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INSURANCE BULLETIN



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hfw 1. Regulation and legislation

Europe: Proposal to merge European insurance and banking supervisory authorities causes controversy

The European Commission's suggestion that the European supervisory authorities with responsibility for insurance (the European Insurance and Occupational Pensions Authority or EIOPA) and banking (the European Banking Authority or EBA) should merge has caused controversy, with both industries criticising the suggestion.

A consultation by the European Commission, which closed recently, had suggested that the merger could make the EU supervisory regime more effective and efficient.

However, Insurance Europe, the European (re)insurance federation, last week stated that the loss of EIOPA, a dedicated insurance supervisor, would reduce the quality of European insurance supervision. The EBA has now added to the dissenting voices, stating that the merger would create "no material benefit". It went on to suggest that, rather than creating cost savings, a merger would in fact create additional pressure on "already very slim" resources.

The EBA is currently based in London, so will need to relocate before the UK formally leaves the EU. It appears that some European countries, such as France and Germany are already manoeuvring themselves into a position to welcome the EBA to their shores, with a German finance ministry spokesperson publicly advocating moving the EBA to Frankfurt. Whether this also naturally results in a merger

with the Frankfurt-based EIOPA remains to be seen.

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Europe/UK: ESMA's tough political stance on Brexit – an indication of what's to come for (re)insurers?

On 31 May, the European Securities and Markets Authority (ESMA) published an Opinion¹ which explains how EU financial markets regulators should deal with market participants which seek to relocate entities, activities and functions from the UK to other EU member states as part of their preparations for Brexit. In short, the Opinion's message is that there will be no lowering of standards for UK businesses which are seeking to relocate to, or establish a subsidiary in, another EU member state.



Since the UK voted to leave the EU, the insurance industry press has contained several reports of European regulators offering incentives to incoming business, such as lower requirements for staff to be on the ground, and greater flexibility to delegate certain responsibilities back to the UK.

RICHARD SPILLER, PARTNER

Although ESMA is technically an independent authority, it is directly accountable to several EU institutions so it is perhaps unsurprising that its Opinion mirrors the tough stance which the EU is taking in other Brexit-related statements. While ESMA's Opinion does not apply to insurers, we expect that the EU authority with responsibility for insurance, EIOPA, will take a similar approach in order to maintain a level playing field across Europe until the UK's post-Brexit relationship with the EU becomes clearer.

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However, ESMA's Opinion states that firms must "*be subject to the same standards of authorisation and ongoing supervision across the [EU] in order to avoid competition on regulatory and supervisory practices between member states.*" On the specific issue of outsourcing and delegation to the UK, the Opinion states that it will be "*possible only under strict conditions*", and even states that certain key activities and functions cannot be



outsourced or delegated back to the UK.

Assuming EIOPA requires EU insurance regulators to adopt a similar position, UK businesses that were expecting to establish an entity in an EU member state but effectively run it using the existing functions in the UK will need to re-think their strategy. Insurance regulators in some smaller EU member states had used the ability to subcontract substantive functions back to the UK as a key selling point of their jurisdiction, although the German insurance regulator, BaFin, has already suggested that outsourcing to the UK would need to be carefully monitored.

While we are still some way off knowing what the UK's relationship with the EU will be after Brexit, ESMA's Opinion is consistent with a "hard" Brexit. It would be surprising if EIOPA took a different approach, so the Opinion again demonstrates the importance of preparing for Brexit in good time. Further information on how businesses operating in the insurance sector can prepare is available in HFW's briefing, here: <http://www.hfw.com/Preparing-for-Brexit-seven-things-that-re-insurance-businesses-can-do-now-July-2016>.

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2. Court cases and arbitration

England and Wales: *Dalecroft Properties Limited v Underwriters*

This case concerned a property that was destroyed by fire. Insurers declined cover under a property owner's policy on the grounds that they had validly avoided it for misrepresentation and non-disclosure and, alternatively, because the insured had breached warranties relating to the state of the property when unoccupied.

The judge, Mr. Richard Salter QC, held that insurers had been induced to accept the risk by the insured's misrepresentations that the property (i) was in a "good" state of repair; (ii) had no flat roof; and (iii) had not been subject to malicious acts or vandalism; and because Dalecroft had failed to disclose that an Environmental Protection Order had been made in relation to the Property. He also held that underwriters would not have been liable anyway because the insured had, among other things, failed properly to secure unoccupied parts of the property, in breach of warranty.

Whilst this case is in many ways a typical avoidance/breach of warranty case, it is unusual in some interesting respects:

Dalecroft argued that the misrepresentations and non-disclosure complained of related to the residential parts of the property and that insurers could not therefore validly avoid cover for the commercial parts. However, the judge rejected this argument because Dalecroft's answers regarding the state of the property pertained to both residential and commercial parts and, as such, the risks covered by the policy were not clearly separable. Moreover, the policy was a single insurance for

which a single overall premium was paid.

Dalecroft also contended that the relevant period in respect of which the truth of the alleged misrepresentations and non-disclosure fell to be decided was when the insurer issued a certificate by which the identity of the insured under the policy was changed. However, the judge found that the effect of the issuance of further certificates was to amend the policy rather than to replace it with new policies, notwithstanding that they had new policy numbers. What was cancelled and replaced was the documentation embodying the contract of insurance, not the contract of insurance itself.

Although the judge applied the law as it stood before the 2015 Insurance Act, the relevant events having occurred before 12 August 2016, he commented that although the pre-2015 Act law may sometimes operate harshly to the detriment of the insured, he was satisfied that it does no injustice to Dalecroft in this case because Dalecroft made no real effort to make a fair presentation of the risk or to comply with the Commercial Unoccupancy conditions of the insurance.

It is also instructive to note that the judge, faced with contradictory evidence from factual witnesses, was able to rely more readily on the evidence of those who had maintained contemporaneous notes than of those who did not.

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hfw 3. HFW publications and events

UK: HFW to host a private screening of Lions v Otago Highlanders

The HFW Insurance/Reinsurance and Shipping teams are hosting a private screening of the Lions v Otago Highlanders match on 13 June with breakfast from 8am. For more information, please contact us at events@hfw.com.

UK: HFW to host London Insurance and Reinsurance Group

On Tuesday 13 June, HFW London will host the London Insurance and Reinsurance Group quarterly meeting. Partners Andrew Bandurka and Adam Strong will give a presentation on claims aggregation. Partner Christopher Foster will present a reinsurance legal update. Enquiries to antonia.munro@hfw.com.

UK: HFW to attend AIRMIC 2017

Nigel Wick and Nick Hughes (Partners, London) are attending AIRMIC 2017: Risk in Transformation in Birmingham on 12-14 June.

France: HFW to present at AMRAE workshop

Pierre-Olivier LeBlanc (Partner, Paris) is presenting at an AMRAE workshop on 15 June on liability issues and insurance relating to RPAS (Remotely Piloted Aircraft Systems). Guillaume Brajeux (Partner, Paris), Pauline Arroyo (Partner, Paris) and Jean-Baptiste Charles (Senior Associate, Paris) will also attend the workshop.

UK: HFW to attend Lloyd's Under 35s Insurance Black Tie Dinner

Members of the Insurance/Reinsurance and Shipping teams will be hosting a table the Lloyd's Under 35s Insurance Black Tie Dinner on 15 June.

UK: Marine Insurance Week

HFW is pleased to be hosting its first Marine Insurance Week on 26 – 30 June 2017 in London. The week long programme of events is designed for those involved in marine insurance claims and includes a variety of seminars relevant to all lines of marine insurance, including hull, cargo, ports & terminals and liability.

A copy of the full programme can be found by clicking [here](#).

If you have any queries regarding this event, or to register your interest in attending, please contact us at events@hfw.com.

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