ARTHUR COX

Group Briefing

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Insurance Regulatory Update

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This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained where appropriate.

JANUARY 2016 – THIS MONTH'S NEWS

IN DOMESTIC NEWS...

SOLVENCY II COMES INTO EFFECT

The Solvency II Directive (2009/138/EC) (**Solvency II**) came into effect on 1 January 2016. Solvency II codifies and harmonises EU insurance regulation and sets new standards for the amount of capital that (re)insurance firms must hold based on their risk profile as well as new standards for governance, risk management and supervision, and reporting and transparency. The Central Bank commented that: "The implementation of Solvency II is a significant challenge for firms as they will need to increase the sophistication of their risk management systems. Overall, it represents a very positive and welcome development for the industry requiring firms to place risk at the heart of decision making and embed a more risk aware culture within their businesses."

A link to the Central Bank press release is here.

GOVERNOR OF THE CENTRAL BANK MAKES STATEMENT TO THE OIREACHTAS COMMITTEE ON FINANCE, PUBLIC EXPENDITURE AND REFORM

The Governor of the Central Bank, Philip Lane, set out for the Committee an overview of the Central Bank's current work programme. He struck a forward looking note by saying that the most intense phase of crisis management undertaken after the financial crisis was now over and that as such, the Central Bank will have a new set of priorities and these will emphasise the Central Bank's dual goals of safeguarding stability and protecting consumers.

In his statements the Governor noted that this is a landmark year for the insurance sector: the first year that the Central Bank implements the Solvency II framework which reconfigures the regulations imposed on (re)insurance firms as well as the supervisory relationship between the Central Bank and those firms. The Governor stated that the Central Bank's product-focused supervisory work would continue and specifically cited the Central Bank's review of health insurance as an example. He also said that the Central Bank is examining the impact that the payment of commissions to insurance intermediaries has on consumers and that there will be an increase in firm-specific engagement with low-impact firms.

A link to his Statement is here.

HEALTH INSURANCE (AMENDMENT) ACT, 2015

The Health Insurance (Amendment) Act, 2015 (the **Act**) was enacted by the Oireachtas on 24 December 2015. The Act makes a number of changes to credits and levies on health insurance products with the purpose of sustaining community rating in the Health Insurance market.

The revised rates were recommended by the Health Insurance Authority and will take effect from 1 March 2016.

A link to the Act is here.

DATA PROTECTION COMMISSIONER TO AUDIT CAR INSURERS WHO USE TELEMATICS BOXES

On 28 January 2016, the Data Protection Commissioner, Helen Dixon, announced at the eighth annual national data protection conference, a plan to audit those insurance companies who use telematics boxes to assess the risk of car drivers. Certain insurers have been offering premium discounts to drivers who consent to installing telematics boxes in their cars.

According to the Commissioner, the data can be used to create an "extremely detailed personal profile" of the driver and this raises data protection concerns. The Commissioner will audit those insurance firms that are using telematics boxes to ensure that they are in full compliance with data protection law and that drivers are being fully informed of what data is being collected, how it will be used and what third parties it may be transferred to and under what circumstances.

IN EUROPEAN AND INTERNATIONAL NEWS...

THIRD SET OF SOLVENCY II IMPLEMENTING REGULATIONS PUBLISHED IN THE OFFICAL JOURNAL

Under Solvency II, the European Commission is required to develop implementing technical standards on a range of aspects of the legislation in the form of Implementing Regulations. On 2 December 2015, the Commission adopted three new Implementing Regulations which were published in the Official Journal of the European Union on 31 December 2015.

Commission Implementing Regulation (EU) 2015/2450 establishes templates for the submission of information to supervisory authorities as part of Solvency II undertakings' regular supervisory reporting and took effect on 1 January 2016. Commission Implementing Regulation (EU) 2015/2451 sets out templates and standards on the disclosure of certain information by supervisory authorities and Commission Implementing Regulation (EU) 2015/2452 lays down procedures, formats and applicable templates for the disclosure of information in the Solvency and Financial Condition Report. The latter two Implementing Regulations became effective on 20 January 2016.

A link to the Commission Implementing Regulation (EU) 2015/2450 is here.

A link to the Commission Implementing Regulation (EU) 2015/2451 is here.

A link to the Commission Implementing Regulation (EU) 2015/2452 is here.

INSURANCE EUROPE VOICES CONCERNS OVER PRIIPS IMPLEMENTATION TIMEFRAME

Insurance Europe has raised concerns that a three to four month timeframe to implement the requirements for a Key Information Document (KID) for PRIIPs is unrealistically short. Based on current timings, there will be a period of three to four months between the publication of the final Regulatory Technical Standards, which will set out key elements of the KID, and the date the PRIIPS Regulation takes effect (on 31 December 2016). Insurance Europe points out that there are a number of reasons why the time period is too tight. For example, the final stage of defining risk indicators for different classes of products, cost indicators and performance scenarios are still the subject of consultation and until there is absolute certainty over the ultimate presentation and content of the KID, the final stages for preparing for its implementation cannot begin. Also, the aim of the PRIIPs Regulation is to ensure comparability between as many products as possible which requires important modifications to insurers' IT systems, which takes time. Therefore, Insurance Europe strongly recommends a one year extension of the PRIIPs Regulation application date.

A link to the Position Paper is here.

EIOPA RECOMMENDS CONSISTENT APPROACH TO THE METHODOLOGY OF GROUP SOLVENCY CALCULATIONS

On 27 January 2016, EIOPA published an Opinion on the application of a combination of methods to the group solvency calculations.

Solvency II provides that group solvency calculations can be carried out on the basis of a consolidated method, a deduction and aggregation method or a combination of both methods. EIOPA provides guidance and clarification on certain issues in relation to the application of a combination of methods. EIOPA states that when a combination of methods is being used for the calculation of the group solvency, the provisions of Solvency II for each method should be applied respectively. EIOPA also recognises that the use of a combination of methods may lead to unintended consequences if it is used by groups which, for example, organise their funding through a central funding company and gives guidance as to approach to be taken in such a scenario. The combination of methods can be applied if approved by the relevant group supervisor and the Opinion states that group supervisors will need to assess the potential impact of the application of a combination of methods before reaching a decision. EIOPA recognises that the application of a combination of methods may result in the group supervisor allowing specific solutions to avoid unjustified disadvantages. EIOPA recommends that to ensure that prudential concerns are addressed and the specific solutions do not place groups concerned in an advantageous position compared to groups using exclusively the consolidation method, certain conditions as set out in the Opinion should be satisfied.

A link to the Opinion is here.

ESA SUBMIT JOINT LETTER TO EUROPEAN COMMISSION ON CROSS-SELLING OF FINANCIAL PRODUCTS

On 26 January 2016, the European Supervisory Authorities (**ESAs**), comprised of EIOPA, ESMA and the EBA, wrote a letter to the European Commission raising concerns about the regulation of cross-selling practices across the investment, banking and insurance sectors.

Under MiFID II, ESMA was required to produce "guidelines for the supervision and assessment of cross-selling practices" in cooperation with EIOPA and EBA by 3 January 2016. The ESAs agreed that to ensure the effectiveness of such guidelines, they should apply equally across all three sectors and not be limited by reference to MiFID II. In support of this, the letter refers to the problems that arose through cross-selling between financial products and payment protection insurance which had such a detrimental impact on consumers and the reputation of the financial services industry as a whole.

However, owing to differences in the underlying legislation governing each of the three sectors, the ESAs have been unable to produce a combined set of guidelines. In order to meet its specific legislative mandate, ESMA published investment-sector only guidelines on cross-selling on 22 December 2015. The letter highlights the inadequacy of this approach and emphasises the need for consistent regulation across all three sectors to protect consumers, facilitate financial institutions' compliance with cross-selling guidelines and enable effective regulation by supervisory authorities.

Consequently, the ESAs have requested the Commission review and address the Level-1 legislative issues in order to achieve the preferred single set of guidelines. They proposed the Commission look at this in the context of its recently published Green Paper on Retail Financial Services in the Banking and Insurance Sectors and/or its Call for Evidence on the regulatory framework in financial services.

A link to the Letter is here.

EUROPEAN COMMISSION PUBLISHES EVALUATION AND FITNESS CHECK ROADMAP FOR CONSUMER PROTECTION DIRECTIVES

The fitness check is being carried out as part of the Commission's Regulatory Fitness and Performance (**REFIT**) programme which aims at making EU law simpler and reducing regulatory burden. It will assess six directives related to consumer protection to determine their efficacy at protecting consumers and whether the regulatory burden they impose can be reduced. According to the roadmap, the Commission intends to commence work on the fitness check now and aims to produce a report on the results of that fitness check in the second quarter of 2017. The roadmap sets out the approach the Commission is taking to the fitness check e.g. why the Commission is looking at these directives, what the original aims of these directives were and how it will evaluate those directives to determine if their objectives have been met.

The following directives are being reviewed: the Misleading and Comparative Advertising Directive (2006/114/EC); the Price Indication Directive (98/6/EC); the Unfair Commercial Practices Directive (2005/29/EC); the Unfair Contract Terms Directive (93/13/EEC); the Sales and Guarantee Directive (1999/44/EC); the Injunctions Directive (2009/22/EC). The Consumer Rights Directive (2011/83/EU) is not being reviewed in the fitness check as it is subject to a separate report by the Commission this year.

The Commission has invited stakeholders to send feedback on the roadmap by Friday 5 February 2016.

A link to the Roadmap is here and a link to the Commission press release is here.

EIOPA PUBLISHES STRATEGY PAPER ON APPROACH TO CONDUCT OF BUSINESS SUPERVISION

EIOPA has published a strategy paper on its new risk-based and preventive framework for conduct of business supervision across Europe, including plans for its implementation.

The paper, split into nine sections, analyses the background to, key principles and methods of implementation in respect of the new conduct of business supervisory framework. At the heart of the new approach is a recognition of the importance of effective conduct of business regulation and supervision.

EIOPA also acknowledges the link between prudential matters and conduct of business as well as the need to have effective supervision of both to ensure the integrity of the financial services sector as a whole.

The paper details the legal foundation for the model as well as how it fits within EIOPA's overarching strategic policies and goals. The new supervisory approach will be more risk-based, with a focus on targeted monitoring, and preventive which will require proactive identification of risks and earlier action to tackle emerging risks and prevent them becoming systemic. EIOPA describes this as a shift away from a "legalistic, 'tick-box' approach" to "smart regulation" which is more dynamic and outcomes-focused.

EIOPA also makes reference to the means by which it intends to implement the new framework. This will include conducting consumer trends reports and ad hoc surveys to identify cases of actual customer detriment, which can often be an indicator of developing risks. Thematic reviews will also be utilised, facilitating a focus on specific activities or products causing concern.

Implementation of the new strategy will be reviewed and EIOPA and will report to the Board of Supervisors during Spring 2017.

A link to the Paper is here.

INSURANCE EUROPE RESPONDS TO THE IAIS CONSULTATION ON NON-TRADITIONAL, NON-INSURANCE ACTIVITIES AND PRODUCTS (NTNI)

On 25 January 2016, Insurance Europe issued a position paper setting out its responses to the recent IAIS Consultation on NTNI activities and products. Insurance Europe welcomes and recognises the importance of the identification of NTNI activities and products for the macro-prudential supervisory measures that IAIS is currently developing. However, it is concerned that a clear distinction between macro and micro prudential tools should be made in the framework being devised by IAIS. Insurance Europe recommends that IAIS should focus on not overestimating vulnerabilities that are already addressed by micro prudential regulation and supervision (for example, market and liquidity risks are in many cases already addressed by the micro prudential framework). Insurance Europe feels IAIS work should focus on residual risk which is not addressed by the micro prudential framework. Insurance Europe also recommends that in the development of a framework, IAIS should not ignore risk mitigation tools and management and supervisory actions such as derivatives etc. The document sets out Insurance Europe's key messages at the start together with sixteen individual Insurance Europe responds to questions posed by IAIS at consultation.

A link to the Consultation Document is here.

INSURANCE EUROPE ISSUES REPORT ON THE USE OF INTERNAL MODELS BY REINSURERS

The Reinsurance Advisory Board of Insurance Europe has issued a report (the **Report**) on the impact of using internal models for calculating the regulatory solvency capital requirement of reinsurers. The use of internal models has been an issue of debate recently and in its report Insurance Europe indicates that prescriptive approaches and formulas are in many cases not appropriate for reinsurers and that internal models can measure risk factors more appropriately in relation to particular exposure. The Report also responds to some of the supervisory criticisms made against internal models. The Report analyses the history and experience of the use of internal models by reinsurers to date, the prudential benefits of using internal models and looks at the future of internal model use.

A link to the Report is here.

CHAIRMAN OF EIOPA COMMENTS ON INSURANCE INDUSTRY

Gabriel Bernardino, Chairman of EIOPA, discussed several topics concerning the European insurance industry in an interview with Greek publication Asfalistiko Nai. He stressed the improvements to consumer protection brought in by Solvency II as well as the improvements that will be brought in by the upcoming Insurance Distribution Directive and the regulatory technical standards that EIOPA is currently drafting on Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPs). The Chairman commented that the number of mergers and acquisitions in the insurance industry may increase due to the current macroeconomic environment; however, he also commented that there will still be room for medium and smaller sized insurance firms. Finally, he stated that, in order to proactively tackle issues that might lead to problems for consumers such as mis-selling, EIOPA is developing a framework to identify these issues at their inception rather than being reactionary. This includes conducting thematic reviews of specific segments of the market.

A link to the Interview here.