

BIPAR Update

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IMD implementation – FOS definition - Update

The European Commission systematically plans evaluations of all European legislation which have been adopted. In cooperation with CEIOPS and BIPAR it has therefore started to check the conformity of the different national implementations with IMD provisions. Questionnaires have been sent to the competent authorities of the Member States and the implementation check is expected to be over by the end of 2009. The practical planning and execution of a possible revision of the IMD will subsequently follow from these checks on both the implementation and the enforcement of the IMD. The Commission has ensured that there will be an extensive prior consultation of concerned parties and furthermore, a full impact assessment of any proposed legislative changes. The Commission will also take into consideration the final report of DG Competition on business insurance which identified potential conflicts of interest and a certain lack of transparency in the way that insurance intermediaries are typically remunerated.

There is a strong pressure from the European Parliament to revise the IMD. In a proposed amendment to Solvency II proposal, Pervenche Berès, Chairwoman of the ECON committee in the European Parliament states that the *“Adoption of this Directive changes the nature of the contracts entered into by policyholders and the conditions of risk acceptance. The revision of Directive 2002/92/EC of the European Parliament and of the*

Council of 9 December 2002 on insurance mediation, which was to have taken place in 2007, should be undertaken by the Commission as soon as possible so as to take account of this Directive.”

FOS ACTIVITIES OF INTERMEDIARIES

In November 2008, CEIOPS published its amended Luxembourg Protocol including inter alia the definition of cross-border services under the IMD (available at the Secretariat of your member association). This definition is based on the intention of the intermediary to do cross border activities and on the location of the policyholder and the risk. It reads as follows: *“An insurance intermediary is operating under FOS if it intends to supply a policyholder, who is established in a Member State (MS) different from the one where the intermediary is established, with an insurance contract relating to a risk situated in a MS different from the MS where the intermediary is established.”*

BIPAR which had strongly requested and discussed this definition with the Commission and CEIOPS welcomed the publication of it in the Luxembourg Protocol. Although this protocol is not a binding instrument contrary to a Directive, including the FOS definition commits the concerned authorities to use this definition and ensures more legal certainty.

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Renewal of Block Exemption Regulation?

On 14 July BIPAR submitted a response to the Commission consultation launched in April 2008 on the functioning of the Block Exemption Regulation (BER). The EC Treaty prohibits anti-competitive agreements, but the BER grants an exemption for certain forms of insurance and reinsurance cooperation agreements. Such agreements include the establishment of non-binding standard policy conditions, the exchange of statistical information for the calculation of risks and the creation of insurance pools. The BER will expire on 31 March 2010 unless it is renewed and even though the insurance industry supports it, the Commission does not see at present any compelling reasons for renewal.

BIPAR'S RESPONSE TO THE CONSULTATION

BIPAR recognises that there is a need for a minimum level of possibility for collaboration and agreements between insurance carriers to ensure the efficient functioning of the insurance sector. A block exemption regulation in the insurance sector

achieves a balance between the conflicting imperatives of co-operation and competition between insurers, a balance which is necessary for economic and consumer policy reasons.

BIPAR is of the opinion that any change to the block exemption should maintain or improve the high level of legal security already achieved by the current EU legislation, as well as the strict safeguards established in the interest of consumer protection and competition.

NEXT STEPS

The Commission is required to submit a report to the European Parliament and Council on the functioning of the Block Exemption Regulation together with any proposals for amendment in the light of experience, by March 2009. The Consultation replies will assist the Commission by drafting an Impact Assessment. BIPAR will continue to closely monitor this dossier.

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Insurance Guarantee Schemes

The European Commission believes that the lack of community harmonisation in the area of insurance guarantee schemes (IGS) could affect the protection of policyholders should an insurance undertaking become insolvent. The Commission has therefore spent the last years analysing and examining together with the Member States and the industry, whether harmonisation is possible in some areas of IGS.

In 2007 the European Commission appointed the consultancy OXERA with the task of conducting a study on IGS, in order to get a better insight of the functioning of IGS at European level. In May 2008, the Commission launched a public consultation to provide stakeholders with the opportunity to comment on the main findings of the OXERA report, as well as to make known their views on the feasibility of IGS at European level.

In addition to collecting written comments, the European Commission held a Public Hearing on insurance guarantee schemes in Brussels on 2 June 2008. During the public hearing in which BIPAR participated, not only was it evidenced that the actual IGS functioning system poses problems to the integration of the single market, but also the enormous existing difficulty to reach an agreement on IGS at European level between the different European countries.

BIPAR'S RESPONSE TO THE PUBLIC CONSULTATION

In its response submitted to the Commission, BIPAR explained that mechanisms should be put in place to protect private policyholders in the event where an insurance company becomes insolvent, in particular, in the framework of cross-border activities. These mechanisms are also important in

helping to maintain consumer confidence in the sector. They would act as an additional layer of policyholder protection in the event of insurers' failure. It should however be ensured that the existence of such a mechanism has no effect on the quality of the supervision and rules on solvency.

COMMISSION FEEDBACK ON ITS CONSULTATION

In its feedback document on the responses received to its public consultation issued in October 2008, it appears that views are equally split between the status quo option and the mandating of the establishment of insurance guarantee schemes in all Member States. As for IGS establishment costs, there is a general agreement on the fact that costs of an IGS can be mitigated through a scheme design. It is also highlighted that respondents believe the presence or absence of IGS not to be an important factor in the development of cross-frontier insurance business, as its impact has been proved to be very small.

The note further explains some key considerations, in the trade-off involved in the decision on whether or not to establish an IGS. Arguments in favour are the enhancement of consumer protection, increased consumer confidence, increased financial stability, industry reputation benefits, equal treatment of policy-holders, and a level-playing-field. Contrary to the establishment of IGS, the summary mentions moral hazard, practicality, contagion risk and distortion of competition.

Based on the results of this public consultation, the Commission will decide next week on the way forward on the IGS dossier. BIPAR will continue to monitor it closely.

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Insurance contracts and ROME I Regulation on the law applicable to contractual obligations

The Rome I Regulation entered into force on 24 July 2008 as the new Community instrument that determines the law applicable to cross-border contracts in the EU (except for Denmark; the UK is currently applying to opt in). The Regulation will apply as of 17 December 2009 to contracts concluded after this date.

All insurance contracts covering large risks are contemplated in this Regulation (whether or not situated in an EU Member State). The Regulation also applies to all other insurance contracts where the risk is in an EU Member State, but does not apply to reinsurance contracts. The parties to an insurance of a large risk retain freedom to choose the applicable law, while parties to other insurance contracts have a limited choice based on the law of the Member State where the risk is situated, or the policyholder's habitual residence. In the case of commercial or professional insurance covering risks which are situated in two or more Member States, the parties

have the possibility to choose the law of any of them, or the law of the policyholder's habitual residence. As for life insurance cases, the applicable law has to be the law of the Member State of which the policyholder is a national. Should insurance contracts cover risks limited to events occurring in one Member State the choice is restricted to the law of that Member State. With regard to compulsory insurance, the contract must comply with the requirements of the Member State imposing the obligation to insure. In the case of any conflict arising between the law of that State and the law where the risk is situated, the law of the Member State imposing the obligation is sovereign.

The new regime is regarded as a consolidation exercise which will deliver satisfactory results and is expected to bring transitional costs for insurers.

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Proposed Directive on Consumer Rights

On 8 October 2008, the European Commission adopted a proposal for a Directive on Consumer rights seeking to enhance consumer protection and empowerment and merges four existing EU Directives, which dated from the 1980's and set minimum regulatory standards. The Directives merged are the Sale of consumer goods and guarantees Directive; the Unfair contract terms Directive; the Distance selling Directive and the Doorstep selling Directive.

Under the proposal, financial services are covered by the new provisions on unfair contract terms. Provisions on off premises sales apply to mortgages or other loans on real estate negotiated or concluded at the consumer's home. For the rest, there is an exclusion as there is special separate legislation in place (for example, the Distance Marketing of Financial Services Directive of 2002 applies to distance sales of financial services; and the Consumer Credit Directive applies to credit agreements concluded at doorstep).

DOORSTEP SELLING CONTRACTS

Insurance contracts remain excluded from the scope of the proposed provision on doorstep selling contracts. While drafting its new proposal the Commission had wondered whether this exemption needed to be modified in the light of the new market developments and had launched a consultation on the issue in October 2007. Taking into account BIPAR's response, the Commission decided to continue not to apply the rules of off-premises contracts to insurance contracts as the Community Acquis in the field on insurance already

provides for consumer protection - in particular the Life Insurance Directive - and that insurance should be treated separately due to its specific nature.

NEW PROVISIONS ON UNFAIR CONTRACT TERMS

Financial and insurance services are covered by the proposed rules on unfair contract terms. Chapter V of the proposed Directive applies to unfair contract terms which have not been individually negotiated, such as standard contract terms where the customer has not had the possibility of influencing their content. Under this proposal unfair contract terms are not binding on consumers. The proposal for a Directive sets out a black list of unfair contract terms which are prohibited across the EU in all cases.

It is important to stress that for the purposes of this Directive, neither the fairness of terms which describe the main subject matter of the contract, nor the quality/price ratio of the goods or services supplied should be assessed unless these terms did not meet transparency requirements. The main subject matter of the contract and the price/quality ratio should nevertheless be taken into account in assessing the fairness of other terms. For example, in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability should not be subject to such an assessment since these restrictions are taken into account in calculating the premium paid by the consumer.

MORTGAGES OR OTHER LOANS ON REAL ESTATE NEGOTIATED OR CONCLUDED AT THE CONSUMER'S HOME ARE COVERED BY THE PROPOSED RULES ON OFF PREMISES SALES

Prior to the conclusion of the contract, the trader must provide the consumer with specific information and must respect a withdrawal period of 14 days for off-premises contracts. This withdrawal period starts running from the day when the consumer signs the order form or in cases where the order form is not on paper, when the consumer receives a copy of the order form on another durable medium. If the trader omits the right of

withdrawal, then the withdrawal period shall expire three months after the trader has fully performed his other contractual obligations. The effect of the right of withdrawal is that the obligation of the parties shall be terminated, and the trader shall be obliged to reimburse any payment received from the consumer within thirty days from the day on which he receives the communication of withdrawal.

BIPAR will closely monitor the European Parliament and Council readings and will propose amendments if necessary.

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Proposal for a Directive on VAT for insurance and financial services

On 27 November 2007, the European Commission published a proposal for a Directive aimed at modernising and simplifying the VAT rules for financial and insurance services. These services are generally exempt from VAT but the exemption dates from 1977 and no legislation has been updated in order to be in line with developments that have occurred since then in the sector.

The proposal follows a three-fold objective:

1) REDEFINITION OF THE SCOPE OF THE EXEMPT SERVICES

This redefinition should ensure that the exemption better reflects the complexity and diversity of today's financial services. The proposal for a Directive is accompanied by a proposal for a Regulation which gives examples of exempted and non-exempted financial services.

The proposal for a Directive sets a new definition of exempted insurance mediation services. The BIPAR Working Group on VAT considers that this new definition covers 95% of insurance intermediaries' activities. The remaining 5% refers to very technical and detailed issues. In this respect, BIPAR VAT Working Party has worked with the European Commission and the French EU Presidency in the past year to ensure that the remaining 5% are exempted. BIPAR will continue to argue for our cause and meet with the soon to be Czech EU Presidency come January 2009.

2) THE OPTION TO TAX IN MEMBER STATES

The European Commission recently tabled an explanatory report on the option to tax which it was asked to draft by the French EU Presidency. There are still issues concerning this idea that need to be

taken into consideration however, BIPAR is of the opinion that an option to tax is a positive development in terms of VAT. The Commission has stressed the importance of uniform application in all Member States so as to ensure legal certainty, harmonization and fair competition. The French EU Presidency took a different stand and suggested that the option to tax could be optional. As of yet there is no clear indication to whether national rules will apply for each Member State or whether there will be one single Community practice.

3) INTRODUCTION OF AN INDUSTRY SPECIFIC EXEMPTION FROM VAT ON COST SHARING ARRANGEMENTS, INCLUDING THOSE WHICH ARE CROSS BORDER

Procedure and next steps

The European Parliament has an advisory role on the proposed VAT Directive however its opinion may influence the voting of Members of the Council of the EU. Due to active dialogue with the European Parliament, the BIPAR VAT Working Party was successful in communicating its stance on the proposed amendments before the European Parliament voted on the proposal on 10 September 2008.

It is of yet undecided when the Council of the EU will vote on the proposal. No adoption is scheduled before 2010. BIPAR will continue to monitor and discuss our principles with the accessing Czech EU Presidency and the European Commission.

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New legal assistant at the BIPAR Secretariat

Further to the departure of Vanessa Villarroya, the BIPAR Secretariat is pleased to welcome its newest member of the team,



Miss. **Gabriella AlMBERG**, as legal assistant. Gabriella is a 25-year-old Swedish lawyer who joined BIPAR on 1 September 2008.

After taking her International Baccalaureate in Sweden, Gabriella moved to the UK to begin her LLB law degree with European languages. She studied at the University of

Wales, Aberystwyth and graduated with honors the summer of 2007. She also spent an intercalary year at l'Université Catholique de Louvain-La-Neuve in

Belgium, where she specialised in European law through the medium of French.

During her degree, Gabriella gained professional experience when working for the Liverpool Crown Court and the Swedish Red Cross where she applied her legal training.

Gabriella began her career by working for a high-profile European Affairs consultancy in Brussels, an experience which provided her with an in-depth knowledge and thorough understanding of the decision-making process of the European Institutions.

As a Swedish national, Gabriella is fluent in Swedish, English and French and has excellent conversational skills in Norwegian and Danish. With Gabriella's background, the BIPAR Secretariat is certain that she will prove to be a great asset for the Federation.

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The European Federation of Insurance Intermediaries

La Fédération européenne des intermédiaires d'assurances

BIPAR is a non-profit European organisation grouping professional associations of insurance intermediaries in Europe.

It presently has a membership of 46 national associations, established in 31 countries, and represents some 80,000 insurance agents and brokers, employing in all about 250,000 people.

Founded in Paris in 1937, BIPAR has been established in Brussels since 1989. It is today the official and recognised voice of insurance intermediaries with the European Institutions.

BIPAR's current Chairman is Alain de Miomandre, a Belgian broker. Its Incoming Chairman is Jaap Meijers, a Dutch broker, and its Outgoing Chairman is Manuel Vila, a Spanish broker. BIPAR's Director is Nic De Maesschalck.

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