minister Theresa May stated that she planned to introduce a bill early in 2017 to convert all existing EU laws into UK legislation.

Overall, the ABI remained hopeful that the UK insurance industry had an optimistic future in a post-Brexit Britain. The ABI stated that although there were many challenges ahead, if *"handled right...the future for the UK insurance and long term savings industry remains bright"*.

The ABI's blog is available at: http://blog.abi.org.uk/2016/09/five-priorities-to-make-the-best-of-brexit/.

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UK: PRA consultation on amendments to whistleblowing rules

The Prudential Regulation Authority (PRA) has published a consultation paper proposing amendments to PRA rules on whistleblowing for UK branches of banks and insurers. The proposed amendments would require UK branches to inform workers about the PRA's and the Financial Conduct Authority's whistleblowing services, and how to use them.

In its June 2013 final report, the Parliamentary Commission on Banking Standards (PCBS) recommended that banks put in place mechanisms to allow their employees to raise concerns of risk and wrongdoing internally (whistleblowing). The PCBS also recommended that banks assign responsibility for overseeing the effectiveness of these arrangements to a senior person.

In October 2015, the PRA introduced new rules requiring internal whistleblowing arrangements to be introduced by deposit-takers, PRA-designated investment firms, and Solvency II insurers. The current consultation paper proposes extending the rule requiring firms to inform their workers about the regulators' whistleblowing services to UK branches of overseas firms. It also contains a proposal that UK subsidiaries of non-EEA banks (which will have established their own internal whistleblowing channels in response to last October's rules) should make these available to workers at UK branches that are part of the wider group. The FCA has published a consultation with similar proposals. In publishing its own consultation paper, the PRA explains that it has worked with the FCA in creating these proposals and will continue to cooperate in drawing up the final rules and policy statement.


In summary, the policy proposals set out in the consultation paper require:

- UK branches of non-EEA banks and of both EEA and non-EEA insurers to inform their workers about the regulators' whistleblowing services; and
- Any non-EEA banking group with both a UK branch and UK subsidiary which is subject to the regulators' whistleblowing rules, to inform the staff of the branch of the subsidiary's whistleblowing arrangements. This latter proposal does not apply to insurers.

The PRA explains that the proposals are made in the context of the current UK and EU regulatory framework, but that the PRA will keep the policy under review to assess whether any changes would be required, due to changes in the UK regulatory framework, including those arising once any new arrangements with the European Union take effect.

The PRA rules published in 2015 came into force in September 2016. The PRA expects the final rules consulted on in this consultation paper will come into force in September 2017.

The consultation closes on Monday 9 January 2017 and the PRA has invited feedback on the proposals set out in this consultation. A copy of the consultation paper can be found at: http://www.bankofengland.co.uk/pra/Documents/publications/cp/2016/cp3516.pdf.

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UK: Tax has to be taxing

At last week's Conservative Party conference, within the broad framework of seeking to achieve a 'fairer economy', the Prime Minister reiterated the government's pledge to stamp out tax avoidance with this warning: *"If you're a taxdodger, we're coming after you. If you're an accountant, a financial adviser or a middleman who helps people to avoid what they owe to society, we're coming after you too. An economy that works for everyone is one where everyone plays by the same rules. So whoever you are – however rich or powerful – you have a duty to pay your tax. And we're going to make sure you do."*

The reference to accountants, IFAs, or middlemen echoes proposals for sanctions (including civil penalties and 'naming and shaming') against those who design, market or facilitate the use of tax avoidance arrangements that are defeated by HMRC. The proposals (which also lists other possible enablers as 'company formation agents, banks, trustees and lawyers') are set out in the government's consultation paper published on 17 August 2016 'Strengthening Tax Avoidance Sanctions and Deterrents: A discussion document'[1]. The closing date for comments was 12 October 2016 and the government is now analysing the feedback that it has received.

While one might ask why successive previous governments have not legislated effectively against avoidance before now, or what is meant by 'paying your fair share of tax', there are more immediate questions for businesses, the insurance market, and professional advisors:

- Companies will need to consider even more carefully and seek specialist advice on what may or may not be permissible tax planning.
- Insurers and their insureds will need to consider whether claims by current/former clients of the insureds whose tax mitigation strategies fall foul of new anti-avoidance legislation are covered by applicable policies.
- Professionals who have been engaged in the design, implementation, or promotion of tax mitigation strategies will need to consider whether they have sufficient D&O and PI insurance cover.
- Whether legally privileged material forming part of the tax mitigation strategy documentation will be made the subject of disclosure applications by competent authorities/third parties on the basis that the iniquity exception applies.
- Those in possession of tax mitigation documents should decide whether to put in place emergency response procedures for dealing with search and seizure processes that are part of anti-avoidance investigations.

Tax experts are concerned that current proposals for what will constitute 'enabling' tax avoidance are too vague and ill-defined as they may apply to advisors providing perfectly legitimate and acceptable tax planning services. It is also not clear whether the legislation will have retrospective effect and apply to tax planning undertaken many years previously. Earlier this week the Chartered Institute of Taxation published its comments on the

1 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/546589/Strengthening_Tax_Avoidance_Sanctions_and_Deterrents-discussion_document.pdf

government's consultation paper which identifies these concerns[2]. The Institute of Chartered Accountants of England & Wales, while supportive of reasonable measures to tackle *"highly dubious tax avoidance schemes"* and those who promote them, has previously identified similar concerns for its professional members[3].

Until we know how the new Finance Act will give effect to the current purge on enablers of avoidance, and whether it will only target tax planning that is 'aggressive', the full implications are not obvious. However, if uncertainties which industry experts see as problematic are not addressed, unjust outcomes seem inevitable. This could also prompt increases in the number of disputes between professionals and their clients (as to what tax planning services should have been provided) and levels of compensation that are claimed. How far the concept of fairness will reach remains to be seen.

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2 https://www.tax.org.uk/media-centre/press-releases/press-release-tax-experts-call-new-penalties-target-deliberate-0

3 https://ion.icaew.com/taxfaculty/b/weblog/posts/strengthening-tax-avoidance-sanctions-and-deterrents-the-latest-government-proposals

2. HFW publications and events

HFW Partner Graham Denny to present at Commercial Risk Africa's West Africa Conference

On Thursday 20 October, HFW Partner Graham Denny will present a seminar on political risk issues at Commercial Risk Africa's West Africa Conference in Lagos, Nigeria.

A victory for insurers? A question again. European Court to decide whether to allow direct actions against insurers

HFW have published a briefing[1] on a question which has been referred to the European Court of Justice (ECJ) about whether a claimant bringing a direct action against an insurer is bound by the jurisdiction agreement between the insurer and insured. The briefing analyses the underlying legislation and considers what the consequences may be if the ECJ finds in favour of the claimant.

1 http://www.hfw.com/A-victory-for-insurers-September-2016