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INSURANCE

Quarterly Legal and Regulatory Update

Period covered: 1 January 2020 – 31 March 2020

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1. SOLVENCY II

1.1 European Court of Justice ruling on life insurer failing to provide correct disclosures to policyholder on cancellation rights

The European Court of Justice ("**ECJ**") was recently asked to rule on the European Union's Directive 2009/138/EC (the "**Solvency II Directive**") and legislation regulating life insurance regarding the cancellation rights of policyholders.

The ECJ ruled that the failure of life insurers to inform policyholders of their right to cancel their life insurance policies or the communication of incorrect information that limits a policyholder's cancellation rights, entitles a customer to receive the repayment of all paid insurance premiums, including capitalised interest. These entitlements remain in place even after the conclusion of the policy and in certain circumstances after its termination.

In their judgment, the ECJ stated that the right of life insurance policyholders to cancel their policy exists even if their life insurers have not informed them of this right. This cancellation right also applies if the policyholders were made aware of their cancellation right by other means.

Once the policy is terminated, policyholders are entitled to exercise their right of cancellation provided that the governing law of the policy does not govern the legal effects of the failure of an insurer to inform them of the cancellation right or for the provision of incorrect information by the life insurer.

A copy of the ECJ's judgment can be accessed here.

1.2 EIOPA consults on review of technical implementation for Solvency II Supervisory Reporting and Public Disclosure

On 5 February 2020, the European Insurance and Occupational Pension Authority ("**EIOPA**") launched a consultation paper on review of technical implementation in respect of Solvency 2 Supervisory Reporting and Public Disclosure (the "**Consultation Paper**").

EIOPA has integrated the 2020 review of technical implementation into the Solvency II 2020 review package, to ensure that it covers the entire reporting processes.

EIOPA aims to improve the efficiency and effectiveness of the reporting and disclosure framework, thereby reducing the costs associated with the processes.

The deadline for submissions closes on 1 June 2020.

The Consultation Paper can be accessed here.

1.3 Implementing Regulation on technical information for calculation of technical provisions and basic own funds for Q1 2020 reporting under Solvency II published in the Official Journal of the European Union

On 12 February 2020, Commission Implementing Regulation (EU) 2020/193 was published by the European Commission. It entered into force on 14 February 2020. The Regulation was made under Article 77e(2) of the Solvency II Directive and sets out the technical information to be used by insurers and reinsurers for reporting in Q1 of 2020.

When calculating basic own funds and technical provisions for reporting, the European Commission seeks to ensure uniformity. The technical information for volatility adjustments, risk-free interest rate term structures, and fundamental spreads for the calculation of the matching adjustment, must be reported for every reference date within the quarter.

The Regulation can be accessed here.

1.4 EIOPA publishes updated Q&As

During the period 1 January 2020 to 31 March 2020, EIOPA published updated Questions and Answers ("**Q&As**") on the following:

- Answers to (EU) No 2015-2450 templates for the submission of information to the supervisory authorities (last updated 6 January 2020);
- Answers to (EU) 2015-35 supplementing the Solvency II Directive (last updated 6 January 2020)

The updated Q&As can be accessed here.

1.5 ESRB publishes report on macroprudential policy for the insurance sector

On 26 February 2020, the European Systemic Risk Board ("**ESRB**") published a report on macroprudential policy for the insurance sector (the "**Report**"). The Report considers three types of tools that national competent authorities ("**NCAs**") should be able to use to deal with systemic risk in the insurance sector:

- solvency tools for preventing and mitigating procyclical investment behaviour of insurers;
- liquidity tools for addressing risks stemming from specific activities, such as hedging with derivatives and selling insurance products with redemption features; and
- tools for addressing risks from the provision of credit to the economy, such as when insurers originate mortgage loans or invest in corporate bonds, with a view to ensuring consistency in macroprudential policy across sectors.

The Report, together with the ESRB's previous work on insurance, was summarised in the ESRB's response to EIOPA's consultation on the review of Solvency II, which it submitted in January 2020. The response focuses on three areas that the ESRB considers most pertinent in terms of their systemic impact. These are the need to:

- better reflect macroprudential considerations in Solvency II;
- establish a harmonised recovery and resolution framework in the European Union; and
- continue ensuring that risks are properly captured in Solvency II.

A copy of the Report can be accessed here.

1.6 Delegated Regulation correcting Solvency II Delegated Regulation on look-through approach and risk weights for flood risk published in the Official Journal of the European Union

On 26 March 2020, Commission Delegated Regulation (EU) 2020/442 was published in the Official Journal of the European Union.

The Commission Delegated Regulation corrects the Solvency II Delegated Regulation (EU) 2015/35, in particular corrections relating to the look-through approach and risk weights for flood risk, which are necessary due to previous amendments made by Delegated Regulation (EU) 2019/981.

The Commission Delegated Regulation entered into force on 15 April 2020 and applies retroactively from 8 July 2019.

A copy of the Commission Delegated Regulation can be accessed here.

2. EUROPEAN INSURANCE AND OCCUPATIONAL PENSIONS AUTHORITY ("EIOPA")

2.1 EIOPA launches thematic review on mortgage life and other credit protection insurance sold through banks

On 6 February 2020, EIOPA published a press release announcing the launch of a thematic review on consumer protection issues relating to mortgage, life and other credit protection insurance sold through banks.

EIOPA held an in-person and online roundtable with industry stakeholders on 5 March 2020, encouraging input in the areas of:

(a) issues and risks with the insurance products in question;

(b) business models used for manufacturing and distributing these products;

(c) potential benefits;

(d) market practices that could cause detriment to consumers; and

(e) developments and trends in recent years.

Through this consultation with stakeholders, EIOPA intends to identify and assess risks, such as high commissions and aggressive sales techniques, that consumers face in this sector. This is on foot of a review of reports provided to EIOPA by NCAs.

The EIOPA press release is available here.

2.2 EIOPA finalises cloud service provider outsourcing guidelines

On 7 February 2020, EIOPA published a report outlining its guidelines on outsourcing to cloud service providers. The report provides guidance on how provisions in the Solvency II Regulation and the Solvency II Delegated Regulation should be applied when it comes to this outsourcing. The guidelines address the following areas:

- criteria regarding whether cloud services should be considered within the scope of outsourcing;
- principles and elements of governance when it comes to cloud outsourcing;
- pre-outsourcing analysis – risk assessment and due diligence;
- contractual requirements;
- management of access, security of data sub-outsourcing and monitoring; and
- instructions for national supervisory authorities.

The guidelines will apply from 1 January 2021 and undertakings must review any outsourcing arrangements to cloud service providers, ensuring compliance by 31 December 2022. NCAs must inform EIOPA within two months of the issuing of these guidelines whether they intend to comply or not and if they do not intend to comply, they must state the reasons why.

The report can be accessed here.

2.3 EIOPA publishes its supervisory convergence plan for 2020

On 12 February 2020, EIOPA published its supervisory convergence plan for 2020 which sets out its priorities and activities for the coming year. The supervisory convergence plan for 2020 builds on previous years' work while incorporating new priorities to reflect new trends and emerging risks. Ongoing priorities set out in the supervisory convergence plan include:

- practical implementation of the common supervisory culture and further development of supervisory tools;
- risks to the internal market and the level playing field which may lead to supervisory arbitrage; and
- supervision of emerging risks.

Three new priority areas have been identified as follows:

- supervisory technology ("**SupTech**"), being the use of technology by supervisors to deliver innovative and efficient supervisory solutions to support a more effective, flexible and responsive supervisory system;
- pensions issues to promote supervisory convergence in the area of supervision of institutions for occupational retirement provision; and
- promoting appropriate cyber underwriting and cyber risk management practices by industry, as well as good supervisory practices.

The supervisory convergence plan for 2020 can be accessed here.

3. INTERNATIONAL ASSOCIATION OF INSURANCE SUPERVISORS ("IAIS")

3.1 IAIS issues paper on the use of Big Data Analytics in Insurance

In March 2020, the International Association of Insurance Supervisors ("**IAIS**") published its Issues paper on the Use of Big Data Analytics in Insurance (the "**Paper**"). The scope of the Paper focuses on the use of algorithms and advanced analytics capabilities by insurers to make decisions based on patterns, trends and linkages and the availability to insurers of new data sources, collectively referred to as big data analytics ("**BDA**").

The Paper notes that the increasing digitisation of insurance provides significant opportunities for the sector however, this digital innovation could unintentionally create risks for policyholders and increased vulnerabilities for the sector as a whole. Supervisors must remain vigilant and consider appropriate and proportionate responses to these risks. To help understand the potential benefits and risks of the use of BDA by insurers, the paper considers the new ways in which insurers are able to collect, process and use data across various stages of the insurance product lifecycle, namely product design, marketing, sales and distribution, pricing and underwriting and claims handling.

The insurance sector has always been reliant on data for accurate risk assessment, underwriting and pricing. The increasing availability of data and enhanced processing capabilities now accessible to insurers can result in a number of benefits for both insurers and customers. Data from multiple sources can lead to more personalised and affordable insurance products, increased choices and more efficient services for customers. Insurers can benefit from BDA by expanding their distribution reach, ensuring more accurate pricing and lowering their cost margins due to improved operational efficiencies, better fraud detection and fewer claims as a result of improved risk behaviour by customers.

The complexity of algorithm technology and the ability of insurers to customise product offerings to an individual level could result in risks to individual customers, as well as to the insurance sector as a whole. Supervisors may need to develop appropriate and proportionate responses to deal with such risks, suited to their respective jurisdictional frameworks and mandates. Supervisors should

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consider whether the use of BDA could adversely impact the availability and affordability of insurance, potentially resulting in reduced options or no coverage for certain consumer segments. Additionally, there should be enhanced governance, oversight and risk management requirements specific to the use of algorithms for BDA purposes and appropriate levels of transparency and insurer accountability for customer outcomes resulting from algorithm-based decisions.

While the collection, use and processing of data raises issues in relation to privacy and data protection, the supervision of these matters is outside the remit of insurance supervisors and is not covered in detail within the scope of the Paper except to the extent addressed in the Insurance Core Principles ("**ICP**") 19.12. Insurance supervisors may need to engage with various cross-sectoral stakeholders on potential consumer privacy and data protection risks associated with the use of BDA in insurance and with the relevant data protection agencies in their respective jurisdictions.

A copy of the Paper can be accessed here.

4. INSURANCE IRELAND

4.1 Insurance Ireland comments on EIOPA Consultation Paper CP-19-006 on the opinion on the 2020 review of Solvency II

On 16 January 2020, Insurance Ireland issued its comments on EIOPA's Consultation Paper CP-19-006 on the opinion on the 2020 review of Solvency II.

In its comments, Insurance Ireland support the efforts of EIOPA to provide its advice on a potential review of the Solvency II Directive and notes that the review is an opportunity to make crucial next steps towards the regulatory and supervisory convergence of the European Union's single market for insurance. Insurance Ireland notes however, that the review should not lead to fundamental changes in the system which is only in force for three years.

Insurance Ireland comments that EIOPA's proposals do not provide for a significant improvement of the convergence of the regulatory regime across the single market and that the proposals would lead to *"quite drastic changes which will result in a significantly increasing bureaucratic burden and rising capital requirements"*. Insurance Ireland highlights the following areas of particular importance for the Irish market:

- Freedom of Services and Freedom of Establishment;
- Protection of consumers in case of insolvencies on a potential minimum harmonisation of Insurance Guarantee Schemes ("**IGS**");
- Proportionality under Solvency II;
- Risk Margin;
- Interest rate risk;
- Reporting and Disclosures;
- Mass laps risk;
- Non-proportional reinsurance; and
- Group supervision.

A copy of the Insurance Ireland comments can be accessed here.

5. INSURANCE EUROPE

5.1 Insurance Europe issues its position paper on the ESAs Joint Consultation Paper concerning amendments to the PRIIPs KID

On 13 January 2020, Insurance Europe published its position on the European Supervisory Authorities ("**ESAs**") Joint Consultation Paper concerning amendments to the Packaged Retail and Insurance-based Investment Products ("**PRIIPs**") key information document ("**KID**").

In its position paper, Insurance Europe has welcomed the opportunity to comment on the proposed changes to the regulatory technical standards ("**RTS**"). However, Insurance Europe have serious concerns with the "quick-fix" approach taken in the ESAs public consultation.The paper states that rather than improve the quality of information in the PRIIPs KID, which is intended to inform consumers about insurance-based investment products ("**IBIPs**"), the ESA's proposals would increase the complexity of the methods and presentation of information, making it even more difficult for consumers to understand, lead to misleading figures being given to consumers and in general overload consumers with information.

In addition, the proposed changes for multi-option products would be particularly burdensome for insurers to implement and not add any value for consumers.

The Insurance Europe's position paper can be accessed here.

6. CENTRAL BANK OF IRELAND

6.1 The Central Bank of Ireland publishes its PRISM Impact Review

In February 2020, the Central Bank of Ireland (the "**Central Bank**") published its "PRISM Impact Review - Revised Prudential Impact Models" document (the "**PRISM Impact Review**"). The PRISM Impact Review has revised the prudential impact models in the asset management, credit union, fund service provider, insurance, payments, e-money and market infrastructure sectors.

A copy of the Dillon Eustace briefing entitled "PRISM - CBI Revises Prudential Impact Models" can be accessed here.

A copy of the PRISM Impact Review can be accessed here.

Action	The Central Bank will inform firms of their impact categorisation on a phased basis over the next few months.

6.2 Additional Pre-Approval Control Functions

On 25 February 2020, the Central Bank issued a notice of intention (the "**Notice**") proposing to: (i) introduce three new Pre-Approval Controlled Functions ("**PCFs**"), namely, Chief Information Officer PCF-49, Head of Material Business Line PCF-50 and Head of Market Risk PCF-51; and (ii) split PCF-39 Designated Person into six PCF roles aligned to the specific managerial functions.

The Central Bank indicates in the Notice that amended regulations will be put in place reflecting the introduction of these new roles pursuant to Section 22 of the Central Bank Reform Act 2010. Once the amended regulations have been implemented, regulated financial service providers ("**RFSPs**") will need to assess persons in situ (i.e. persons in the new PCF roles) to ensure that such persons comply with the Fitness and Probity Standards 2014 (the "**Standards**") (and that such persons have agreed to abide by such Standards).

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RFSPs will be required to submit confirmation of such an assessment to the Central Bank. The exact timings and specifics of the confirmation remain unclear. It would however appear that a period of six weeks will be provided after the implementation of the amended regulations to submit the in situ confirmation.

The Central Bank had invited comments from stakeholders on this proposal prior to 14 April, 2020.

A copy of the Notice can be accessed here.

Action	Once the amended Regulations have been implemented, RFSPs will need to: (i) assess "in scope" persons in situ to ensure that such person complies with the Standards (and that such person has agreed to abide by such Standards); (ii) submit confirmation of such an assessment to the CBI; and (iii) review their fitness and probity policies to ascertain if any updates need to be made to reflect the new PCF roles.

7. ANTI-MONEY LAUNDERING ("AML") / COUNTER-TERRORIST FINANCING ("CTF")

7.1 Anti-Money Laundering Risk Factor Guidelines to be revised

On 5 February 2020, the European Banking Authority ("**EBA**") issued a consultation paper in relation to a revision of the guidelines issued by the European Supervisory Authorities in January 2018 on simplified and enhanced customer due diligence ("**CDD**") and the factors credit and financial institutions should consider when assessing money laundering and terrorist financing risk (the "**Risk Factor Guidelines**").

Please see the Dillon Eustace briefing entitled "Anti-Money Laundering - Risk Factor Guidelines to be revised - consultation open" which can be accessed here.

The Consultation Paper can be accessed here.

8. SUSTAINABLE FINANCE

8.1 Political agreement on the Taxonomy Regulation confirmed

On 5 February 2020, the European Council's Committee of Permanent Representatives ("**COREPER**") confirmed political agreement with the European Parliament on the proposed text of the EU Regulation the establishment of a framework to facilitate sustainable investment (the "**Taxonomy Regulation"**). The final Regulation is expected to be published in the Official Journal in May 2020.

The Taxonomy Regulation seeks to establish an EU-wide classification system (or taxonomy) intended to provide firms and investors with a common framework for identifying to what degree economic activities can be considered to be "environmentally sustainable".

The Taxonomy Regulation applies to a number of issuers and undertakings, including "financial market participants" making available "financial products" (as defined in the related Disclosures Regulation) which covers a broad range of investment funds, product manufacturers and managers, including insurance undertakings, pension funds, AIFMs and UCITS management companies.

The Taxonomy Regulation can be accessed here.

9. SHAREHOLDERS RIGHTS DIRECTIVE ("SRD II")

9.1 SRD II transposed into Irish law

On 5 February 2020, the second Shareholders Rights Directive (Directive (EU) 2017/828) ("**SRD II**") was transposed into Irish law via the European Union (Shareholders' Rights) Regulations 2020 (the "**Irish Regulations**") which amend the Companies Act 2014. It entered into operation on 30 March, 2020.

SRD II intends to encourage institutional investors and asset managers to engage in long-term stewardship and to move away from a focus on short-term performance.

SRD II can be accessed here.

A Dillon Eustace article in relation to the impact of SR II on life assurers can be found here.

10. COVID-19

10.1 EIOPA issues statement on actions to mitigate the impact of COVID-19 on the insurance sector

On 17 March 2020, EIOPA issued a statement on the impact of COVID-19 on the insurance sector.

EIOPA encourages insurers to take the necessary measures to navigate the current challenging market conditions in order to maintain operations and protect employees and consumers and states that European Union insurance companies are required to hold sufficient eligible own funds on an on-going basis to cover their Solvency Capital Requirement, that enables them absorb significant losses and give confidence to policyholders and beneficiaries.

A copy of the statement can be accessed here.

10.2 EIOPA issues recommendations on supervisory flexibility regarding deadlines for supervisory reporting and public disclosure by insurers

On 20 March 2020, the EIOPA issued recommendations addressed to NCAs on supervisory flexibility regarding deadlines for supervisory reporting and public disclosure in light of the COVID-19 pandemic (the "**Recommendations**").

The Recommendations were issued so that undertakings can concentrate on monitoring and assessing the impact of the COVID-19 situation as well as ensuring business continuity during this pandemic.

The Recommendations offer relief in allowing for delays in reporting and public disclosure in the following cases:

- Annual reporting referring to year-end occurring on 31 December 2019;
- Quarterly reporting referring to Q1-2020; and
- Solvency and Financial Condition Report referring to year-end occurring on 31 December 2019.

The Recommendations can be accessed here.

10.3 IAIS address impact of COVID-19 on the Insurance sector

In March 2020, the IAIS held a conference call to continue its discussions of the impact of COVID-19 on the global insurance sector and the IAIS' activities (the "**Statement**").

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The Statement notes that the rapid global spread of COVID-19 and the impact the steps taken to limit contagion is having on the global economy, means that insurers are exposed on both sides of their balance sheets (changes in interest rates, potential increase in claims and market volatility).

The IAIS will utilise the framework it has developed for forward-looking risk assessment to undertake a targeted assessment of the impact of COVID-19 on the global insurance sector.

The IAIS, in consultation with the Financial Stability Board ("**FSB**") will review the 2020 timelines for the implementation of the Holistic Framework for the mitigation of systemic risk in the global insurance sector. The IAIS will also review and adjust the timelines for the data collection for the Insurance Capital Standard ("**ICS**") confidential reporting in 2020, as well as the Aggregation Method ("**AM**") data collection being supported by the IAIS.

Submission deadlines have been extended to 31 October 2020, to provide operational relief to participating insurers. The IAIS will monitor the situation closely and propose additional adjustments if necessary.

The IAIS will postpone development of supporting material (Issues Papers and Application Papers providing guidance on supervisory practices), with public consultations generally deferred by at least six months.

The IAIS is also taking steps to safeguard the well-being of members, stakeholders and staff, while maintaining operations by having its Working Group meetings and in-person Committee meetings through conference calls, as appropriate and the June 2020 Committee meetings and Global Seminar scheduled for Seattle, USA are cancelled. The IAIS is exploring virtual means for engaging with stakeholders in the absence of the Global Seminar.

The IAIS will continue to assess and address the implications of COVID-19 on the global insurance sector and coordinate with the FSB and other standard setting bodies on cross-cutting financial system issues.

The Statement can be accessed here.

10.4 Central Bank issues Dear CEO Letter on its expectations of insurers in light of COVID-19 emergency

On 27 March 2020, the Central Bank set out its expectations of how regulated insurance firms should treat their customers in light of the economic disruption caused by COVID-19.

The 'Dear CEO Letter' is addressed to the Chairs and CEOs of both life and general insurance firms, requiring them to put forward consumer-focused solutions for insurance payment breaks, policy rebates and claims in light of the emergency.

The Central Bank is of the view that where a claim can be made because a business has closed as a result of a Government direction due to contagious or infectious disease, that the recent Government advice to close a business in the context of COVID-19 should be treated as a direction.

Insurance firms must ensure that claims are appropriately assessed and where there is insurance cover in place that claims are accepted and paid promptly. Where relevant, insurance firms must proactively communicate in a clear, transparent manner to customers about the levels of cover provided by individual insurance policies, including informing customers, when renewing existing policies, if there are any changes to those policies. Insurance firms must ensure that their customer-facing functions are adequately resourced to ensure that customer needs are met, queries are handled in an appropriate timeframe and that they have processes in place to engage positively with customers who are having difficulties paying premiums as a result of COVID-19.

Insurance firms must ensure that they are fully compliant with the Central Bank's Consumer Protection Code 2012 and all other relevant regulatory requirements. Any claim settlement offer made to a claimant must be fair, must take into account all relevant factors and must represent the firm's best estimate of the claimant's reasonable entitlement under the policy. Insurance firms must also ensure that they handle claims effectively and properly and where appropriate to do so they must offer to assist their customers in the process of making a claim, including, where relevant, alerting the claimant to policy terms and conditions that may be of benefit to the claimant.

The Central Bank expects that policy wordings are clear in what cover is provided and what is excluded. Where there is a doubt about the meaning of a term, the interpretation most favourable to the consumer should prevail.

CEOs of Irish authorised insurance undertakings shall take responsibility for the oversight of how their firm is managing determinations of whether claims are covered or not in the context of COVID-19. Where an insurance firm is passporting into Ireland, senior management will be expected to take that responsibility.

A copy of the Dear CEO Letter can be accessed here.

10.5 EIOPA publishes extraordinary information for Solvency II Relevant Risk Free Interest Rate Term Structures and Symmetric Adjustment to Equity Risk

From 27 March 2020, EIOPA will carry out extraordinary calculations on a weekly basis to monitor the evolution of the relevant risk-free interest rate term structures ("**RFR**") and the symmetric adjustment to equity risk ("**EDA**") due to the COVID-19 pandemic.

EIOPA will publish this information in order to support insurance and reinsurance undertakings in the monitoring of their solvency and financial position. The information will be published on a specific area of the website created for this purpose both for RFR and EDA named "Extraordinary weekly updates".

RFR information has been calculated applying the content of the Technical Documentation published on 1 October 2019 and based on RFR coding released on 8 October 2019.

The technical information with reference to 24 March 2020 for the RFR can be accessed here and the EDA can be accessed here.

10.6 Central Bank issues statement on provision of essential services by financial services firms during the COVID-19 emergency

On 31 March 2020, the Central Bank issued a statement on provision of essential services by financial services firms. The Central Bank notes that it expects "financial service firms' boards and senior management to actively monitor developments in order to be in the best position to preempt and respond to rapidly changing circumstances" and sets out its specific expectations in this regard.

This includes keeping business continuity plans under constant review to ensure that they remain fit for purpose and notifying the Central Bank, as soon as possible, where they believe circumstances present a risk to the maintenance of essential services to consumers, industry or markets.

The statement can be accessed here.

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below.

Andrew Bates
E-mail: andrew.bates@dilloneustace.ie
Tel : + 353 1 673 1704
Fax: + 353 1 667 0042

Keith Waine
E-mail: keith.waine@dilloneustace.ie
Tel : + 353 1 673 1822
Fax: + 353 1 667 0042

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