Introduction

Our Firm
With over 1,500 partners and lawyers worldwide, we are the fourth largest law firm (by number of lawyers) in the UK. We have over 230 independently recognised experts across 130 practice areas, and we hold the record for the independent rankings in the leading legal directory, Chambers & Partners.

Our Team
Pinsent Masons’ Insurance & Wealth Management team is recognised as market leading. The team advises many of the leading global insurance groups. Our expertise covers Europe, the Gulf and the Asia Pacific Region. We are experts in each of the core sectors within the market, including General Insurance, Life & Pensions, Health and Savings & Investments.

We offer expertise in both contentious and non-contentious (re)insurance matters, from lawyers that know and understand the London and international markets. In addition to advising on claims and disputes, we offer the full range of non-contentious services to (re)insurers, including advising on distribution arrangements, product wordings and development, acquisition and disposal of books of insurance business and regulation. We advise on exit strategies and legacy business issues.

Our core insurance team works closely with our wider Insurance & Wealth Management Sector team of data protection, IT, e-commerce, employment, corporate, intellectual property, tax, competition, pensions, FS regulatory, restructuring and finance lawyers. The Insurance & Wealth Management Sector is central to Pinsent Masons’ business. Our success is based upon the ability of our sector specialists to appreciate the commercial requirements and realities of our clients and respond accordingly to their needs.

We hope you enjoy this issue of Insurance Outlook. If you have any comments or would like additional information on any of the topics covered please contact Alexis Roberts.

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1. Regulatory Round-up: FCA

There have been a number of developments from the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) affecting the insurance sector since our last update at the end of October. In this section and the next, we look at some of the key developments.

**Managing bribery and corruption risk in commercial insurance broking (November 2014):** On 14 November, the FCA published a thematic review ‘Managing bribery and corruption risk in commercial insurance broking’ (TR 14/17). The review follows from a report on the same topic published by the Financial Services Authority in 2010 whose purpose was to consider whether intermediaries were adequately addressing bribery and corruption risk across their business. The regulator assessed 10 insurance intermediaries’ approach to tackling corporate crime and found that most “did not yet adequately manage the risk that they might become involved in bribery or corruption”. It said brokers’ risk assessments on bribery and corruption were “often too narrow”, that client relationship risk assessments were not scrutinised sufficiently thoroughly, and that senior managers’ oversight of risk management was weak at some of the brokers it reviewed. Click here to access the thematic review in full.

Financial services enforcement expert at Pinsent Masons, Michael Ruck, said that it is clear that anti-money laundering (AML) and anti-bribery systems is “one of the key areas on which the FCA is focusing”. He said: “When combined with the FCA’s increasing desire to hold senior management personally accountable the FCA is seeking to ensure better behaviours are encouraged with appropriate systems and controls being put in place and monitored. However, it is clear that the FCA will only use the carrot approach to a certain extent and the stick of enforcement or similar action could become increasingly prevalent. All firms across the regulated industry should take note and, from senior management downwards, ensure AML and anti bribery are high on the agenda for review with appropriate systems and controls in place. The regulator has previously made it crystal clear that a failure to address the risk of money laundering or bribery will incur large penalties without any evidence of criminal behaviour or improper payments being found.” Click here to read more on Out-Law.
Changes to the Approved Persons Regime for Solvency II firms (November 2014): On 26 November, the FCA published a consultation paper (CP 14/25) identifying proposed changes to the Approved Persons Regime for Solvency II firms. The paper is part of the FCA’s joint consultation with the PRA (which published its related consultation paper on the same date) on a new regulatory regime for Senior Insurance Managers. The consultation paper builds on the PRA’s proposals and both papers should be reviewed together. To read the paper in full click here. We look at the proposed Senior Insurance Managers Regime in more detail in Section 11.

The commercial importance of culture to industry (December 2014): On 2 December, the FCA published a speech by Martin Wheatley, Chief Executive of the FCA, given at the FCA’s Enforcement Conference, in which he spoke of the “increasingly significant” topic of strong corporate culture. Mr Wheatley asked why “six years on from an economic crisis accelerated by poor conduct, five years on from PPI, three years on from LIBOR – are more than half of financial service executives still insisting ‘ethical flexibility’ is important for career progression within their firms?” and concluded by stating that “it is an imperative for industry to reduce the frequency and scale of the problems it has encountered”. He said that he did not think firms had “the luxury” of waiting a generation for that to happen. Click here to read the speech in full.

FCA strategy document and impending structural changes (December 2014): On 8 December, the FCA published a strategy document (click here to read in full) outlining a new and updated strategy. The FCA noted, in its press release publishing the document, that the number of firms coming under the FCA’s remit had trebled over the past eighteen months due to its additional responsibility in regulating consumer credit. The regulator has also confirmed a number of organisational changes to commence from 5 January 2015, and to be fully implemented from April 2015, including the establishment of a new Strategy and Competition division, a new Risk division and a new Markets Policy and International division. Click here to read more on the FCA website.

Davis Review (December 2014): On 10 December, the FCA published the ‘Davis Review’ and its response to the review. The Davis Review is a report, prepared by Simon Davis of Clifford Chance LLP, of the independent inquiry into events which took place on 27 and 28 March 2014 relating to the press briefing of information in the FCA’s 2014/15 Business Plan. Mr Griffith-Jones, the FCA Chairman, said in a press release in response to the Davis Review: “Simon Davis has produced a comprehensive and rigorous report in which he makes a number of criticisms of the way the FCA handled the launch of the 2014/15 Business Plan. The Board fully accepts Mr Davis’ criticisms and on behalf of the FCA we apologise for the mistakes that were made and the shortcomings in systems and controls which his report has revealed.” and “Mr Davis also makes a number of recommendations about changes to our systems, processes and ways of working. We accept all of his recommendations and I can confirm that we are now implementing them.” Click here to read the Davis Review in full.

FCA proposals to tackle issues in GAP insurance market (December 2014): On 12 December, the FCA published its consultation paper (CP14/29) setting out proposed changes to promote competition in the guaranteed asset protection (GAP) insurance market, including limiting the point of sale advantage for GAP sales made on the vehicle showroom floor and making it easier for consumers to shop around. The objectives for the proposals set out in the paper are intended to reduce the advantage enjoyed by the add-on distributor and to empower customers to make informed and active decisions on whether to buy GAP insurance and, if so, from where. The FCA has asked for comments on its proposals by 13 March. It intends to consider the feedback received and publish its final rules in a policy statement by June 2015 with a view to the rules coming into force on 1 September 2015. Click here to read the consultation paper in full.

Post-implementation review of the Retail Distribution Review (December 2014): On 16 December, the FCA published the findings from the first stage of its post-implementation review of the Retail Distribution Review (RDR). The RDR was launched by the Financial Services Authority in 2006. The rules aimed to make the retail investment market work better for consumers. They raised the minimum level of adviser qualifications, improved the transparency of charges and services, and removed commission payments to advisers and platforms from product providers. FCA chief executive Martin Wheatley said that “early indications” were that the sector had responded positively to the reforms.

Overall, research commissioned by the FCA concluded that the RDR had improved the service offered to consumers by financial advisers and reduced the level of product bias, and that new rules on adviser charging had reduced the cost of products and platforms. Additional research also showed that fears of an ‘advice gap’, restricting the availability of lower value advice products to those with less complex demands, had largely been unfounded. However, the FCA said that the cost of advice itself had not appeared to have decreased, and that in some cases it had even increased despite a “surprisingly high number” of firms incurring little or no additional costs as a result of the changes.

The next phase of the post-implementation review will be published in 2017 followed by a subsequent third phase of the review which will consider the longer-term implications. Click here to access the review. Click here to read more on Out-Law.

Retail investment advice: Adviser charging and services (TR14/21) (December 2014): On 16 December, the FCA published a thematic review (TR14/21) setting out findings from the third cycle of its three-cycle thematic review into how firms were implementing its requirements under the RDR following its introduction on 31 December 2012. Cycles one and two of the thematic review found that firms had made progress in implementing the RDR, but identified some areas where they were failing to meet the requirements, particularly around adviser charging disclosure.
This report found that the way in which firms disclose the cost of their advice and the scope and nature of their services to clients had materially improved since two previous reviews, suggesting that the sector responded positively to the findings from cycle two. However, the FCA also found that a “significant proportion” of firms were still not making the cost of their ongoing services clear enough in cash terms, or were not providing an approximation of how long services could take when quoting hourly rates. The FCA stated in the report that it was now taking enforcement action against one unnamed firm that had not “sufficiently engaged with the changes required” by the RDR. Click here to read the review in full. Click here to read more on Out-Law.

**FCA consults on new competition law enforcement powers (January 2015):** On 15 January, the FCA published a consultation paper (CP 15/1) seeking, inter alia, views on draft guidance on its powers under the Competition Act 1998. The FCA obtains new competition powers on 1 April 2015 which will include, inter alia, powers to enforce the prohibitions in the Competition Act 1998 on anti-competitive behaviour in relation to the provision of financial services. Given the Competition and Markets Authority (CMA) will also be in a position to exercise these powers, it means that the CMA and the FCA will have ‘concurrent powers’ and the FCA will be a ‘concurrent regulator’. On 26 January, the FCA separately published a consultation on the Payment Services Regulator Competition Concurrence Guidance (PSR CP 15/1). We look in further detail at this topic in Section 18. Click here to read the consultation paper CP 15/1.

**FCA Consumer Spotlight microsite (January 2015):** On 19 January, the FCA launched its Consumer Spotlight microsite. Consumer Spotlight divides the UK population into ten segments, based on their financial needs and attitudes. The segments are: retired with resources, retired on a budget, affluent and ambitious, mature and savvy, living for now, striving and supporting, starting out, hard pressed, stretched but resourceful and busy achievers. The FCA states that the site can be used by the industry because it contains a wealth of data about financial consumers in the UK. The resources on the site provide information on the characteristcics, attitudes and behaviours associated with each group of consumers which can then help firms design products and communications that work well for different, specific consumers. Click here to access the site. Click here to access information on the ten consumer segments.

**FCA’s thematic review work on coverholders:** Although there have been no significant developments on this issue since our last update, an FCA thematic review report on coverholders is expected to be published in the second (or third) quarter of 2015. In its Business Plan published last year the regulator said that it intended to look at distribution chains in firms that operate in wholesale markets but also looking through to the impact on retail and small commercial customers. The regulator noted that it would be looking in particular during its review at key risks in complex distribution chains and the mixed responsibilities in them, including the cultural risks relating to product design, sales and post-sales handling.

Accordingly, in our view the focus of the review is likely to be two-fold. First, there will be a focus on ensuring that there is effective and robust oversight over coverholders and other delegated authorities particularly in complex or elongated distribution chains; and second, where there are mixed responsibilities, there will be a focus on uncovering whether this is leading to poor consumer outcomes. It will be interesting to know whether the FCA will continue to press in terms of the oversight it expects risk carriers to have or, alternatively, whether there will be scope to continue a more staged distribution chain where each party is responsible only for its particular key segment. There will likely be more substantive developments over the coming months.

**FCA summarises feedback on call for examples of retrospective application of regulatory rules (January 2015):** On 22 January, the FCA published a summary of the feedback it had received from 36 firms in response to its call for examples of retrospective application of its regulatory rules. The regulator said that the responses raised a number of issues, none of which reflected retrospection in the specific terms outlined, but many raised wider questions about regulatory behaviour. The FCA said that the feedback received had been “very valuable” and that it recognised that there had been a number of genuine issues raised during the call for input related to the way it regulates firms. It outlined suggested improvements to regulatory practices coming out of the exercise including improving its communication with firms and clarifying the way it gives guidance; recognising that fast-paced technological change may mean that rules become inappropriate and that there may be a need to consider how the FCA uses waivers in these circumstances; and recognising the need to intervene at an earlier stage to avoid the development of problems over a long period, particularly where firms draw a conclusion that the regulator does not perceive there to be a problem. Click here to read the summary of feedback in full.

**Consumer credit law changes will make it easier for insurers to offer payment of premiums in instalments (February 2015):** New regulations published at the end of February will extend the exemption from consumer credit laws contained in the Financial Services and Markets Act (FSMA) to agreements with up to 12 monthly repayments. This will allow insurers to offer annual policies with premiums payable in monthly instalments without being at risk of providing regulated credit to their customers. Click here to read more on Out-Law
FCA publishes webpage documenting its use of attestations (February 2015): On 13 February, the FCA published a webpage on its use of attestations. The page includes information on the aims of attestations and the most usual scenarios in which the regulator uses attestations. The page also includes information on the number of attestations requested by the regulator in 2014 and the FCA says it intends to continue to publish this information on a quarterly basis. Click here to access the FCA webpage. Our comprehensive guide on the use of attestations to assist firms is at Section 12.

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FCA issues final guidance on what constitutes retail investment advice (January 2015): On 22 January, the FCA published its finalised guidance on retail investment advice (FG 15/01). The guidance updates and finalises the FCA’s position on retail investment advice as previously set out in the July 2014 guidance consultation, and it includes a range of examples designed to help businesses understand its approach. Clarity on the regulator’s interpretation is important because the provision of retail investment advice, particularly where it constitutes a “personal recommendation” is a heavily regulated activity. Businesses operating in the retail investment advice market have been calling for further guidance from the FCA amidst uncertainty over whether certain practices in the industry fall subject to the rules.

Commenting on the release of the finalised guidance financial services regulation expert, Tobin Ashby said that the FCA’s latest interpretation of what is and is not regulated advice is based largely on pre-existing guidance, and that the existing guidance had generally been interpreted in a cautious way by businesses operating in the retail investment advice market when launching new services. He said firms may have wanted the FCA to go further in its interpretation of the retail investment advice rules in its finalised guidance especially in the context of innovative online propositions.

“The cautious approach has not realistically come as a surprise and ultimately the regulator has not changed its position to any substantial degree. The FCA has also made it clear in its responses to feedback that it is not intending to provide any further interpretation on the difference between providing information and regulated advice. The good news is that the FCA has listened to feedback that it should provide more guidance on the difference between merely providing information and regulated advice. The examples provided originally were a useful way to communicate the FCA’s views and now contain more information on the FCA’s interpretation. I think the effort the FCA has put into this is indicative in my view of the more open approach of the regulator.”

Click here to read the guidance. Click here to read more on Out-Law.

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2. Regulatory Round-up: PRA

Introduction of a Senior Insurance Managers Regime (November 2014): On 26 November, the PRA published a consultation paper (CP26/14) introducing the Senior Insurance Managers Regime (SIMR), a regulatory framework to ensure that those individuals who run insurers have clearly defined responsibilities and behave with integrity, honesty and skill. The consultation paper includes an outline of the PRA’s proposals on the scope of the new regime; allocation of responsibility to senior insurance managers; application of conduct standards to individuals performing key functions; and assessment of fitness and propriety of those individuals. We consider the proposed regime more closely in Section 11. Click here to read the consultation paper.

In December, the Pinsent Masons’ Insurance & Wealth Management team ran a webinar on this topic, covering:
- the impending regime itself – why it is emerging from the regulators now, and the possible thought processes behind it.
- FCA attestations and their increasing use by the regulator particularly in the context of the SIMR.
- Directors and officers’ insurance and the issues this new regime may have on coverage.

Click here to access the webinar.

Solvency II Updates: The transposition and implementation dates for the new Solvency II regime are approaching quickly. As those in the industry will be aware, the Solvency II regime sets out broader risk management requirements for European insurers and reinsurers and dictates how much capital firms must hold in relation to their liabilities. The regime includes the Solvency II Directive (as amended), together with a large number of delegated acts and binding technical standards (BTS), as well as guidelines. The transposition date of Solvency II is 31 March 2015 and the regime will apply to affected firms from 1 January 2016. In the UK, the PRA has advised that Solvency II will apply to around 400 to 450 retail and wholesale UK insurers and reinsurers, and to Lloyd’s. The PRA is the lead regulator in transposing Solvency II and has a dedicated webpage providing updates and providing information to the UK insurance industry to help prepare and highlight key dates. Click here to access the PRA Solvency II updates page. There have been several developments (from both the PRA and key developments from EIOPA) noted on that page since our last update in November.

In summary:
- On 31 October, the European Insurance and Occupational Pensions Authority (EIOPA) submitted Set 1 Implementing Technical Standards on supervisory approval processes for Solvency II to the European Commission.
- On 21 November, the PRA published CP24/14 ‘Solvency II: further measures for implementation’. To read the consultation paper in full click here.
- On 21 November, the PRA released a checklist, information and an accompanying spreadsheet for firms to use when submitting a pre-application for matching adjustment.
- On 21 November, the PRA published an update letter from the PRA’s Insurance Directors for all Solvency II-affected firms.
- On 2 December, EIOPA published its Public Consultation CP-14-062 on Set 2 of the Solvency II Implementing Technical Standards and Guidelines’.
- On 12 December, the PRA published feedback for general insurance firms on the standardised risk information data collection exercise issued in May 2014. Click here to read the feedback.
- On 19 December, the PRA published an update letter from the PRA’s Insurance Directors for all Solvency II-affected firms.
- On 19 December, the PRA published reporting schedules for firms with non-December year ends (and on 16 January, these were re-published to correct a number of inaccuracies).
- On 18 January, the Delegated Regulation on Solvency II was published in the Official Journal. Click here to access the Regulation.
- On 22 January, the PRA published a speech by Paul Fisher, acting executive director for insurance supervision at the PRA, who told insurers that the regulator did not intend to use the incoming Solvency II regime as “an opportunity to raise capital requirements across the board”. He said: “The PRA believes the UK industry is in a good position, having had the UK risk-based ICAS regime for around 10 years,” and “We… recognise and respect that Solvency II is a maximum-harmonising Directive with a key objective of promoting supervisory co-operation. The PRA is committed to upholding this valued objective and will implement the Directive as intended. We can’t, and won’t, gold-plate.” Click here to read more on Out-Law.
- On 23 January, the PRA published a consultation paper that sets out draft rules on transitional measures for risk-free interest rates and for technical provisions, necessary to implement the Solvency II Directive. The paper includes two draft supervisory statements: the first on the PRA’s expectations regarding the calculation and application process for these transitional measures; and the second on the internal model treatment of technical provisions. Click here to access the consultation paper.
- On 30 January, the PRA published information on its internal model page to assist firms in their preparations to submit a formal internal model application from 1 April 2015.
- On 10 February, the PRA published further clarification on its approach to the review of the Solvency II balance sheet, technical provisions and own funds.
- On 12 February, the PRA published an update letter from the PRA’s Insurance Directors for all Solvency II-affected firms.
- On 19 February, the PRA published a consultation paper (CP 5/15) on applying the first set of EIOPA guidelines under the new regime to PRA-authorised firms.
• On 20 February, the PRA published a letter from Paul Fisher clarifying the PRA’s expectations of firms planning to re-structure their equity release mortgage portfolios in order to meet the matching adjustment eligibility criteria.

• On 20 February, the PRA published an amendment to supervisory statement SS2/14 -Solvency II: recognition of deferred tax.

• On 27 February, the PRA issued data collection exercises to both life and general insurers.

• On 3 March, the PRA published a speech by Paul Fisher entitled ‘Confronting the challenges of tomorrow’s world’ in which he covers the current and prospective state of the insurance industry, as well as commenting more generally the role regulation will play. Click here to read the speech.

New requirements for outsourcing will come into force under the new regime. These requirements are detailed in Article 274 of the Delegated Regulation that came into effect on 18 January. We take a brief look at these requirements in Section 15.

PRA proposes changes to the PRA Rulebook (November 2014): On 24 November, the PRA published a consultation paper (CP 25/14) with its proposals for redrafting certain modules of the PRA Handbook. Most relevant to insurers is the draft statement of policy in Appendix 2 that sets out the PRA’s approach to insurance business transfers. The PRA has advised that the Rulebook will appear in a new online website in mid-2015 and, until then, will appear on the existing Handbook site in PDF form. The consultation closed on 23 January. Click here to read the consultation paper.

PRA “Dear CEO” letter to general insurance firms on reserving (December 2014): On 2 December, the PRA published a “Dear CEO” letter (dated 13 November 2014) sent to general insurance firms by Chris Moulder, PRA Director of General Insurance relating to reserving. The letter makes reference to the regulator’s increased emphasis at present on gaining assurance over firms’ reserving. The letter also comments on the firm’s obligations under the new Solvency II Directive and the need to demonstrate that requirements are met by the implementation date of 1 January 2016. Click here to read the letter in full.

PRA letter to insurance firms on its approach to transfers to insurance business (January 2015): On 22 January, the PRA published a letter (dated 21 January 2015) sent to firms by its Directors of General Insurance and Life Insurance, to explain how the PRA will deal with transfers of insurance business under Part 7 of the Financial Services and Markets Act 2000 (FSMA) during 2015. Click here to read the letter in full.

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3. Legislative Round-Up

In this section, we look at legislative developments during the quarter that are of particular interest to the insurance industry.

**Insurance Act 2015**
The Insurance Act 2015 received royal assent on 12 February (ahead of the predicted timetable). The Act, which will update aspects of commercial insurance law currently governed by the 1906 Marine Insurance Act, had been passed unanimously by the House of Commons on Tuesday, 3 February. It marks the biggest reform to insurance contract law in more than a century. We look at the key aspects of the new legislation, and how it compares to insurance law currently in force, in Section 8. Click here to read an article on Out-Law commenting on the passing of the Bill by the House of Commons. Click here to read an article on Out-Law in December reviewing the addition of a new warranty clause 11 to the Bill by the Law Commission at the eleventh hour. That clause now forms part of the new legislation.

**Counter Terrorism and Security Act 2015**
The Counter Terrorism and Security Act 2015 received royal assent on 12 February. Of particular interest to insurers are provisions which are aimed at preventing insurers from covering or reimbursing ransoms paid to terrorists by policyholders. Click here to review section 42 of the Act (Insurance against payments made in response to terrorist demands).

**Social Action, Responsibility and Heroism Act 2015 (SARAH Act)**
The Social Action, Responsibility and Heroism Act 2015 received royal assent on 12 February. The government state that the provisions in the Act have been designed to help volunteers, community groups, businesses and people who step in heroically to help in dangerous circumstances – following years of concerns that people were being put off from doing simple good deeds for fear of legal action if something went wrong.

**Criminal Justice and Courts Act 2015**
The Criminal Justice and Courts Act 2015 received royal assent on 12 February. Of interest to insurers, the new Act contains a provision which requires courts to dismiss the whole of the claimant’s claim if it is satisfied that the claimant has been ‘fundamentally dishonest’. Click here to review clause 57 ‘Personal Injury claims: cases of fundamental dishonesty’.

**Consumer Rights Bill**
The Consumer Rights Bill has now passed through its third reading in both the House of Lords and the House of Commons and is now in the ‘ping pong’ stage during which it is moving between both Houses until the exact content has been agreed. Due to the fact that the Bill is not yet in final form and has not received Royal Assent anything stated is subject to change. We also await finalised guidance on the provisions of the Bill from The Department for Business Innovation and Skills (BIS). The Bill is the greatest reform of consumer rights for a generation and it is intended that the finalised Bill will come into force, as the Consumer Rights Act 2015, in October 2015. The new Act will consolidate and reform (i) consumer remedies for defective goods, services and digital content; (ii) unfair terms in consumer contracts; (iii) public enforcers powers; (iv) consumer collective redress for anti-competitive behaviour. Firms will need to familiarise themselves with the new legislation and start reviewing terms and conditions and contracting procedures to ensure they have complied. We look at the new legislation in more detail in Section 9. Click here to read more on new rules in the legislation on liability proposed for digital content suppliers.

**Medical Innovation Bill**
The Medical Innovation Bill has passed through the Lords committee stage and is closer to being finalised. The Medical Innovation Bill has been proposed by Lord Saatchi as a way to encourage doctors to innovate responsibly when prescribing medical treatments without a fear of being held as having acted negligently should those treatments fail. The Bill has received the backing of the UK government. Click here to read more on Out-Law.

**Small Business, Enterprise and Employment Bill**
The Small Business, Enterprise and Employment Bill is expected to pass into law in March this year and is intended to reduce the barriers faced by small businesses that hamper their ability to innovate, grow, and compete. Amongst other things, the Bill and accompanying regulations will set out a new legal position in relation to the use of corporate directors in UK companies. On 27 November, the Department of Business, Innovation and Skills (BIS) opened a consultation (which has since closed) seeking views on the extent to which exceptions should be made to the proposed ban on corporate directors. Click here to read the consultation paper. More recently, BIS has published a provisional implementation plan for the Bill as its provisions will be introduced in phases. The prohibition on corporate directors, with exceptions (still to be finalised) is expected to come into force in October. Click here to read the provisional implementation plan.

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4. Regulatory Round-Up: Europe & Beyond

We look at recent and forthcoming legal developments coming from Europe and beyond that will be of interest to the insurance industry.

PRIIPs KID Regulation published in the Official Journal (December 2014): On 9 December, the PRIIPs KID Regulation was published in the Official Journal (OJ) of the EU. It entered into force on 24 December. Its requirements will apply to firms from 31 December 2016. Click here to access the Regulation. The European Commission has proposed the KIDs requirement as part of wider efforts to improve investor protection in the sale of retail investment products, efforts which have included proposed revisions to both the Markets in Financial Instruments Directive (MiFID) and the Insurance Mediation Directive (IMD), the revised directives being known as MiFID II and IMD. KIDs will be uniform disclosure documents giving standardised information about products that are designed to give retail investors sufficient clear information on the range of PRIIPs to compare them for suitability and value. Click here to read our guide on this issue on Out-Law.

ESMA sets out “practically applicable rules” for EU financial markets in final MiFID II consultation (December 2014): On 19 December, the European Securities and Markets Authority (ESMA) published a consultation paper on its draft regulatory technical and implementing standards which, once approved, will apply to the implementation of the revised Markets in Financial Instruments Directive (MiFID II) and the Markets in Financial Instruments Regulation (MiFIR). ESMA also published its final technical advice to the European Commission, which deals primarily with measures designed to improve the protection of investors, particularly retail investors. The consultation closed on 2 March.

The main proposals include restrictions on the circumstances in which portfolio managers can receive research for third parties; new governance requirements for those investment firms that manufacture or distribute financial instruments; and requirements for firms to provide clients with details of all costs and charges relating to their investment up front. It also introduces new transparency requirements when dealing commissions are used to pay for research. Once in force, MiFID II will revise and update the existing Markets in Financial Instruments Directive, which came into force on 1 November 2007 with the aim of creating a harmonised regulatory regime for investment services across the European Economic Area (EEA). The revised MiFID package was adopted by the Commission in October 2011, partly in response to the financial crisis. The new regime is due to be phased in from 3 January 2017, although transition periods will apply to some of the rules. Click here to read the ESMA draft regulatory technical and implementing standards. Click here to read the final technical advice. Click here to read more on Out-Law.
On 22 December, the FCA updated the “latest news” section of its dedicated webpage on MiFID II including information on its implementation of the Directive, changes to the FCA Handbook, and information on the legislative changes required to implement MiFID II in the first quarter of 2015. Click here to access the webpage.

Update on the EU data protection framework (December 2014): On 4 December, the Council of the EU reached a partial general approach on specific aspects of the draft regulation setting out a general EU framework for data protection (General Data Protection Regulation) which the European Commission put forward in 2012. In its press release dated 4/5 December 2014, the Council stated that the partial general approach includes provisions which are crucial to the public sector as well as provisions relating to specific data processing situations. Andrea Orlando, Italian Minister for Justice and President of the Council, said in the press release: “Today we have agreed on two of the most politically sensitive issues on data protection reform. We see this as an important result for the Presidency, and a decisive step towards achieving global agreement on this complex and important file”. Click here to read the Council’s press release. We look at the General Data Protection Regulation in more detail in Section 13.

IAIS consults on risk-based global insurance capital standard (December 2014): On 17 December, the International Association of Insurance Supervisors (IAIS) published a consultation paper on the risk-based global insurance capital standard (ICS). The purpose of the consultation was to generate feedback on:

- Valuation
- Qualifying capital resources
- An example of a standard method for determining the ICS capital requirement
- Potential other methods for determining the ICS capital requirement.

There is a timetable for developing the ICS set out within the consultation document which is due to be finalised by the end of 2016, with testing taking place throughout 2015. The consultation closed on 16 February 2015.

Insurance Distribution Directive (IDD) (previously the Insurance Mediation Directive (IMD2)) – latest position (January 2015): The re-cast Insurance Distribution Directive (IDD) (renamed during the consultation process by the Council of the EU to reflect the focus on regulating the distribution of insurance products) is nearing completion in the European legislative process. In our last update, we noted that a general approach to the Directive had yet to be agreed. This has now happened and, at the beginning of November, the Council agreed its general approach to the Directive (taking into account the various amendments that have been put forward). This was an important step and trilogue negotiations between the Commission, Parliament and Council resumed in January. We consider the key elements of the Directive in detail in Section 14.

In a speech by Jonathan Hill, Commissioner responsible for Financial Stability, Financial Services and Capital Markets Union, published on 30 January, he said in relation to the progress of IDD and its importance: “I am confident that the trilogue negotiations between Parliament, Council and Commission can be finalised under the Latvian Presidency during the first half of 2015. We certainly have to be aware that there are many differences between insurance distribution systems in the EU Member States. The issue therefore requires a balanced and flexible approach that takes into account those different traditions and practices. One of the main features of the new Directive will be that it will create a level playing field so that whatever kind of insurance is being sold and however it is sold the basic rules will apply. It will guarantee that however customers buy insurance they get the same standards of choice and service. It will also provide for appropriate standards of transparency. This will help consumers make informed choices on the basis of meaningful data. It will also help build trust that the products they are being recommended are not just those that give the adviser the highest commission. And there will be specific rules for insurance-based investment products in order to give consumers who want to invest their savings comparable levels of protection. In short, we hope that this Directive will help intermediaries to compete in a fair market, to sell services more easily across borders and build relationships with their clients on the basis of transparency and trust.” Click here to read the speech.

Solvency II developments: In Section 2, we looked briefly at developments in transposing and implementing the new Solvency II regime in the UK. More generally, in Europe, on 1 December, the European Insurance and Occupational Pensions Authority (EIOPA) announced the results of its EU-wide Insurance Stress Test. The exercise aimed to test the overall resilience of the insurance sector and to identify its major vulnerabilities. Throughout 2014, the EIOPA had conducted a series of stress tests of insurers which were carried out against the new risk-based regulatory regime of Solvency II. European Commissioner Jonathan Hill said: “These were serious and thorough stress tests. The results show that the European insurance sector is, broadly speaking, in good health although vulnerabilities have been identified, in particular for some smaller insurers. The new Solvency II framework – to be fully applied from early 2016 - will introduce a new regulatory system in the European Union. It is designed to prevent some of the issues detected in these stress tests, so public authorities and insurers should press on with their preparations for 2016.” Click here to read the European Commission press release. Click here to read more on Out-Law;

On 17 January, the Delegated Regulation, which supplements the Solvency II Directive, was published in the Official Journal of the EU (OJ). The Delegated Regulation came into force the day after publication on 18 January 2015. The Commission adopted the Delegated Regulation in October 2014. In November 2014, the Council of the EU announced that it would not object to the Delegated Regulation and in January 2015 the time period for the European Parliament to object to the Delegated Regulation expired. Click here to access the Delegated Regulation. New requirements for outsourcing will come into force under the new Solvency II regime. These requirements are detailed in Article 274 of the Delegated Regulation. We take a brief look at these requirements in Section 15.
EIOPA says sellers of insurance-based investment products need conflict of interest policy (January 2015): The European Insurance and Occupational Pensions Authority (EIOPA) said that there are some situations where there will always be a conflict between companies’ interests and those of consumers, including where an insurer or distributor will make a gain or avoid a loss at a consumer’s expense or where a distributor manages or develops insurance-based investment products. It said that insurers and insurance intermediaries involved in selling insurance-based investment products should “assess all cases where they have an interest related to distribution which is distinct from the customer’s interest and which has the potential to influence the outcome of the services to the detriment of the customer”. Click here to read the EIOPA opinion. Click here to read more on Out-Law.

EIOPA warns of online pension and insurance sales risks for consumers (January 2015): In an opinion on consumer protection and insurance and pensions sales published on 28 January, EIOPA said that users do not do adequate research before buying products online. It said that national regulators should ensure that companies selling products online comply with a ‘duty of advice’ to protect consumers. EIOPA has recommended that national competent authorities (NCAs) in each country ensure that online sellers of financial products comply with any applicable ‘duty of advice’ in that country, and that consumers are given “appropriate information on the selling process of the online distributor with a view to avoiding unsolicited, or mistakenly concluded, contracts”. Insurance law expert Bruno Geiringer said it was not surprising to see the EIOPA “throw in its tuppence worth” since technological developments are driving an increasingly digital insurance market where communicating with customers and potential customers is becoming easier. He said “Although there are benefits deriving from online distribution, EIOPA is signalling to the European regulators that they need to manage the risks which could lead to customer detriment and it is calling for greater awareness of the impact of sales on the internet for consumer protection.” Click here to read the EIOPA opinion. Click here to read more on Out-Law.

EIOPA starts work on infrastructure investments (February 2014): On 4 February, EIOPA published a press release announcing that it is starting a new workstream on infrastructure investments by insurers. In the press release EIOPA states that it intends, in the course of its work:

- to develop a definition of infrastructure investments that offer predictable long-term cash-flows and whose risks can be properly identified, managed and monitored by insurers
- to explore possible criteria for the new class of long-term high quality infrastructure assets covering issues such as standardization and transparency
- to analyse the prudentially sound treatment of the identified investments within Solvency II, focusing on their specific risk profile.

Click here to read more.
5. Enforcements
Round-Up: FCA

In recent months there has been further considerable regulatory enforcement action against banks and non-compliant senior individuals. We look at selection of actions below.

Big Bank Fines for serious misconduct and failings

• On 11 November, the regulator published the final notices it had issued to five major banks (the Royal Bank of Scotland, HSBC Bank plc, Citibank N.A, JP Morgan Chase Bank and UBS AG) imposing its largest fine to date totalling £1.114 billion (fines of £217,000,000, £216,363,000, £225,575,000, £222,166,000, £233,814,000 to each of the banks listed respectively). In its press release publicising the enforcement action, the regulator noted that between 1 January 2008 and 15 October 2013, ineffective controls at these banks had allowed G10 spot FX traders to put their banks’ interests ahead of those of their clients, other market participants and the wider UK financial system. The regulator noted that the banks had failed to manage obvious risks around confidentiality, conflicts of interest and trading conduct. Click here to read more on the FCA website.

• On 19 November, the regulator published the final notice it had issued to RBS, National Westminster Bank Plc and Ulster Bank Ltd, imposing a fine of £42,000,000. In the final notice, the regulator noted that as a result of an IT incident within the banks’ systems, which was caused by a software compatibility issue between upgraded software and a previous version of the software, 6.5 million customers of the banks were affected (10% of the population). Amongst other consequences these customers could not, during the relevant period, use internet banking, manage payments, verify cheques or make international cash transfers. Click here to read the final notice.

Director prohibited for failing to purchase a valid rail ticket:

• On 15 December, the FCA took action against a senior fund manager after a court hearing found he had been dodging train fare payments for several years. The regulator issued an order that the senior executive, Jonathan Burrows, be permanently prohibited from senior roles within the financial services industry. Click here to read the final notice. Tracey McDermott, the FCA’s director of enforcement and financial crime, said: “Burrows held a senior position within the financial services industry. His conduct fell short of the standards we expect. Approved persons must act with honesty and integrity at all times and, where they do not, we will take action.” Click here to read.
Directors fined and banned for failure of responsibilities in relation to insurance products:
• On 5 November, three former directors of Swinton were fined and banned for failing to discharge their duties to a reasonable standard when making decisions with regard to monthly add-on products which included personal accident insurance, breakdown insurance and home emergency insurance. The actions and decisions of the directors were held to be improperly motivated by Swinton's incentive scheme for directors. Click here, here and here for the final notices of each of the directors concerned.

Government urges UK City regulator to consider ending discounts for late settlement of enforcement cases:
• In December, HM Treasury issued a final report containing the findings of its review of the institutional arrangements and processes of both the FCA and the PRA. In its report the Treasury said that discounts on fines issued by the FCA should generally only be offered to financial services companies that settle enforcement cases with the regulators at an early stage. Currently, the "graduated discount scheme" operated by the FCA allows financial services companies to benefit from a 30% discount on any fine they are issued with if they settle those enforcement cases during the first stage. Discounts of 20% and 10% respectively are available for settlements during stages 2 and 3 of the regulator’s investigations.

The Treasury said: “The government considers that removing the discounts currently available at stages 2 and 3 will assist in demarcating, at an early stage, between those cases that can be settled, and those that must be contested. The regulators should consider reviewing the graduated discount scheme and applying a discount only to those cases which settle in stage 1. The regulators may wish to retain the ability to apply a discretionary discount in cases which settle outside stage 1, where they consider it appropriate.” Click here to read more on Out-Law and here to access the full report.
6. Disputes, Claims and Coverage Round-Up

We provide a round-up of recent and forthcoming claims-related legal developments. For recent cases of interest, see Section 7.

Government response to consultation on implementing the ADR Directive and the Online Dispute Resolution Regulation (November 2014): On 18 November, the Government published its response to the consultation by the Department of Business, Innovation and Skills (BIS) on the implementation of the Alternative Dispute Resolution (ADR) Directive. ADR can offer a less costly and speedier alternative to the courts, for disputes where a consumer is not able to resolve their complaint directly with the seller. In the foreword to the response, the Minister for Employment Relations and Consumer Affairs, Jo Swinson, said “In the UK, there are already several large and well established ADR schemes in regulated sectors, such as financial services, energy and telecoms. In other sectors, some businesses are members of voluntary ADR schemes, but access to ADR is patchy. The ADR Directive means that we have to fulfil certain requirements, including ensuring that ADR is widely available for consumer disputes, and that ADR providers meet certain quality standards. This Directive gives us the opportunity to examine the UK ADR landscape and ensure we have a system which works for both consumers and business”. Some of the changes to the current system proposed by the government include:

- The creation (with Citizens Advice) of a consumer complaints helpdesk;
- The establishment of an Online Dispute Resolution (ODR) contact point to help consumers with cross-border disputes submitted through the Commission’s ODR platform;
- The appointment of a number of regulators as competent authorities to monitor ADR entities in particular sectors;
- Implementation of provisions on which the UK has a choice about how to adopt the Directive, and how limitation periods for complaints can be resolved without the need for a formal letter.

The Directive must be transposed into UK law by 9 July 2015 whilst ensuring that we have an effective regulatory structure.”

According to a recent report in Insurance Day, the LMG held a meeting at the end of January to consider the market’s feedback to the report and to its work on the “guts of an action plan” which would prioritise a number of key areas that needed to be focused on to address the issues and concerns raised in the report.

Improving Complaints Handling – Regulator publications (November/December 2014): On 18 November, the FCA published a thematic review on complaints handling (TR 14/18) and subsequently, on 16 December, it followed this with the publication of a consultation paper (CP 14/30) on the same theme. Financial firms have collaborated with the FCA on the thematic review which was aimed at uncovering barriers to effective complaints handling in firms and these firms have agreed to make improvements to the way they deal with consumer complaints. The FCA reported that it found some improvements and innovations had already been made, for example, senior management in firms are more engaged with complaint handling, and firms told the FCA that they were empowering their staff to make the right judgments and to demonstrate empathy. However, the review also identified areas requiring further improvement.

Of particular interest to firms, as part of its proposals for improving complaints handling, the FCA is considering an extension to three days for the period during which less complex complaints can be resolved without the need for a formal letter. However, firms will be required to report all complaints to the FCA to “improve transparency”, along with the causes and categories of complaints. This information will then be published by the regulator alongside details about the size of firms. The regulator also intends to ban the use of premium rate telephone numbers by firms as a means of customer contact, and is considering the introduction of a 15 year ‘long stop’ time limit by which any complaints must be made to the Financial Ombudsman Service (FOS). It is now consulting on its proposals until 13 March 2015 and hopes to introduce the changes in March 2016.

Globalisation of insurance market ‘undermining London’s position as the insurance centre’ according to new report (November 2014): A report published in November by the London Market Group (LMG) and The Boston Consulting Group (BCG) noted that “London’s position as the pre-eminent centre” was being undermined by the emergence of other market hubs around the world, including Bermuda, Singapore and Zurich. Click here to read the press release publishing the report. Commenting on the report in an article on Out-Law, head of the Insurance & Wealth Management team, Nick Bradley said: “The report serves as an important reminder to those of us who serve the London market, be they international law firms based in the City, such as ourselves, or other professional services, that we all have an important role to play in maintaining and indeed enhancing London as the environment in which commercial enterprises across the globe choose to place their commercial risks for protection. That may translate into the way we assist with the development of innovative new products, such as cyber or supply chain, the distribution chain, the maintenance of an effective dispute resolution mechanism in court or arbitration, or work to ensure we have an effective regulatory structure.” Click here to read more on Out-Law.

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Centralised driver data sharing service for motor insurance industry gets underway (December 2014): The government’s Driver and Vehicle Licensing Agency (DVLS) will share some driver details with insurers to help calculate premiums. The information will only be shared with drivers’ permission. Click here to read more on Out-Law.

Lord Chief Justice’s Report 2014 (December 2014): On 14 December, the Lord Chief Justice laid his annual report before Parliament. His report looks back at the past twelve months and explains how the judiciary have administered justice across all jurisdictions by focusing on key priorities. Of particular interest, the Chief Justice refers to the new investment and modernisation of the court’s IT systems. Click here to read the report in full. In an article on the Law Society website on 29 January, Deputy District Judge Peter Causton follows this theme and looks at how technological change might impact court proceedings. In his article entitled ‘The e-court service – a vision of the future’, the Deputy Justice averts to the one-off investment in technology for the courts, averaging up to £75m per annum over five years from 2015/16 and notes that we stand on the verge of momentous change in the way in which justice is delivered. Click here to read the article on the Law Society website. The recent report by the Civil Justice Council’s Online Dispute Resolution (ODR) Advisory Group appears to be a first significant step in this direction. Click here to read more on Out-Law. Click here to access the CJC ODR webpage.

High Court rejects advisers’ appeal against Keydata FOS complaints (December 2014): In a decision dated 2 December 2014, the High Court rejected an application by three financial advice firms for the Financial Ombudsman Service (FOS) to halt decisions on Keydata advice worth hundreds of thousands of pounds. The court rejected the advisers’ argument that the complaints should be stayed until the outcome of the Financial Services Compensation Scheme’s (FSCS) legal battle with advisers over Keydata is known. Click here to read the High Court judgment.

The Insurance Fraud Bureau (IFB) intends to explore a data-sharing hub: The new “intelligence sharing” initiative is planned under a new expansion of the IFB’s remit from combating fraud in the motor insurance market to tackling the issue across general insurance products. In a press release issued on 17 October last year, which followed the launch of IFB’s 5 year strategy, it said that 76% of industry stakeholders it had consulted with said it should act as “the central industry hub for all fraud data and intelligence”. Click here to read the IFB press release. Click here to read more on Out-Law.

On 20 January, the British Insurance Brokers’ Association (BIBA) unveiled its 2015 Manifesto which detailed its ongoing commitment to work with the IFB to help reduce the cost of insurance fraud. The 2015 manifesto document entitled Insuring Britain’s future includes 20 ‘Calls to action’ to Government and 11 ‘Commitments’ on the issues that are impacting general insurance brokers and their customers. Click here to read more.
Government Task Force to tackle insurance fraud: On 2 December, in a speech at the ABI’s annual motor conference 2014, Chris Grayling, Secretary of State for Justice, announced the establishment of a government task force chaired by David Hertzell to examine the issues of insurance claims fraud. Click here to read the speech in full. The taskforce met for the first time last month and some interim findings are expected to be reported by March. Click here to read more on Out-Law.

Financial Ombudsman Service (FOS) consults on plans and budget for the year ahead (January 2015): On 6 January, the FOS published for public consultation its plans and budget for 2015/2016 which sets out:

- how it is dealing with the current demand on its service – and the operational and financial implications for the current year (2014/2015);
- the expected demands on its service in 2015/2016;
- its plans for the future looking ahead to 2015/2016;
- the operational and financial implications for 2015/2016.

The Ombudsman reports that it expects to receive 16,000 new cases relating to investments and pensions this year – in line with the projected figure for 2014/15. It has also requested industry views on whether there will be a rise in complaints after the new pensions landscape comes into action in April. The Ombudsman reports that it is planning to recruit an additional 200 adjudicators to tackle a predicted 88,000 banking complaints, 33,000 insurance cases and 17,000 investment complaints. The figure for PPI cases is also predicted to fall, with the Ombudsman hoping to resolve 250,000 disputes, reducing the number of existing PPI cases from roughly 280,000 to 180,000. The consultation was open until 16 February following which the Ombudsman’s budget will be finalised and submitted to the Financial Conduct Authority. Click here to read the FOS consultation.

‘No-claims bonus’ information requirements included in draft CMA motor insurance order (January 2015): The Competition and Markets Authority (CMA) is consulting until 6 February on a draft order that would give effect to its planned remedies tackling anti-competitive practices it identified during its private motor insurance (PMI) market investigation. The draft order also sets out detailed reporting requirements for insurers, brokers and price comparison websites (PCWs). The draft order requires ‘PMI providers’ to give specified ‘NCB [no-claims bonus] protection information’ and an ‘NCB protection statement’ to prospective consumers at the point at which the add-on is offered or the consumer has selected the add-on, for example while requesting a quote on the provider’s own website. Providers are defined in the order as brokers or insurers with a consumer-facing relationship. PCWs must also provide the information where they provide access to an offer. Click here to access the draft order. Click here to read more on Out-Law.

Allianz 2015 Risk Report reveals the “top emerging risk for the next five years” is disruption from technological innovation and cyber attacks (January 2015): In its Risk Barometer report for 2015, Allianz said that the top business risk currently identified by the businesses that had responded to its survey was business interruption (BI) and supply chain risk. Natural catastrophes and the risk of fire or explosions were the second and third most commonly cited risk businesses are concerned about at the moment. Cyber risk was identified by survey respondents as being the “top emerging risk for the next five years”. Among the other top risks businesses identified that they are concerned they could have to contend with over the next five years is political or social upheaval and terrorism. The businesses included in the survey were spread across 47 countries including the UK, US, France, Germany and China. Click here to read the Allianz Risk Barometer Report. Click here to read more on Out-Law. We look in greater detail at cyber risk and its implications for the insurance industry in Section 10.

Terrorism risk insurance backstop to run until 2020 following US Senate reauthorisation (January 2015): In mid-January, the US President Barack Obama signed into law legislation extending the federal terrorism insurance backstop to take effect until 31 December 2020. The programme had lapsed on 31 December 2014 after the Senate failed to take up the legislation reauthorizing it. The legislation, the Terrorism Risk Insurance Program Reauthorization Act of 2015 (TRIA) is designed to keep terrorism risk insurance available and affordable for businesses by providing insurers with an assurance of government support in the event of a catastrophic attack. In order to trigger coverage under TRIA, an event must be certified as a terrorist act by the US government and result in aggregate losses to the industry of more than $200 million. Under the original programme, insurers would have been entitled to government support once aggregate losses exceeded $100m; a figure which will now increase by $20m each year from 2016 until the new $200m threshold has been reached. The revised programme also gradually reduces the percentage of insurers’ losses that the US government would cover above the threshold from 85% to 80%. David Gittings, chief executive of the Lloyd’s Market Association (LMA), which represents the interests of the underwriters that make up the Lloyd’s of London insurance market, said that TRIA’s reauthorisation ended the “period of considerable uncertainty” that had affected the industry over the winter break. Click here to read more on Out-Law.
Business interruption from terror attacks unlikely to require Pool Re rethink (January 2015): Business interruption (BI) losses resulting from short-term disruptions caused by terror attacks are unlikely to require the intervention of a market pool, according to Pool Re chief executive, Julian Enoizi. In an article published in Insurance Day on 20 January, triggered by concerns following the terror attacks in Paris, it is reported that Enoizi said, in relation to Pool Re, that the reinsurance pool was constantly reviewing the scope of its coverage but that it was created for the purpose of addressing areas where the market is unable to fulfil the needs of those it is serving. He said “Business interruption insurance is a dynamic market and to reflect the evolving terrorist threat, business interruption cover where there is no property damage is currently available to insureds across the UK through the insurance market”.

Recent US winter storms required a reconsideration of business interruption coverage (January 2015): Much of north east coast of the US was in lock down in late January because of winter storm Juno. Whilst the storm’s impact may have been less serious than at first feared, property owners and their insurers would have been dusting down their insurance policy wordings again, with a view to checking, in particular, the coverage available for BI losses arising from the storm. A key issue for insureds and insurers is whether their policies cover losses caused by those measures taken by governmental organisations or only cover BI losses caused by actual physical damage arising from the storm itself. Generally, BI and CBI coverage begins after a period of time, normally 72 hours, following an event and continues until the damaged or destroyed property is reinstated. Click here to read more on Out-Law.

The Financial Conduct Authority to gather evidence on how the payment protection insurance (PPI) complaints process is working (January 2015): On 30 January, the FCA announced that it expects to report in the summer on whether the industry’s current approach to PPI is meeting its consumer protection and market integrity objectives. Possible outcomes could include a consumer communication campaign or other rule changes, possible time limits on complaints, or continuing the scheme in its current form if it is found to be working well. The FCA may propose the introduction of a time limit on claims for mis-sold PPI as part of a review of “current trends” in such complaints. Click here to read more on Out-Law.

Online Court called for to handle low value civil cases (February 2015): The new online dispute resolution (ODR) system could be up and running by 2017 and operate alongside the traditional court system according to a report produced by a working group set up by the independent Civil Justice Council (CDC). The report sets out examples of similar systems already in operation across the world, including those run by online retailer eBay and the Financial Ombudsman Service (FOS). Click here to read more on Out-Law. Click here to access the CJC ODR webpage.

Court fees for claims to significantly increase (February 2015): The Government is set to raise issue fees for all claims with a value of over £10,000. It will introduce fees of 5% of the value of the claim for those claims over £10,000 with a capped fee of £10,000 payable on claims valued at £200,000 or more. Click here to read more on the charges which are expected to be implemented imminently.
7. Case Summaries

We take a look at some cases of interest since our last update.

FOS does not have jurisdiction to determine a D&O complaint: The case of R. (on the application of Bluefin Insurance Ltd) v Financial Ombudsman Service Ltd, Queen’s Bench Division (Administrative Court), 20 October 2014, concerns D&O insurance, Financial Ombudsman Service decisions, Judicial Review of FOS decisions and terms of cover.

A director had been declined cover by his D&O insurers due to late notification. The director had argued that he had notified his broker but that the broker had failed to notify his insurers. Rather than suing the broker, the director opted to seek recovery via the Financial Ombudsman Service (FOS). The DISP Rules which govern the FOS’ jurisdiction, amongst other things, specify that a “consumer” is entitled to bring a complaint under the FOS scheme and that a “consumer” is any “natural person acting for purposes outside his trade, business or profession”. The director was successful in obtaining a FOS decision against the broker for the broker’s negligence.

The broker chose to judicially review the FOS’ decision on the grounds that the director was not a “consumer” under the DISP Rules and therefore the FOS did not have jurisdiction to determine the director’s complaint. The broker alleged that the director was not a “natural person acting for purposes outside his trade, business or profession”, despite the director seeking to recover from the broker in a personal capacity.

The court found that the fact that the director could benefit from the D&O policy in a personal capacity did not make him a consumer and consequently the FOS did not have jurisdiction to determine the complaint.

Supreme Court considers the concept of “on behalf of” in a statutory context: The most common assessment of Plevin v Paragon Personal Finance Ltd Supreme Court handed down by the Supreme Court on 12 November 2014, concerns the aspect of “unfair”. However, value can also be extracted from this case due to the considerations the court gave to the concept of “on behalf of” in a statutory context.

The Supreme Court’s rejected the Court of Appeal’s finding that a broker’s failure to conduct a needs assessment for the consumer in breach of Insurance Conduct of Business Rules (ICOBs) was something done “by or on behalf of” the lender. The Supreme Court held that the ordinary and natural meaning of the words “on behalf of” imports agency and that is how the courts have ordinarily construed these words.

In this case, the broker’s failure to conduct its own needs assessment for the consumer could not be treated as something done “by or on behalf of” the lender as it was not acting as the lender’s agent. The case clarifies the law in so far that for an act to be done “on behalf of” another, for the purposes of section 140 of the Consumer Credit Act 1974, there must be an agency or deemed agency relationship with that person. Click here to read an article on this case on Out-Law.

The importance of compliance by insured parties with special claims conditions: In the decision of Ted Baker Plc & another v Axa Insurance PLC [2014] EWHC 3548 handed down by the Commercial Court in December, the Court dismissed a claim for business interruption (BI) losses arising from employee theft, due to the breach of a special claims condition in the policy.

Ted Baker sought to recover its losses after a company employee carried out a series of thefts at one of the company stores over a period of approximately five years. The key issue which led to the litigation between Ted Baker and its insurers, was the existence of a special claims condition in the policy which required the insured to provide specific information and documents in relation to the claim. It was expressly provided that if the condition was not satisfied, no claim would be payable.

Finding, inter alia, that Ted Baker had been in breach of the condition, Justice Edler dismissed its claim in the entirety. Given the provision of the information and documents would not have resulted in unreasonable cost and effort to Ted Baker, there was no reasonable justification for it to withhold the information and it was in breach of the claims condition.

Supreme Court: legal expenses insurance premium could not be recovered with costs: The successful party in a civil court case is not entitled to recover the cost of any ‘after the event’ (ATE) legal expenses insurance premium from an unsuccessful opponent, no matter how “reasonable” it was to have taken out the policy in relation to the claim. It was expressly provided that if the condition was not satisfied, no claim would be payable.

High Court judge overturns “overly generous interpretation” of relief from sanctions rules: Parties to civil litigation cases have been issued with an important reminder of the need to manage their cases effectively after the High Court overturned an “overly generous interpretation” of the rules governing when relief from sanctions can be granted. Click here to read more on Out-Law.

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The Insurance Act 2015 (the Act) received Royal Assent on 12 February 2015, rubber-stamping what has been described as “the biggest reform to insurance contract law in more than a century”.

The Act is a result of the joint review by the Law Commission and Scottish Law Commission into insurance contract law, which commenced just over 10 years ago, and it will bring changes to the following main areas:

1. Disclosure in non-consumer insurance contracts;
2. Warranties and other contractual terms; and
3. Insurers’ remedies for fraudulent claims.

We have set out in the table below details of the key changes introduced by the Act. We also consider the practical implications of these changes and provide practical advice to insurers and insureds on the new legislative requirements.

<table>
<thead>
<tr>
<th>Issue</th>
<th>Current Position</th>
<th>New Position</th>
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<tr>
<td>Disclosure – Non-Consumer Insurance Contracts (Part 2 of the Act)</td>
<td>Insureds must disclose every circumstance that they know, or ought to know, which would influence an insurer in fixing a premium or deciding whether to underwrite a risk. The current law therefore requires insureds to predict, without much guidance, what factors a hypothetical prudent insurer would be influenced by. Brokers have the same obligation and must also disclose every circumstance which the insured is bound to disclose – this can be difficult without psychic powers! Insurers must ask questions where information disclosed by the insured suggests that there is more that they need to know. Otherwise insurers generally play a passive role.</td>
<td>New duty of “fair presentation” that is aimed at encouraging active, rather than passive, engagement by insurers. Clarification and specification of matters that will be known or presumed to be known. Before entering into a contract of insurance, insureds will be required to disclose: • Every matter which they know, or ought to know, that would influence the judgement of an insurer in deciding whether to insure the risk and on what terms (very similar to current position) or, failing that; • Sufficient information to put an insurer on notice that it needs to make further enquiries about potentially material circumstances (active engagement of insurer required). The following will be considered to be “known” or “ought to be known” by insureds: • Matters that could be expected to be revealed by a reasonable search of information available to the insured (for example, information held within an organisation or by a broker). • Insured individuals will have knowledge of anything known by a person responsible for their insurance (for example, a broker). • Insured organisations will be deemed to have the knowledge of anyone who is part of the organisation’s senior management (that is, persons who play a significant role in making decisions about how the organisation’s activities are managed or organised - this may extend beyond the board of directors) or who is responsible for their insurance (for example, employees/risk manager or agents). The following will be considered to be “known” or “ought to be known” by insurers: • Matters known to individuals who participate on behalf of the insurer in deciding whether to take the risk and on what terms (for example, underwriting teams).</td>
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<td>Issue</td>
<td>Current Position</td>
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<td>• Knowledge held by the insurer and readily available to the person deciding whether to take the risk.</td>
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<td></td>
<td></td>
<td>• Matters known by an employee or agent of the insurer and which should reasonably have been passed on to the person(s) deciding whether to take the risk.</td>
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<td>Disclosure must be made in a reasonably clear and accessible manner; material representations of fact must be “substantially correct” and material representations of expectation or belief must be made in “good faith”.</td>
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<td>Individuals will be deemed to know matters which they suspected and which they would have known about had they not deliberately refrained from confirming or enquiring about it.</td>
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<td>There will be a removal of the disclosure duty imposed on brokers.</td>
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</table>
| Remedies for Breach of Duty of Pre-Contractual Disclosure - Non-Consumer Insurance Contracts (Part 2 and Schedule 1 of the Act) | The insurance contract may be avoided and an insurer can refuse all claims. This is the case even if the breach was committed by the broker.             | A range of proportionate remedies will be introduced depending on the scale of the breach and the state of mind of the insurer:  
  • Deliberate or reckless breach: the insurer will be able to avoid the contract and keep any premiums.  
  • Breach is neither deliberate nor reckless and the insurer would not have entered into the contract: the insurer will be able to avoid the contract but must return any premiums.  
  • Breach is neither deliberate nor reckless and the insurer would have entered into the contract on different terms (other than terms relating to premium): the insurer will be able to treat the contract as if those different terms apply (for example, any additional exclusions that would have been imposed).  
  • Breach is neither deliberate nor reckless and the insurer would have entered into the contract for a higher premium: the insurer will be able to reduce the cover to which the insured is entitled on a proportionate basis.  
These remedies will only be available if the insurer would not have entered into the insurance contract or would have done so on different terms. |
| Contractual Terms and Warranties – Consumer and Non-Consumer Insurance Contracts (Part 3 of the Act) | In non-consumer insurance contracts, “basis of the contract” clauses can convert all representations into contractual warranties.  
A breach of a warranty completely discharges an insurer from liability for all risks covered by the policy from the time of the breach, even if the warranty has no bearing on the risk. | “Basis of the contract” clauses will be prohibited from non-consumer insurance contracts.  
Instead of discharging liability, a breach of warranty will result in the insurance cover being suspended for the duration of the breach and re-instated once the breach has been fixed.  
An insurer will not be able to rely on non-compliance with a warranty, or other term relating to loss of a particular kind or at a particular location or time, if the non-compliance could not have increased the risk of loss that occurred in the circumstances that it occurred. |
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<td>• For example, a breach of a warranty associated with a burglary risk will also discharge an insurer from liability for losses arising from flooding.</td>
<td>• For example, if a requirement in a policy to maintain window locks is not complied with by the insured and loss is subsequently caused by flooding then the insurer will no longer be able to rely on the insured’s non-compliance to avoid liability as the maintenance of window locks could not have increased the risk of flooding occurring. However, this will not apply in respect of terms that define the risk as a whole, such as terms restricting cover to non-commercial use (rather than a term that relates to loss of a particular kind during such non-commercial use).</td>
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<tr>
<td>Remedies for Fraudulent Claims by Policyholders – Consumer and Non-Consumer Contracts (Part 4 of the Act)</td>
<td>In the event of fraud, insureds forfeit the whole claim and insurers can also avoid the whole contract.</td>
<td>There will be a clear statement of insurers’ remedies in the event of fraudulent claims brought by policyholders.</td>
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<td>Insurers:</td>
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<td>• Will not be liable to pay the fraudulent claim;</td>
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<td>• May recover any sums paid to the insured in respect of the claim;</td>
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<td>• May, by notice, treat the policy as terminated with effect from the fraudulent act and retain all premiums paid (but previous valid claims are unaffected).</td>
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<td>The same rights apply in respect of fraudulent claims made by persons under group insurance policies, although only in respect of those persons who committed fraudulent acts and not the other innocent members of the group policy.</td>
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<td>Insurers will need to serve a notice on the fraudulent group member and the person who took out the policy on behalf of the group.</td>
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<tr>
<td>Sums paid in respect of the claim may be recovered from the person who committed the fraudulent act, or the person who took the policy out on behalf of the group, if they had not passed sums on to the fraudulent person.</td>
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<tr>
<td>Utmost Good Faith – Consumer and Non-Consumer Contracts (Part 5 of the Act)</td>
<td>Either party can avoid an insurance contract if the other failed to act in accordance with utmost good faith.</td>
<td>Avoidance of contract will be removed as a remedy for breach of this duty. Any parts of legislation prescribing this as a remedy will be abolished.</td>
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<tr>
<td>Insurance contracts will still be based on upon utmost good faith and clauses and obligations will be interpreted in a way that favours compliance with this duty.</td>
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<tr>
<td>Contracting Out of the Insurance Act – Consumer and Non-Consumer Contracts (Part 5 of the Act)</td>
<td>In consumer insurance contracts, insurers will not be able to contract out of the Act to place an insured in a worse position than they would have been in under the provisions of the Act.</td>
<td>In non-consumer insurance contracts, parties will be able to agree less favourable terms than the Act provided the alternative provisions are clear and unambiguous and sufficient steps are taken to draw them to attention of the insured or its agent before the contract is concluded. Parties to both consumer and non-consumer insurance contracts will not be able to contractually prevent the prohibition on “basis of contract” clauses.</td>
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</table>
Practical implications of change and things to consider

Disclosure – New Duty of “Fair Presentation”

Insureds

- Insureds should review their disclosure processes to ensure that those responsible for procuring insurance disclose all matters they will be presumed to know.
  - For example:
    - Consider keeping internal records of the names and roles of individuals responsible for arranging insurance cover, as matters within their knowledge will need to be disclosed.
    - Senior management should be involved in any disclosures made.
    - Evaluate the steps taken to obtain information from internal and external sources and records kept to demonstrate that reasonable searches have been made.
- The Law Commission stated that the new standards are designed in part to prevent “data dumping” (that is, the presentation of large volumes of material without distinction between the material and trivial). Pre-disclosure analysis and filtering of relevant information is needed to ensure that disclosure will be made in a reasonably clear and accessible manner.

Insurers

- Insurers will not be able to rely on a passive approach to disclosure if seeking to exercise remedies for non-disclosure. A more active engagement will now be encouraged and, if not in place already, insurers should consider establishing systems and processes to identify when further enquiries need to be made before underwriting risks.
  - For example:
    - Consider keeping internal records of the names and roles of individuals responsible for these decisions.
    - Establish appropriate processes and lines of communication to ensure that relevant information is shared widely enough with those making decisions to cover certain risks.

Remedies for Breach of Duty of Disclosure

Insurers

- To bring an action for relief for non-disclosure, insurers will need to prove how they would have acted differently if the breach had not occurred.
  - For example:
    - Such an action could be supported by records of underwriting decisions made and factors considered.
    - Disclosure of underwriting guides and other relevant documents may now be required.
    - Insurers will need to consider the extent to which they are willing to disclose commercially sensitive information contained within such records or documents.

Remedies for Fraudulent Claims by Insureds

- As drafted, claims that would be valid, but for the occurrence of an act of fraud, could be denied due to such fraud. This is even if the fraud does not have a material effect on the insurer’s decision to pay the claim – will this be a big area of challenge?

Next steps

The provisions discussed above will come into force in 18 months’ time on 12 August 2016 so insurers and insureds need to start considering how they might be impacted by the changes and taking all necessary action to ensure that they understand the new landscape and are fully compliant. This needs to be done sooner rather than later as annual policies issued or renewed in August 2015 will be in force when the changes take effect.

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9. The Consumer Rights Bill: a look at the proposed bill that will consolidate consumer protection laws in the UK

Background
Consumer protection laws in the UK are complex and can be difficult to understand due to the raft of separate pieces of legislation protecting consumer rights. The Consumer Rights Bill (the Bill) aims to rectify this by consolidating the existing law and creating one overarching piece of legislation.

The Current Status of the Bill
The Bill has now passed through the third reading in both the House of Lords and the House of Commons and is now in the ‘ping pong’ stage during which it is moving between both Houses until the exact content has been agreed.

We caveat what follows by noting that the Bill is not yet in its final form and has not yet received Royal Assent. We also await finalised guidance on the provisions of the Bill from The Department for Business Innovation and Skills.

It is intended that the finalised Bill will come into force, as the Consumer Rights Act 2015, in October 2015.

The Bill
The Bill is split into three parts: Part 1 deals with consumer contracts for goods, digital content and services, Part 2 covers unfair terms and Part 3 contains miscellaneous and general provisions.

For the most part, the law set out in the Bill is significantly the same as the laws which are currently in force in the UK, in fact the majority of the Bill’s content is simply a restatement of the pre-existing legislation. There has however been some changes which could impact on firms in the insurance industry in particular and which could require some practical changes to be made – two areas of change which are of relevance to insurance firms include the provisions relating to services in Part 1 of the Bill and the provisions on unfair terms found in Part 2 of the Bill and this article will focus on these two changes.

The Bill will also introduce, in Schedule 8, significant changes to private actions in competition law including: expanding the jurisdiction of the Competition Appeal Tribunal, the introduction of opt-out collective actions and the establishment of voluntary redress schemes. However, these changes are beyond the scope of this article.

Application
General
The Bill covers contracts and notices between a ‘trader’ and a ‘consumer’.

A ‘consumer’ is defined as “an individual acting for purposes that are wholly or mainly outside that individual’s trade, business, craft or profession.” This definition of consumer is wider than existing definitions found in UK and EU law as it includes individuals who are entering into a contract for a mixture of business and personal reasons.

A ‘trader’ is a “person acting for purposes relating to that person’s trade, business, craft or profession, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf.” This definition includes government departments and public sector authorities.

Territorial
Territorially, the Bill extends to England, Wales, Scotland and Northern Ireland. However, there are some areas in the Bill which have separate rules for Scotland, for example the Bill makes reference to the Scots law remedy of specific implement (a remedy used to compel performance).

Financial Services
Certain parts of the Bill do not apply to financial services firms as they implement part of the Consumer Rights Directive (the Directive) which does not apply to such firms. The Bill does not make it particularly clear which terms are inapplicable to financial services firms and it requires looking behind the Bill to discover this. However, certain provisions relating to the contractual status of information and the delivery and risk in goods which originated in the Directive clearly do not apply to financial services firms.

The Supply of Services
The provisions relating to the supply of services consolidate various pieces of legislation and regulation. The new provisions will apply alongside the various financial services-specific regulations which are imposed on businesses (namely by the FCA). It is intended that if stricter duties or requirements are already in place that these will take precedence over applicable provisions outlined in the Bill.

Key Changes
Two changes are particularly important in the insurance sector, namely the remedies for supply of services and the status of certain statements made prior to entering into a contract for the supply of services.
1. Remedies
Consumers now have statutory remedies of repeat performance and price reduction if a service does not conform to the contract, the remedy available is dependent on the level of non-compliance, for example:

- if a trader breaches their duty to provide services with 'reasonable skill and care', or does not comply with information that they have provided to the consumer about the service, the consumer is entitled to repeat performance or a price reduction for the services; or
- if the service is not performed within a reasonable time or the trader does not conform with the information that they have provided to the consumer, which does not relate to the service, then they are entitled to a price reduction for these services.

Although the Consumer has the right to these particular remedies, in the above circumstances, they are not excluded from seeking other remedies such as damages or specific performance (so long as they do not recover twice for the same loss).

The inclusion of specific statutory remedies, where none previously existed, improves the consumer’s position and provides clarity on the consumer’s rights.

2. Contractual status of voluntary statements
Voluntary statements, spoken or written, about the trader or the trader’s service and which are made by a trader can now be deemed to be binding contractual terms provided the statement:

- is taken into account by the consumer when deciding to enter into the contract
- is taken into account by the consumer when making any decision about the service after entering into the contract.

At present, if a consumer was presented with misleading information, this information would not be deemed part of the contract and therefore, the consumer’s remedy would be to raise an action of misrepresentation. As any misleading statements made by the trader can now become contractual terms, a consumer will also be entitled to raise a breach of contract claim.

The significance of this is that:

- breach of contract claims are generally easier to prove
- the level of damages awarded for a breach of contract claim is generally higher than for a misrepresentation claim, this is because damages for breach of contract aim to put the consumer in the position that they would have been had the contract been performed.

In summary, the consumer’s position is enhanced in that the new position is likely to result in the consumer receiving a higher level of damages. This makes it increasingly important for traders to seriously consider all communications made to the consumer.

Unfair Terms
The test for unfair terms under the Bill is the same as that under the Unfair Contract Terms Act 1977, it provides that: “a term is unfair if, contrary to the requirements of good faith, it causes a significant imbalance in the parties’ rights and obligations to the detriment of the consumer.” The test for notices mirrors the test for terms except that it does not make reference to ‘the contract’.

Key Changes
There are a number of important changes to the law on unfair terms which include:

1. The ‘Prominence’ Requirement
The most significant change relates to ‘relevant terms’, which are terms specifying the main subject matter of the contract or setting the price. These terms are not subject to the fairness test provided that they are both:

- transparent – in plain and intelligible language and if in writing legible
- prominent – brought to the consumers attention in such a way that the average customer (who is well informed, observant and circumspect), would be aware of the term.

This goes further than the existing law which includes the transparency requirement but not the prominence requirement. This added requirement means that businesses should be even more vigilant in ensuring that relevant terms are clearly brought to a consumer’s attention.

The fact that a relevant term is not transparent does not make it automatically unfair however, it exposes the term to the scrutiny of the ‘fairness test’ (unless the term was found on the ‘grey list’ – see below).

2. Individually Negotiated Terms
The Bill provides that a term can be deemed to be unfair even when it has been individually negotiated with the consumer. This goes further than the existing law and the Consumer Rights Directive.

Despite this change it is probably unlikely to have a major impact given that very few consumer contracts are actually individually negotiated anyway. Consumers rarely have the bargaining power to negotiate their contract terms individually with traders.
3. The ‘Grey List’
The ‘grey list’ is an indicative and non-exhaustive list of terms in consumer contracts which may be regarded as being unfair. A term can be fair even if it is found on the grey list, and it can be unfair even if it is not. The list gives an indication of the types of terms which are likely to be considered unfair without any justification being provided.

The list is part of existing legislation but the Bill adds an additional three terms which have the object or effect of:
• allowing the trader to decide the characteristics of the subject matter after the consumer is bound
• allowing disproportionate charges or requiring the consumer to pay for services which have not been supplied when the consumer ends the contract
• allowing the trader discretion over the price after the consumer is bound.

It is worth noting that not all provisions on the grey list apply to financial services suppliers (although the above three do). The particular exclusions can be found in the Bill.

4. Notices
A consumer notice is broadly defined as a notice that relates to rights or obligations between the trader and the consumer or restricts the trader’s liability. It includes announcements and other communications even where these are made orally.

Consumer notices were not expressly covered in previous legislation but they are specifically covered in the Bill which brings them within the fairness regime. The Bill treats consumer notices in much the same way as contract terms.

It is important to be conscious of the content which is included in notices and ensure that such content complies with the fairness test.

5. Duty to Consider Fairness
A court is now under an obligation to consider contractual terms for fairness, even if neither party to the proceedings raise fairness as an issue. This reflects the position of the European Court of Justice.

This will lead to contract terms coming under increasing scrutiny by the courts and terms may be held to be unfair even when the consumer has not complained of unfairness.

Digital Content
When in force, the Bill will be the first piece of legislation to regulate the supply of digital content (including data and software). Generally, the supply of digital content is treated in much the same way as the supply of goods, in that it must be of satisfactory quality, fit for purpose and it should conform with the description provided by the trader.

The supply of digital content will be regulated when:
• It is supplied for a price
• It is supplied free with goods and services which the consumer has paid for and which would not be generally available otherwise.

The provisions do not apply merely because the trader supplies a service by which digital content reaches the consumer.

The impact of these provisions is unlikely to be significant in the insurance sector. However, it could impact where a particular institution supplies digital content as part of its services.

Conclusion
Following its implementation, the Bill will provide a single point of reference for consumers and businesses who want to determine their rights and obligations. In theory, this should make compliance with consumer protection laws much easier in the long run.

However, as the Bill makes changes to contractual relationships and affects how products should be offered to consumers some preparation will be required at the outset. Therefore, it is important that businesses begin to consider the impact that the Bill might have and the changes which may be needed in order to comply with the new legislation. It provides a good opportunity for businesses to reconsider and review product terms and conditions, product literature and other communications.
10. Cyber Risk, Cyber Insurance and D&O policies: a look at the issue that is rocketing up the managerial agenda of global businesses with a separate spotlight on cyber risk in the Middle East

Cyber attacks can be devastating, eroding consumer trust, damaging a business’s brand and saddling companies with significant fines and exposure to law suits. Yet a predicted boom in cyber risk insurance has not as yet materialised. Where there is a lack of cover companies are looking to their existing policies to identify where uninsured cyber losses may be covered.

Cyber risk policies have been around since the 1990s but the need to take out specific cover has gained more attention in the wake of high profile incidents like those suffered by Sony Pictures last year and US retailer Target in 2013. A $1bn virus attack on over 100 banks publicised last week will focus minds further.

Cyber insurance is needed to cover both first-party and third-party losses. First party losses should cover everything from the loss or damage to the company’s digital assets to business interruption from network failure to loss of reputation and customers as a result of a cyber-attack or data breach.

Third-party losses include the cost of compensating any customers or anyone else who incurs loss as a result of a breach, as well as any resulting litigation. Insurers are increasingly refining coverage limits as well as the specifics of what will be covered when a breach occurs and a firm has to notify all those affected. The numbers can be huge – 120 million customers of Target had to be notified, with potentially 40 million of those requiring ongoing credit monitoring.
Companies who suffer losses are increasingly looking to D&O policies to cover uninsured losses. The trend is most visible in the US but is likely to extend to the UK. Where allegations of poor cyber risk management are made traditional side A cover, for losses that the director’s company can not or will not indemnify, will be affected, as will side B cover, for companies when they do indemnify their directors. However, the biggest impact will be on side C cover (or other entity cover), which covers the companies own liabilities as a legal entity. It is this part of a policy that contains the biggest scope for D&O insurers to pick up third party cyber losses where the company is targeted for any breach.

Despite this D&O cover will not insulate a business from all cyber losses. D&O policies contain exclusions, such as contractual liability exclusions, which exclude loss based on, arising from, or in consequence of any actual or alleged liability assumed under any written or oral contract or agreement. This may prevent the recovery of certain losses.

Companies should be assessing the risks posed by third parties who have access to a business’s customer data. A NetDiligence Survey found that 20% of all data breaches occurred at third-party vendors. Sound business practice might be to insist that all third parties have their own cyber insurance in place. At the very least a company should examine the contractual liability clauses in contracts with its third parties to make sure it is not exposed.

Headline-grabbing attacks have not led to as much growth in the sales of cyber risk insurance as predicted, but they should prompt all companies to take cyber risk seriously.

The UK Department for Business, Innovation and Skills (BIS) said last year that 81% of large organisations and 61% of small and medium sized enterprises experienced a security breach in 2013. The average resulting cost for SMEs was between £65,000 and £115,000, while for larger businesses it ranged from £600,000 to £1.5 million.

Regulators are paying more attention than ever – in the UK the Information Commissioner’s Office and the Financial Conduct Authority have responded to the threat by issuing fines, bringing financial penalties and unwelcome attention to organisations including the British Pregnancy Advice Service; Royal Bank of Scotland; NHS trusts, and local authorities.

There is evidence that companies are taking cyber risk seriously. According to Allianz Global Corporate and Specialty’s 2015 Risk Barometer, cyber crime and data loss is now the fourth biggest business concern for businesses operating in the Americas, up from eighth in 2014. In Europe, the Middle East and Africa, it has jumped from ninth to fifth spot on the risk list.

All boards should be discussing cyber risks on a regular basis. A dedicated cyber risk sub-committee is a good idea and a board might even want to consider bringing in an independent security expert to provide a different perspective on the cyber risks facing the company.

One major advantage of putting in place a sound cyber plan is that it can help when defending court action. In a US case shareholders sued the directors of hotel group Wyndham when there was a data breach which exposed the personal information of 600,000 of its guests. The court dismissed the claim in part because Wyndham’s board discussed cyber-attacks at 14 separate meetings during the time period covered by the lawsuit, thereby demonstrating due diligence.

When designing cyber security plans businesses should take advantage of the cyber security best practice protocol published by the US National Institute of Standards and Technology and UK government department BIS’s ‘Cyber Essentials’ scheme.

These schemes, which set national best practice for businesses tackling cyber risk, are increasingly being incorporated by the insurance industry into policy wordings: in particular with regard to what is reasonable behaviour by a company when protecting itself from attack.

It is possible that some cyber risk will be covered in a CGL policy, but whether a CGL policy will pay out is far from conclusive and dependent on both jurisdiction and policy wording. The US Insurance Services Office, an insurance industry organisation which develops standard insurance forms, introduced a number of data breach exclusion clauses in April 2014, which will further limit cover for cyber loss on CGL policies.

As part of a cyber risk plan companies should consider putting cyber-specific insurance in place. It should cover the two main kinds of cyber incident: cyber attacks where systems are disabled or used for malicious purposes, and data breaches where data is stolen by attackers or exposed when an employee loses a phone, computer, file or password.

Cover for notification and redress programmes, as well as regulatory investigations and fines, are standard on cyber risk insurance policies.

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**Middle East: Protecting Business from increasing Cybersecurity risks**

As reported in the 2014 Global Economic Crime Survey by PriceWaterhouseCoopers (PwC), cybercrimes are the second most common form of economic crime reported in the Middle East. That same survey estimates that an approximate amount lost due to cybercrime in the Middle East may vary between USD 1 million and USD 100 million annually.

The most common targets of cyber attacks in the Middle East are applications, networks, systems, mobile devices, removable storage devices and data held by third parties. In fact, the recent rise in cyber-criminals attacking internet infrastructure has meant a rise in password and credential theft, data theft, significant security breaches and infiltrations.

A Middle East ICT Security Study undertaken by Cisco also found that the Middle East shows increasingly high levels of smart device adoption, set to grow from 133 million to 598 million by 2018. These new technologies come with new complex security threats which the marketplace is struggling to keep up with.

Understandably, businesses are reluctant to publicly report security breaches but many of these new complex threats are sector specific. Companies in the banking and finance sectors are the most obvious targets and countries in the Middle East, whose economies depend largely on oil and gas, have become increasingly vulnerable to cybercrime.

In 2013, Gulf News reported that Saudi Aramco was the victim of an assault which infected over 30,000 of its machines. It is said to have taken over two weeks to recover, disrupting the world’s largest oil producer. According to reports, the same malware was the source of an attack against Qatar’s RasGas, which is considered to be among the largest liquefied natural gas producers in the world. The Syrian Electronic Army is claiming credit for hacking into Qatar’s e-government services as well as multiple news websites and social media accounts including Facebook, Twitter and Skype.

While parts of the Middle East are no stranger to terror threats and civil unrest, it is obvious that these economically rich countries that hold some of the world's largest oil and gas reserves will also be targets of “hacktivism”, which is the subversive use of computers and computer networks to promote political agendas and state-sponsored attacks.

High-profile breaches and new trends in cybercrime have led to a heightened interest and need for cyber liability insurance in the region. Leading insurance brokers in the Region have advised that increasingly local businesses are requesting more information regarding stand-alone cover with particular interest from the financial institutions and also internet service providers.
For the Boards and senior management of businesses this increasing exposure requires active consideration to protect the assets of the business and also avoid liability and censure. Directors and officers have duties of good faith to the business and shareholders at law and increasingly in regulated sectors such as financial services and healthcare, the regulatory authorities are launching investigations and censuring or fining organisations for weaknesses in systems of control. The financial consequences are significant and include losses incurred in restoring systems, damage to brand reputation and business interruption costs and liabilities. The costs of dealing with regulatory investigations and defending third party claims are potentially very large.

Cyber liability insurance including data breach response services are now increasingly available and consideration of such policies can be a necessity in demonstrating that the Boards are acting in the best interests of the company. Directors and officers should now be considering stand-alone cyber insurance to mitigate security risks to include forensic costs, incident and crisis management response costs and litigation costs that could follow from major cyber breaches.

Traditional insurance policies including commercial general liability and directors and officers cover have become the subject of ‘coverage’ disputes for such cyber breach claims. Most general liability clauses now specifically exclude cyber risks and where they do not it should be recognised that these traditional lines were developed without contemplation of these cyber risks. Insurers are not surprisingly discouraging policyholders from making claims under such policies counselling more attention to new types of specialty cyber coverage. This does not mean that contested coverage issues around such traditional lines will not be justified and there is case law where courts have supported insured claims for cover under typical general liability that deserve careful consideration and the need for revisions to policy wordings and more attention to exclusions.

To be eligible for cybersecurity insurance, insurers will require that companies have technology solutions implemented which are strong enough to weather the threat of cyber attacks including sophisticated password protections for access to company servers and email accounts, encryption of highly-sensitive data, and robust firewalls.

Many insurers may offer better rates to those who are better secured and this will include examination of procedures and policies for managing responses to security breaches where mitigation of losses will be key. Drafting of effective cyber insurance policies requires a thorough understanding of specialist cyber liability risk and prevention mechanisms.

Of course, governments play a vital role in managing the threat of cyber crime. Indeed, insurers want to know that companies are operating within a robust legal and regulatory framework which both protects entities from cyber attacks but also promotes emergency preparedness so that companies are prepared for, and responsive to, major breaches.

Amongst the member states of the Cooperation Council for the Arab States of the Gulf (member states being Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates (UAE)), governments are much more aware of the need to target cybercrime and punish offenders.

As an example, in the UAE, a new Cyber Crimes law (Federal Law No.5 of 2012) was passed in December 2012 which provides for a range of offences connected with IT security issues and hacking including a number of provisions specifically aimed at State security.

In Qatar too, a new Cybercrime Prevention Law (No. 14 of 2014) was recently passed which imposes many sanctions and severe penalties for offenses committed through the internet, IT networks, computers and other related crimes. While this legislation is crucial to safeguarding Qatar’s technological infrastructure and promoting cybersecurity, Qatar’s Ministry of Information and Communication Technologies (ictQATAR) has also created an agency to enforce its law and promote collaboration between the government and the private sector which would foster knowledge sharing and enable companies to better equip themselves against cyber crime. The Qatar Computer Emergency Response Team (Q-CERT) proactively seeks to identify major threats to the digital space and resolve them before they cause harm to a persons or companies. The response team also promptly reacts in cases where cyber-attacks have actually occurred in any of the critical sectors. The response team is always ready to receive incident logs from everyone in Qatar, when they encounter a cyber-mischief act. Such initiatives will also be key to insurance programmes and the mitigation of risks.

Furthermore, ictQATAR recently held a cyber security conference where it launched a series of sector-specific drills organised to improve the readiness of public and private organisations against cyber threats. The first drill will focus on the oil and gas sector in an effort to set a global standard information security exercises to improve government-industry collaborations.

With the Middle East’s cybersecurity sector valued to reach 25 billion by 2025, the need for cyber insurance is as real as ever. While new technologies and sector-specific threats breed new risks and challenges for companies operating in the region, proactive steps by governments and their agencies to foster collaborations between the state and the private sector show a positive push towards risk mitigation and new ways for insurers to model client risk.

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11. Senior Insurance Managers Regime: Important changes are proposed to the UK’s rules for senior managers in the insurance sector

Senior individuals working for insurance firms will become ever more directly responsible for the decisions that they make once the new regime proposed by financial regulators comes into force, in the latest example of increased personal accountability for financial managers.

Although the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) will not have the same powers to prosecute insurance managers criminally for misconduct as are about to be introduced in the banking industry, both regimes will result in senior individuals being held increasingly responsible for failings by their firms. This may well lead to an increase in prosecutions by the Serious Fraud Office (SFO) and similar criminal investigatory bodies, even where the regulators’ powers are limited.

Ever since the financial crisis of 2008, when regulators were criticised by politicians and the public for their perceived failure to hold anybody personally responsible, the FCA has ramped up enforcement action against individuals. Just last November, the FCA issued fines and industry bans against three former senior directors with insurer Swinton after holding them responsible for a sales culture within the company that, one year previously, had cost it over £7 million in fines (click here to read more on Out-Law). Fines issued by the FCA this financial year are already at £1.39 billion – a substantial increase from the not insignificant £425m total issued in 2013/14.

The regulators have been clear that their new regime for insurers should not be identical to that for banks, given the differences in industry business models and the level of risk each poses to overall financial stability. Some of the changes, including a “fit and proper” test for senior managers at large firms, also come from the EU, whose Solvency II regulatory regime is due to come into force on 1 January 2016. However, the consultations make it clear that the PRA is looking for “suitable alignment” of the conduct standards for individuals at both insurers and banks.

Therefore, it is worth looking to the banking senior managers’ regime to give some indication of what these proposals might contain. Near-final rules are due shortly ahead of the banking regime itself coming into force from mid-2015. Under the new banking regime, senior managers’ functions will be outlined by the PRA and FCA, with prescribed responsibilities being allocated by firms dependent upon each manager’s function. Statements of responsibility will have to be prepared by firms setting out precisely each individual’s responsibilities, who reports to them and how they will go about their day to day role.

The banking regime will work in conjunction with the new criminal offence under section 36 of the Banking Reform Act, which covers a member of senior management being involved in a decision or failing to be involved in a decision which they should have been which leads to the failure of that bank or financial institution. Whether the criteria of that offence will ever be met or whether it will ever be in the public interest to prosecute, it is certainly an indication of the intention to criminalise aspects of senior management conduct.

Within the banking senior manager’s regime are provisions for remuneration, including both claw back and deferral. There are minimum amounts which must be deferred for no less than seven years, with claw back being allowed for a period of a minimum of seven years from the time in which any award was given. These extremely lengthy provisions are aimed at ensuring that individuals are able to account for a significant period of time after any events take place.

The new Senior Insurance Manager’s Regime (SIMR) will apply to senior managers who are running insurance companies, or who have responsibility for certain ‘key functions’. The regulator will look more closely at those applying for these roles because it believes that a higher hurdle to entry is more resource effective than seeking to remove individuals due to any subsequent misconduct. However, this new regime will not entirely replace the existing ‘approved persons’ regime, which will continue for those who are not senior insurance managers. This already sets it apart from the new rules for bankers, which will replace the existing regime entirely. The PRA is currently consulting on which insurance roles should fall under which regime.

Clearly defined responsibilities will be allocated to those who are subject to the new regime, in the same way as proposed for those in the banking industry. Whilst there will not be a similar ‘presumption of responsibility’, the regulator will still likely start form the position that where an individual takes responsibility for an area or an activity then that individual will be the first to face questions in relation to perceived failures in that area. There is no criminal offence within the current insurance proposals similar to that within the banking regime, but there are new conduct rules that will be put in place by the FCA which will apply only to those captured by the SIMR or significant influence function holders.
As part of the requirements, the PRA will identify the core responsibilities that they believe those individuals should take. They include fitness and propriety, developing the firm’s culture and standards, embedding that culture and those standards in the day to day management of the firm, producing financial information, regulatory reporting, oversight of capital and liquidity, development of the firm’s business model and training. Towards the end of the list is ensuring and maintaining the independence, integrity and effectiveness of the firm’s whistle blowing procedures – an indication of how whistle blowing is becoming increasingly important within the regulatory sphere.

Again, the regulators do not really have the same powers over insurers’ remuneration as they do over bankers’ remuneration. However, what is almost inevitable is that when regulators visit firms as part of their supervisory relationship or investigations the regulator will examine how senior management are remunerated and how this incentivises them to ensure that they are complying with their responsibilities. It may well be a less formal process than that adopted in the banking regime, but deferral and claw back policies may help firms to demonstrate compliance in this regard.

All of this stems from a desire for increased accountability and transparency within the financial services sector, on behalf of both regulators and government. As well as enabling regulators to hold those within the industry accountable, this new approach will make it clearer how the industry and its institutions work, what its aims are and who holds responsibility.

While we may not be looking at increased criminalisation of senior management conduct within the insurance regime in quite the same way as we are in the banking regime, it appears quite clear that there is a push towards holding senior management responsible for any misconduct, criminal or otherwise, even if the FCA and PRA are themselves unable to prosecute. It is certainly worth keeping an eye on what is happening in the banking regime, as this will provide a signpost as to what it likely to happen within the insurance sector.

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12. Attestations: guidance for firms to know what to do when faced with a request for an attestation from the regulator

Financial regulators have been using attestations for a number of years to obtain personal commitments from named individuals about a particular state of affairs at their firms. However, recent moves by the Financial Conduct Authority (FCA) and Prudential Regulation Authority (PRA) to increase senior individuals’ personal accountability for the actions of their firms mean that they will become an increasingly important regulatory tool.

What is an attestation?
Attestations enable regulators to formally obtain a personal commitment from a named senior individual at an authorised firm that their firm is complying with some aspect or other of the regulatory rules. They are designed to make the chief executive or board of a regulated firm pay particular attention to an area that is perceived as being weak or having poor systems and controls in place. Attestations are usually quite short, but can lead to serious consequences for the individual if given incorrectly.

A number of people in regulated firms may be asked to provide an attestation. These can range from senior managers such as chief executives, chairmen or directors; to compliance officers and possibly others with managerial or supervisory roles. However, the FCA will usually ask for an attestation to be given by the most relevant significant influence function holder.

Attestations are used for four main reasons:
- **notification**: a commitment to notify the regulator if an emerging risk changes in nature, magnitude or extent
- **undertaking**: a commitment that a specific action will take place within a specified time period
- **self-certification**: confirmation that certain risks have been mitigated or resolved
- **verification**: after a regulatory notice, an attestation can be used to verify that the issues identified by the regulator have been resolved and a particular action has taken place.

What to do when faced with an attestation request
A request for an attestation will generally accompany the results of a regulatory review or investigation, meaning that you will already know the regulator’s area of interest. Pay close attention to the specific findings of that review.

Although the attestation wording may be very short, a substantial amount of work and due diligence may be needed before the attestation can be given. You should be able to show the process used to investigate relevant internal systems and controls in a controlled environment when answering a request for an attestation so keep good records of what you do. It is important to look at existing controls and processes with an open mind and to document absolutely everything so that you can provide evidence of your conclusions. That evidence must reliably lead to your conclusions with a seamless line of responsibility from the current position to your future action plan. Some firms will undertake internal audits to verify the evidence.

Sometimes, the notice from the regulator setting out the attestation request will provide a timescale. It is really important to ensure that this timescale gives you enough time and, if it doesn’t, to go back to the regulator and explain why you need more time. If you agree to a timescale, you will be expected to deliver against it.

If possible, provide a positive attestation. However, if this is not possible you must state the situation as you see it and not say all is fine if it is not. Where existing practices do not measure up to regulatory standards this should be explained, justified if possible and a remediation plan provided.

Risks of signing an attestation
Signing an attestation makes an individual an easy target for future enforcement action if non-compliance is identified post-signing. The FCA has also said that it intends to name and shame persons under investigation. For these reasons, it may be appropriate to use internal attestations to reduce the risk and perhaps spread the burden of signing the final attestation with the regulator. An attestation which is signed by all board members internally can produce the right discussion, debate and challenge.

When facing an attestation request, as in all dealings with the FCA, it is important to keep in mind Principle 11 in the FCA Handbook: that a firm must deal with its regulators in an open and cooperative way. In addition, section 398 of the Financial Services and Markets Act states that it is an offence to knowingly or recklessly provide false or misleading information in purported compliance with regulatory requirements.

With these two principles in mind, it is important to ensure that you are absolutely clear as to the purpose and scope of the attestation request at the very outset. If in doubt, pick up the phone or email your FCA supervisor to check your understanding of the notice.
Future developments

In August 2014 the FCA’s practitioner panel asked the regulator to identify exactly what its expectations were around the use of attestations, because there had been a number of industry concerns in relation to their use. In response, the FCA said that it planned to make “substantial and important” changes to the process to ensure that attestations were being used consistently.

According to the letter, the FCA plans to issue “revised internal guidance and supporting materials” to its supervisors in order to emphasise the importance of clarity and transparency when using attestations. It also plans to introduce stronger governance requirements, including a new requirement that attestations be signed off by a department head and a new central review process; and has committed to publishing data on its use of attestations on a quarterly basis.

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13. Europe: General Data Protection Regulation – What does the data protection reform mean for obtaining ‘customer consent’?

If a business wants to process data that relates to a person located in the European Union (EU), it must comply with EU privacy laws. By far one of the easiest ways to lawfully process personal data is by obtaining consent from the person whose data a business would like to process. But how does a business demonstrate that it has obtained valid consent from a customer or user of its services? This is one issue that remains controversial as review continues at EU level of the European Commission’s proposal for a new EU-wide data protection law - the General Data Protection Regulation. If current proposals for new data protection laws are implemented then rules about consent could cripple innovative businesses that increasingly rely on data to provide services.

What does the current law say?
Under the existing Data Protection Directive, for a business to rely on consent as a valid ground for processing personal data, the consent must have been unambiguously given, ‘freely’ given and not given under compulsion or as a result of an act of deceit, and constitute a “specific and informed indication” of a person’s wishes for data to be processed. If the consent relates to data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, and the processing of data concerning health or sex life, it must be provided in a way so that it could be described as ‘explicit consent’, which can be contrasted with ‘implied consent’. Data can be transferred to countries outside the EU where these provisions are complied with and shared with another business or organisation.

How has this been interpreted?
The Article 29 Data Protection Working Party, set up under the Directive 95/46/EC of the European Parliament, has said that for consent to be ‘unambiguously given’ the procedures for obtaining it “must leave no doubt as to the data subject’s intention”, and enable the data subject to give an “active indication” of his or her wishes. At a minimum some form of “active behaviour” is required, according to the Working Party. For consent to be ‘freely given’ the Working Party said that the business seeking consent should be able to demonstrate that there is “no risk of deception, intimidation, coercion or significant negative consequences if consent is not given.”

To be ‘specific and informed’ means that “blanket consent without specifying the exact purpose of the processing is not acceptable”. If there are multiple purposes for which data may be processed, each would need to be listed.

What did the European Commission’s proposal say in 2012 about consent?
In the Commission’s proposal for a new General Data Protection Regulation, it said that whenever a business relies on consent as a valid ground for processing personal data, that consent should be ‘explicitly’ given. This would change the current position where consent only need be ‘explicit’ where a business wants to rely on it as a basis for processing sensitive personal data.

Explicit, freely given, specific and informed consent obtained through a statement or “clear affirmative action” would be required by businesses seeking to rely on individuals’ consent to go ahead with personal data processing. The Commission said consent to such processing would not be legally valid if obtained where there is “a significant imbalance between the position of data subject and the controller”, and said individuals should also be given the right to withdraw their consent at any time.

What does the European Parliament’s amended version say about consent?
For the proposed new data protection rules to be introduced, the Commission, the European Parliament and EU’s Council of Ministers must formally agree on the same wording. However, there are major differences between the Parliament and Council on a number of the areas of prospective reform, including notably in relation to the ‘consent’ rules.

The Parliament has given its backing to the new definition of ‘consent’ suggested by the Commission. It also believes consent needs to be “freely given specific, informed and explicit” and provided “either by a statement or by a clear affirmative action”. The burden of demonstrating that the legal standard of ‘consent’ has been achieved would lie with organisations.
The Parliament has set out more detail than the Commission to help businesses understand what practices will be acceptable. For example, it has said consent would not be considered 'freely given' if individuals are forced to provide personal information which is "not necessary for the provision of a service" when signing up to that service. 'Free' consent would also not be said to be obtained, under the proposals, if businesses pre-select 'tick' boxes relating to data processing activities that individuals would need to "modify" to express their objection to those processing operations.

The Parliament specifically demands that it should be "as easy to withdraw consent as to give it" under the reforms and that individuals need to be told if their withdrawal of consent would lead to "termination of the services provided".

In addition, the Parliament wants consent to processing to be "purpose-limited". Consent for each individual processing purpose would be invalidated where a purpose "ceases to exist" or if the data is "no longer necessary for carrying out the purpose for which they were originally collected", under its proposals.

Under the Parliament’s rules, consent would be a valid legal basis for businesses wishing to transfer personal data overseas so long as the individuals concerned are "informed of the risks of such transfers due to the absence of an adequacy decision and appropriate safeguards".

**EU justice ministers looking at a two-tiered consent regime**

Whilst MEPs gave their backing to an amended version of the Commission’s original proposals last spring, despite giving consideration to more than 4,000 suggested changes to the Commission’s draft, no such consensus has been reached by justice ministers from across the EU under the Council of Ministers’ framework.

However, under a provisional agreement reached in December last year, the Council said there was broad support for rules which would require organisations seeking to rely on consent to process personal data to ensure that the consent is "unambiguous". In other words, it seems that they back the broad legal standard for consent that exists under current EU data protection laws.

A working document leaked in December last year revealed further details about the current direction of travel by the Council on the data protection reforms and the consent rules more specifically. That document said that, regardless of the method for gaining consent that is used, organisations should ensure the consent given is a “freely-given, specific and informed indication of the data subject’s wishes, either by a written, oral or other statement or by a clear affirmative action by the data subject signing up for his or her agreement”.

The Council’s paper stated that consent could not be considered to be ‘informed’ unless individuals are told who the data controller is and the purposes for which they intend to process their data. Consent would not be ‘freely-given’ if individuals have "no genuine and free choice and is unable to refuse or withdraw consent without detriment", it said.

However, the ministers appear to be considering giving their support to maintaining the two-tiered legal standard for consent to personal data processing that is provided for under the current law. For processing information falling within selected listed special categories of data, such as health data or information about political or religious beliefs, organisations would require individuals’ explicit consent, according to the proposals. Overseas transfers of personal data could be facilitated with individuals’ explicit consent, under the Council proposals.

**Implications for businesses**

There are many competing interests underpinning the reform discussions on consent. It is important however, that the differing views of the Commission and the Parliament on the one hand, and the Council on the other, do not result in impractical solutions. Data privacy and the value that processing and re-using personal data can bring to consumers, economies and more generally society as a whole need to be carefully balanced.

The Commission’s proposal that the legal validity of consent should depend on whether or not a ‘significant imbalance’ between the parties exists is concerning. The UK Information Commissioner’s Office (ICO), in its analysis of the Commission’s proposal for the General Data Protection Regulation, said in regard to this proposed condition that “determining whether there is a ‘significant imbalance’ between an individual and a data controller is difficult to do in practice”. It said that whilst it “fully accept[s] that genuine consent depends on freedom of choice, it is still possible to have genuine consent within a basically ‘imbalanced’ relationship – for example in respect of certain aspects of employer – employee data processing.”

In a business-to-consumer context, it often may be difficult to demonstrate that the relationship is balanced. Where a business provides a service that has unique attributes - for example, the number of users that Facebook and LinkedIn have mean that there are currently no services that can currently act as effective substitutes for their services - it may never be possible to conclude that the relationship is ‘balanced’.

Most businesses are striving to gain competitive advantage by demonstrating the uniqueness of their products, services and business models, If the Commission’s ‘significant imbalance’ condition were to succeed, it could mean that all attempts at obtaining consent by businesses that provide unique services might be subject to legal challenge on the grounds that valid consent has not been obtained. Limiting the ability of businesses to provide unique products and services benefits no-one.
The Parliament’s argument that businesses should not be able to rely on implied consent is equally concerning. As the ICO has also pointed out, doing away with implied consent could result in unnecessarily overburdening both service providers and consumers. The ICO has highlighted that under a ‘no implied consent regime’ “when you buy a book online, for example, there would have to be separate consent to use your details to despatch the book and take payment. Consent could not be implied from the customer’s decision to buy the book. This could be onerous and in many cases pointless.”

These are just two examples of the concerning implications the General Data Protection Regulation could have on businesses if a poorly-worded version is agreed upon. It is as yet unclear how the clash between the Council and Parliament will be resolved when the institutions come round to negotiating an agreement on the new Regulation. Talks are expected to take place later this year. Ensuring that the Council engages effectively with the Parliament should therefore be viewed as a policy engagement priority in the coming months for all businesses that rely on processing personal data.

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14. Europe: Insurance Distribution Directive (IDD): The re-cast Directive is nearing completion in the EU legislative process

This new European Directive is designed to make it easier for firms to trade cross-border, to ensure a level playing field among all participants involved in the sale of insurance products, and to strengthen policy-holder protection.

What?
The current directive for the regulation of insurance intermediaries is the Insurance Mediation Directive (2002/92/EC) or IMD. The new directive has, until recently, been referred to as the ‘Second Insurance Mediation Directive’ or IMD2 or IMD II. To reflect the focus on regulating the distribution of insurance products, including by insurers directly where no intermediation occurs, the name was recast in September as the Directive on Insurance Distribution or IDD. Click here for the current version of the new directive. As with the IMD, the IDD applies equally to reinsurance distribution although, for ease, we have only made reference to insurance distribution in this note.

Why?
The current directive is being updated to take into account developments in insurance markets since its implementation. Although it will also be a minimum harmonising directive it is intended to significantly raise the minimum standards of the IMD. The new directive is designed to make it easier for firms to trade cross-border, to ensure a level playing field among all participants involved in the sale of insurance products, and to strengthen policy-holder protection. In relation to cross-border trade in particular, the introductory wording to the directive refers to the fact that the European insurance market remains very fragmented despite the existing single passport systems for insurers and intermediaries. Given it is a minimum harmonisation directive, member states will still be able to “gold-plate” on top of its requirements.

We look at key changes to be introduced with the new regime below. Key terms defined in the directive are included at the end of this article.

Key Provisions
The key changes under the new regime are:

A. Extension of Scope (Chapter I/page 21/Articles 1&2)
The IMD applies to the regulation of insurance intermediaries. The IDD applies to the wider regulation of insurance distributors.

Pursuant to the definitions of insurance distribution and insurance distributor in the IDD (set out at the end of this article) the new directive will apply to:

• All sellers of insurance products, including insurance undertakings that sell directly to customers: Currently, the IMD applies to insurance intermediaries only. However, in order to level the playing field between direct and intermediated sales, the new directive will apply to all sellers of insurance products, including insurance undertakings that sell directly to customers. This will reportedly result in the IDD regime covering about 98% of the market compared to about 48% of the market currently. This change will not significantly impact the UK due to “gold-plateing” of the IMD however the new directive does contain specific information provisions that may add cost and complexity to insurers’ direct sales processes.

• Any person whose activities consist of assisting in the administration and performance of insurance contracts including those acting on behalf of insurers e.g. claims management activities: Currently, the IMD only covers those acting on behalf of the policyholder. However, the new directive extends its application more widely to others who assist in the administration and performance of insurance contracts, for example, in the event of a claim. This may improve service provision for insurers as such firms will have better controls in place but additional costs may be passed onto insurers e.g. fees. Firms will need to confirm that all such entities that it does business with are properly authorised and that their contractual arrangements reflect the change in regulation. Notably, the management of claims of an insurance/reinsurance undertaking on a professional basis, loss adjusting and expert appraisal of claims have been carved out of the extended definition.

• Ancillary insurance intermediaries: The scope of the new directive has also been extended to include ancillary insurance intermediaries although a lighter touch regime will apply, and member states are entitled to require that insurers and intermediaries take greater responsibility for ancillary intermediaries. Given the provision for “gold-plateing”, the UK regulator may not apply the lighter touch regime. The definition for ancillary insurance intermediaries includes three conditions which must be met including that the insurance products concerned must not cover life assurance or liability risks, unless that cover is incidental to the main cover.
The directive separately provides under Article 1 that its provisions will not apply to ancillary intermediaries where all of the following conditions are met:

- the insurance is complementary to the good or service supplied by any provider, where such insurance covers:
  - the risk of breakdown, loss of or damage to the goods or the non-use of the service supplied by that provider, or
  - damage to or loss of baggage and other risks linked to the travel booked with that provider
- the amount of the premium for the insurance product does not exceed €400. Where the contract is concluded for a period of more than 1 year, this threshold shall apply to the annual premium.

This is the connected contracts exclusion. A similar exemption is currently set out in the IMD. There are changes to the conditions that need to be met to rely on this test (e.g. the premium amount) and certain conditions are not longer provided for (e.g. that the total term of the contract be no more than 5 years). Any person that does business on the basis of the exemption (or any person that has arrangements with such a person) should confirm that they are still able to meet these conditions and do not need to be authorised. The UK has “gold-plated” this provision so that the conditions are more restrictive than the IMD. This is likely to continue following implementation of IDD i.e. in the UK under the equivalent condition to (a)(i), the exclusion is only available in respect of non-motor goods. As above, where the directive does apply to ancillary intermediaries, firms will need to confirm that all such entities are properly authorised and that their contractual arrangements reflect the change in regulation.

- **Aggregators/price comparison websites:** The directive provides confirmation that the provisions will apply where aggregators, price comparison websites or others provide information on one or more contracts of insurance in response to criteria selected by the customer, and where this activity is remunerated directly or indirectly by the insurance distributor or the customer. This has already been confirmed by the UK regulator.

- **Carve-outs:** The definition of insurance distribution contains important carve-outs which provide that none of the activities below will be considered to be insurance distribution for the purposes of the directive. The first two carve-outs are already set out in the IMD (albeit with slightly different wording) and apply to the definition of insurance mediation in IMD. The third carve-out is new. These are:
  - the provision of information on an incidental basis to a customer in the context of another professional activity, if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract;
  - the management of claims of an insurance undertaking or a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims;
  - the mere provision of data and information on potential policyholders to insurance intermediaries or insurance undertakings or of information about insurance products or an insurance intermediary or insurance undertaking to potential policyholders if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract.

**B. Freedom to provide services and Freedom of Establishment (Chapter IV/page 32/Articles 5 – 7c):**

- The current regime does not include provisions on the split of jurisdiction between home and host member state regulators, and the FCA presently has authority to take enforcement action against EEA firms passporting into the UK.
- It is proposed under the new regime that the procedure for cross-border entry to insurance markets across the EU be simplified in a number of ways. Member States will be expected to establish a ‘single information point’ providing public access to their registers for insurance, reinsurance and ancillary intermediaries. In turn, EIOPA will establish a website coordinating each of the member states’ single information points.
- Under the new regime, it is proposed that any breaches of the directive will need to be referred back to the competent authority of the home member state in the first instance. There will also be clear areas in which the new regime will grant jurisdiction to the host member state regulator (This may affect the FCA’s current approach of claiming jurisdiction over all activities of UK firms passporting into other EEA states).
- **General good rules:** Significantly, it is proposed that any member state which possesses additional “general good” type rules ensures that they are made publicly available, and a single electronic register with this information should be made publicly available. EIOPA will publish on its website hyperlinks to the websites of the competent authorities of member states where information on general good rules is published and will review their use in the context of the proper functioning of the market. The “general good” principle allows additional regulatory measures to be imposed by a host state if they serve a general good. The concept of the “general good” is based in the European Court of Justice (ECOJ) case law and was developed first in the context of the free movement of services and goods and was subsequently applied to the right of establishment. While there is no formal definition, by way of example, the ECOJ has acknowledged that areas including, but not limited to, consumer protection, prevention of fraud, social order and protection of intellectual property could fall within the scope of the interest of the “general good”.
- The home member state may agree that another member state will act as home member state if the distributor’s primary place of business is located in that other member state.

**Abc:** The “general good” principle allows additional regulatory measures to be imposed by a host state if they serve a general good. The concept of the “general good” is based in the European Court of Justice (ECOJ) case law and was developed first in the context of the free movement of services and goods and was subsequently applied to the right of establishment. While there is no formal definition, by way of example, the ECOJ has acknowledged that areas including, but not limited to, consumer protection, prevention of fraud, social order and protection of intellectual property could fall within the scope of the interest of the “general good”.

**The home member state may agree that another member state will act as home member state if the distributor’s primary place of business is located in that other member state.**
C. Professional requirements (Chapter V/page 41/Articles 8 – 8g):

- It is proposed that there should be stricter and more specific professional requirements under the new regime. Member states will have to specify and publish appropriate criteria for determining the level of professional qualification, experience and skill required. The criteria will have to specify over certain time horizons, either a minimum number of hours or training and development or the successful completion of an appropriate exam taking into account the role performed by the insurance distributor and the activity carried out.

- The directive also includes a minimum professional indemnity insurance requirement for intermediaries of at least €1.25 million per claim or €1.85 million in the aggregate unless such insurance or comparable guarantee is already provided by an insurance or other undertaking on whose behalf the intermediary is acting. This is currently €1 million or €1.5 million under the IMD. Ancillary insurance intermediaries will also be required to hold professional indemnity insurance.

D. Information Requirements and Conduct of Business Rules (Chapter VI/page 49/Articles 15 – 20):

- Under the new regime, two general principles will be introduced providing that (i) insurance distributors must “always act honestly, fairly, and professionally in accordance with the best interests of customers”; and that (ii) all information must be “fair, clear and not misleading.” Some have commented that this may be the beginning of a European principles based regulation. These two principles are more or less the same as the following existing FCA Principles for Business – Principle 1 (Integrity), Principle 6 (Customers’ Interests), and Principle 7 (Communications with Clients).

- There are also detailed requirements, differentiated for insurance undertakings, insurance intermediaries and ancillary insurance intermediaries, about the information which insurance distributors must disclose to customers prior to the conclusion of an insurance contract including but not limited to identity, address and registration detail.

- Provisions that required insurance distributors to provide detailed information on remuneration received by it have been removed. These provisions have been replaced by less onerous requirements for intermediaries in respect of remuneration received by it (see below). This issue was considered by the House of Commons European Scrutiny Committee in the twentieth report of the 2014-15 parliamentary session published on 5 December. The report notes that, in the context of non-investment insurance products, the government had not seen any justification in requiring mandatory disclosure by distributors of granular information on the level and structure of commission received, and that it believed that this would overload customers with information and would probably not be understood.

- The remuneration disclosure requirements for insurance intermediaries in the current version of the new directive include disclosure of:

  (i) the nature of remuneration received in relation to an insurance contract; and

  (ii) the basis of the remuneration, that is whether it is:

      (a) on the basis of a fee, that is the remuneration paid directly by the customer; or

      (b) on the basis of a commission of any kind, that is the remuneration included in the insurance premium; or

      (c) on the basis of other type of remuneration, including an economic benefit of any kind offered or given in connection with the insurance contract; or

      (d) on the basis of a combination of any type of remuneration set out at points (a), (b) and (c).

  Where the fee is payable directly by the customer, it shall provide the amount of the fee or, where this is not possible, the method for calculating it.

(iii) If any payments, other than ongoing premiums and scheduled payments, are made by the customer under the insurance contract after its conclusion, the insurance intermediary shall also be obliged to make the disclosures after each such payment.

  In the UK, intermediaries will already, if acting as the agent of the insured, be obliged to provide information on remuneration to consumers under common law principles, and under ICOBS rules in respect of commercial customers, however consideration will have to be given to the new requirement to always provide consumers with the nature and basis of remuneration, and the manner in which these disclosures will be made.

- The remuneration disclosure requirements for insurance undertakings in the current version of the new directive include disclosure of the nature of the remuneration received by its employees in relation to the insurance contract. In addition, if any payments, other than ongoing premiums and scheduled payments, are made by the customer under the insurance contract after its conclusion, the insurance undertaking shall also be obliged to make the disclosures after each such payment.

- The remuneration disclosure requirements for ancillary insurance intermediaries in the current version of the new directive include only the nature of the remuneration received in relation to the insurance contract.

- The new directive also includes new requirements where information is provided by email or via a website.
E. Cross-selling/bundled products (Chapter VI/page 58/Article 21):

• The new regime provides, inter alia, that when an insurance product is offered together with another service or in a package or as a condition for the same agreement or package, the insurance distributor shall inform the customer whether it is possible to buy the different components separately and, if so, shall provide for an adequate description of the different components of the agreement or package as well as separate evidence of the costs and charges of each component. These new provisions tie in with the FCA's recent market study on add-ons, so these changes will have a less of an impact in the UK.

F. Insurance PRIIPs (Chapter VII/page 60/Articles 22 – 25):

• The new directive includes additional specific and stricter requirements in relation to insurance-based investment products.

Next steps?
The European Commission’s initial draft of the new directive was published in July 2012. Then, the Parliament and the Council for the EU (who share the final say on new EU laws proposed by the Commission) were aiming to adopt the proposal at its first reading in early 2014. However, this did not happen, a number of amendments were put forward by both the Council and the Parliament, and progress has been stalled until recently. At the beginning of November, the Council agreed its general approach on IDD (taking into account the various amendments that have been put forward). This was an important step and trialogue negotiations between the Commission, Parliament and Council resumed in January. At this stage, if progress continues in the expected way, the new regime may come into force in 2016/2017. A review is expected to be carried out five years after the Directive comes into force.

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Key Terms defined in the Directive

Insurance distribution: the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, concluding such contracts, or assisting in the administration and performance of such contracts, in particular in the event of a claim.

The provision of information on one or more contracts of insurance in response to criteria selected by the customer, whether via an aggregator or price comparison website or other means, or the provision of a ranking of insurance products or a discount on the price of a contract, shall also be considered as insurance distribution for the purposes of the directive when this activity is remunerated directly or indirectly by an insurance distributor or by the customer.

None of the following activities shall be considered to be insurance distribution for the purposes of the directive:

• the provision of information on an incidental basis to a customer in the context of another professional activity, if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract;

• the management of claims of an insurance undertaking or a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims;

• the mere provision of data and information on potential policyholders to insurance intermediaries or insurance undertakings or of information about insurance products or an insurance intermediary or insurance undertaking to potential policyholders if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract.

Reinsurance distribution: the activities of advising on, proposing or carrying out other work preparatory to the conclusion of contracts of reinsurance, concluding such contracts, or assisting in the administration and performance of such contracts, in particular in the event of a claim. These activities shall be considered to be reinsurance distribution also if carried on by a reinsurance undertaking without the intervention of a reinsurance intermediary.

None of the following activities shall be considered to be reinsurance distribution for the purposes of the directive:

• the provision of information on an incidental basis to a customer in the context of another professional activity, if the provider does not take any additional steps to assist the customer in concluding or performing a reinsurance contract;

• the mere provision of data and information on potential policyholders to reinsurance intermediaries or reinsurance undertakings or of information about reinsurance products or a reinsurance intermediary or reinsurance undertaking to potential policyholders if the provider does not take any additional steps to assist the customer in concluding or performing an insurance contract.
**Insurance distributor:** defined in the directive as any insurance intermediary, ancillary insurance intermediary or insurance undertaking.

**Insurance undertaking:** a direct life or non-life insurance undertaking which has received authorisation in accordance with Article 14 of Directive 2009/138/EC (being an EU Directive on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II)).

**Insurance intermediary:** any natural or legal person, other than an insurance or reinsurance undertaking, who, for remuneration, takes up or pursues the activity of insurance distribution.

**Ancillary insurance intermediary:** any natural or legal person, other than a credit institution or an investment firm as defined in Article 4(1) of Regulation (EU) No 575/2013 [CRD IV], which carries out and is remunerated for the activity of insurance distribution on an ancillary basis with respect to clearly identified insurance products, provided that all the following conditions are met:

(i) the principal professional activity of the insurance distributor is other than insurance distribution;

(ii) the insurance intermediary only distributes certain insurance products that are complementary to a good or service;

(iii) the insurance products concerned do not cover life assurance or liability risks, unless that cover is incidental to the main cover.

**Reinsurance intermediary:** any natural or legal person, other than a reinsurance undertaking, who, for remuneration, takes up or pursues the activity of reinsurance distribution.

**Reinsurance undertaking:** an undertaking which has received authorisation in accordance with Article 14 of Directive 2009/138/EC (being an EU Directive on the taking up and pursuit of the business of Insurance and Reinsurance (Solvency II)).
15. Europe: Solvency II: a brief look at the new requirements for outsourceings by insurance undertakings which will come into force under the new regime

The requirements are detailed in Article 274 of the European Commission’s Delegated Regulation which supplements the Solvency II Directive (known as the Delegated Act, this just recently came into effect on 18 January having been published in the Official Journal).

There are some high level requirements that will apply to any outsourcing by an insurance undertaking, but many of them will only apply to the outsourcing of “critical or important operation functions or activities” – which replaces the existing concept of “material outsourcing”. While insurance undertakings will be required to have their own criteria for determining whether a function or activity is critical or important, and whether it is being outsourced, EIOPA’s Guidelines on system of governance and own risk solvency assessment give some examples. In broad terms, the more substantial or frequent the advice or service provided by a third party is, the more likely it is to be an outsourcing. Critical or important functions or activities will include:

• Underwriting in the name and on account of the undertaking
• Design and pricing of insurance products
• Investment of assets or portfolio management
• Claims handling
• Provision of regular or constant compliance, internal audit, accounting, risk management or actuarial support
• Provision of data storage
• Provisions of on-going, day-to-day systems maintenance or support
• ORSA process.

In particular, in relation to all outsourceings of critical or important functions, there must be a written outsourcing agreement which clearly states all of a number of requirements concerning:

• duties and responsibilities of both parties
• compliance with all applicable laws, regulatory requirements and guidelines and cooperation with the undertaking’s supervisory authority
• disclosure of any development which may have a material impact on the service provider’s ability to carry out the outsourced functions and activities
• termination rights and periods
• the insurance undertaking’s right to be informed about the outsourced functions and activities and to issue general guidelines and instructions
• protection of confidential information
• access to information relating to the outsourced functions and activities
• sub-outsourcing by the service provider.

This is a development to the existing SYSC rules, under which insurers are required only to have regard to certain items.

In addition, the Delegated Act includes more detailed requirements on insurer’s policies on, and governance of, outsourcing than under the existing regime.

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16. VAT: recent guidance from HMRC on the VAT implications arising out of the Skandia judgment

Last year the CJEU ruled that services supplied by the US headquarters of insurance business, Skandia, to a Swedish branch which was VAT grouped with other local companies were subject to VAT. The court said that because the Swedish branch of Skandia was the member of a VAT group, it could no longer be treated as being the same legal entity as its US head office for VAT purposes. The creation of the VAT group established a new entity, for VAT purposes, which was an amalgam of all its members, it said.

HMRC said it would consider the implication of the decision for UK VAT groups and it has now published Revenue & Customs Brief 2 (2015) which sets out its views.

HMRC says that no changes to the UK’s VAT group provisions are required because the UK’s VAT group rules operate differently to the Swedish rules.

Under the UK’s VAT grouping provisions, a company must have an establishment in the UK to join a UK VAT group. However, unlike in Sweden, the whole body corporate is part of the VAT group, not just the branch or head office which is in the UK. Therefore services provided between an overseas establishment and a UK establishment of the body are not normally supplies for UK VAT purposes, as they are transactions within the same taxable person.

However, HMRC says that there will be implications for UK companies operating through VAT grouped branches in member state that operate similar ‘establishment only’ grouping provisions to Sweden. HMRC says that from 1 January 2016, affected businesses will have to treat intra-entity services provided to or by such establishments as supplies made to or by another taxable person and account for VAT accordingly, even if the entity is within a UK VAT group. HMRC says that it will confirm the member states that operate similar VAT grouping rules as Sweden as soon as possible.

The changes will have cost implications for banks and insurers operating in the UK and in Sweden, or other EU member states operating similar grouping rules. These businesses cannot recover VAT paid in the same way as businesses in other sectors, as much of their business is VAT exempt.

The impact of the changes does not appear to be as damaging as businesses at first feared, following last year’s CJEU judgment. However, the policy to be implemented by HMRC from the beginning of 2016 will require businesses to undertake specific due diligence concerning the VAT rules around grouping in those member states in which they have branches. In particular there could be problems for those UK businesses with VAT groups in Germany, the rules for which operate on both a compulsory and ‘German establishment only’ basis. In addition to the basic legal entity principle, HMRC also confirmed that the impact of the changes would apply to any s43(2A) calculations being performed by the business.

It is probable that the combination of the prospective date of implementation along with the narrowed scope of the changes will lead many businesses to conclude that the news could have been a lot worse. However, it remains the case that a number of businesses may well see profound impact from even this more limited iteration of the VAT group principle.

One must assume that HMRC took legal advice prior to announcing the implementation and so should be reasonably confident of its position. That being said, there will be a sense of watch this space as we await any reaction from the Commission, which has, in the past, disagreed with the UK’s establishment position.

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17. Employment piece: what is the future likely to hold for holiday pay calculations?

Now that the excitement surrounding the much anticipated judgement of Wood and Others v Hertel UK and Fulton and another v Bear Scotland Limited (Bear) has started to die down, we consider what the implications of this decision are for businesses and what the future likely holds for holiday pay calculations.

What was all the fuss about?
To answer that question we need to cast our minds back to 2009 when the principle was established that any underpayment of holiday pay under the Working Time Regulations 1998 (WTR) amounted to an unlawful deduction from wages under the Employment Rights Act 1996. A worker can also pursue an underpayment claim under Regulation 16 of the WTR but this can be less attractive for a potential claimant, not least because a complaint under the WTR must be brought within three months of the employer’s failure to pay the correct holiday pay amount. Contrast this to an unlawful deduction from wages claim which can be made in respect of a ‘series of deductions’ provided that the claim is brought within 3 months of the date of the last deduction. The concept of a ‘series’ of deductions made it possible for a worker to claim for underpayments made many months or even years earlier by an employer provided he/she could demonstrate they were connected and the claim was brought within 3 months of the last deduction.

The cases of Wood and Others v Hertel UK and Fulton and another v Bear Scotland Limited concerned the question of whether or not “non-guaranteed overtime”, acting up supplements and emergency call out payments should be included in a worker’s normal remuneration for the purposes of calculating how much holiday pay a worker should receive. It has long been established that guaranteed ‘compulsory’ overtime should be included in the calculation.

It was widely anticipated therefore that a decision that non guaranteed overtime ought to be included by employers in holiday pay calculations would potentially open up the flood gates to claims for underpaid holiday dating back as far as 1998 (the year when the WTR were originally implemented in the UK) as those potential deductions or underpayments ostensibly looked in some cases, like a very long series of deductions. Such a decision could have cost employers in both the private and public sectors billions of pounds in backdated payments and future claims. Hence the fuss.
**The Bear Decision**

Whilst the EAT did decide in *Bear* that non guaranteed overtime must be included when calculating holiday pay it limited the potential damage to employers by also finding that these pay elements need only be included when calculating the appropriate level of holiday pay for the 20 days holiday required by the Working time Directive. They need not be included when calculating holiday pay for the additional 8 days per year which the UK added under the WTR.

The EAT also went a little further and clarified what a ‘series of deductions’ means in the context of holiday pay claims. It clarified that a gap of 3 months or more between any periods of holiday would be fatal to the backdating element of any claim as it would break the series of deductions. In effect a worker would only be able to claim back pay in respect of underpaid holiday pay if they have consistently taken annual leave in each three month period. A worker who took their annual leave outside those periods would not be able to claim that they formed part of a ‘series’. In this respect the EAT vastly limited the potential scope and value of most holiday pay claims.

**What lies ahead?**

The *Bear* judgement has not been appealed but this area of the law is still somewhat unsettled. For instance the EAT gave no further clarity on whether voluntary overtime should also be included in the calculation of holiday pay.

In the weeks since the decision the Employment Tribunals of England, Wales and Scotland have issued Practice Directions relating to claims presented before the *Bear* decision. The Directions allow Claimants to amend previously presented claims and to add further complaints which may have arisen after the presentation of the original claim, if those new claims could not have been included in the first complaint. The purpose of this Direction is to assist with the management of holiday pay claims already proceeding through the system and to avoid Claimants having to issue fresh proceedings and pay additional tribunal fees.

In addition on 18 December 2014 the Government laid the *Deduction from Wages (Limitation) Regulations* before Parliament. The Regulations will apply to claims for holiday pay, commission, fees, bonuses and their emoluments whether payable under a worker’s contract or otherwise presented on or after 1 July 2015. In effect this means that holiday pay claims will be limited to two years’ worth of deductions. Whether this will lead to a rush of claims being lodged before July remains to be seen.

Whilst the outcome of the *Bear* case was probably the best employers could have hoped for businesses must still take action. If you have not done so already you should consider how you structure overtime, allowances and commission payments and whether, in the light of *Bear* there is any historic liability and/or whether existing arrangements may give rise to future liabilities. It would also be prudent for any employers with existing back pay claims to analyse holiday pay records to determine where there are or could be three month gaps that could invalidate claims altogether.

We would recommend that you speak with your usual Pinsent Masons contact should you wish to discuss the impact of the decision on your business and specific advice.

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18. Competition: FCA and PSR consult on Competition Concurrency Guidance

Introduction
The Financial Conduct Authority (FCA) and the Payment Systems Regulator (PSR) have published consultations on their proposed approach to the application of their concurrent competition law powers. The guidance provides some helpful clarification on the exercise of the FCA’s new powers and the PSR’s proposed approach.

Responses to the FCA consultation are due by 13 March 2015 (and to the PSR’s consultation by 20 March). This means that final guidance may not be ready until after the FCA’s and PSR’s concurrent powers come into force. Comments may be provided on both consultations jointly.

Key points
• The FCA’s remit under competition law extends beyond regulated firms and for regulated firms, the FCA will have a choice as to whether to proceed using competition law enforcement or FSMA enforcement powers. However, importantly, it has stated a clear view that it is able to pursue both avenues against regulated firms in relation to the same conduct where appropriate.
• The ability of the FCA to share information received in the course of its activities will depend on the context in which that information is acquired, whether under its FSMA remit or competition remit, and from whom. The practical impact of differences in the underlying legislation and the inter-relationship with the rules on disclosure under the EU competition regime are not drawn out in any detail. It would be helpful for the FCA to be clearer on these issues.
• The introduction of a new specific Rule in SUP 15 and related guidance, which the FCA considers merely to be clarificatory, will be likely to create considerable uncertainty for regulated firms in terms of their notification and disclosure obligations. A key concern will be that this should not prejudice or disincetivise firms from making a leniency application. However the FCA has gone some way to accommodate this by permitting oral disclosure.

FCA
The FCA already has an ‘operational objective to promote effective competition in the interests of consumers’. On 1 April, however, it will gain concurrent competition powers in relation to the provision of financial services, and will have the power to:
• enforce the prohibitions on anti-competitive behaviour under the Competition Act 1998 (CA98) and Articles 101 and 102 TFEU;
• conduct market studies and refer cases to the Competition and Markets Authority (CMA) under the market investigation provisions of the Enterprise Act 2002 (EA02).

The FCA will not have the power to enforce the criminal cartel offence (this will remain the responsibility of only the CMA and the Serious Fraud Office (SFO)) but it will have the power to apply to a court for competition disqualification orders to be imposed on directors that have breached competition law. Merger control enforcement under the EA02 will remain exclusively with the CMA.

The FCA’s regulatory powers extend to regulated markets, but its concurrent competition powers are broader, covering the provision of financial services, whether regulated or not. The FCA has stated that in its view, this covers any service of a financial nature such as banking, credit, insurance, personal pensions or investments.

PSR
The PSR (a subsidiary of the FCA) will similarly gain concurrent jurisdiction on 1 April in relation to the application of the CA98 prohibitions to participation in payment systems. Its concurrent powers under the EA02 market investigation provisions entered into force on 1 April 2014. The PSR’s consultation paper closely mirrors that of the FCA, with minor amendments by reference to the different scope of the PSR’s powers. The consultation also recognises that the PSR has only recently consulted on its enforcement powers and procedures under the Financial Services (Banking Reform) Act 2013 (FSBRA) and has not published its final views.

Again, the PSR’s concurrent competition powers extend beyond those it regulates, i.e. to all payment systems falling within the definition in section 41 FSBRA, and not only to designated systems. There are also mechanisms to avoid double jeopardy in relation to competition cases that may be pursued by the CMA, FCA, or PSR in relation to the same subject matter.

Use of information
Both the FCA and PSR are clear that information received can be shared internally: any information which comes to them when conducting a CA98 investigation can be used in taking action under other legislative powers, for example FSMA or FSBRA. For example, information the FCA receives in the course of an EA02 or FSMA market study can be used by the FCA for its other enforcement functions, under CA98 or FSMA.
Disclosure: external information sharing
One of the reasons the FCA obtained concurrent competition powers was to provide more flexibility in sharing information with competition authorities in appropriate cases and the consultation sheds some light on this. However, we expect industry would have welcomed some more practical insights into how the FCA (and the PSR) will approach information sharing, particularly within the UK Competition Network (UKCN). The guidance merely sets out the statutory position, which relates the constraints and obligations in relation to onward disclosure to the way in which the information comes to the FCA or PSR respectively.

Competition law prohibitions: General Approach
The draft guidance focuses on the procedural aspects of these authorities’ enforcement powers under CA98. These include how the FCA/PSR will identify potential infringements and decide whether to open a formal investigation, and who will be the decision-makers for certain key decisions during such an investigation. They have taken account of the different statutory frameworks within which they operate and, for example, the FCA’s existing practices in enforcement under other legislation (for example, FSMA) so this guidance is not entirely consistent with the processes and procedures adopted by the CMA although they largely mirror the CMA’s approach to basic issues concerning the investigation procedure, access to file and the use of confidentiality rings and data rooms.

In other contexts, the FCA has incorporated some important aspects of its established enforcement processes under FSMA, for example in its settlement procedure. There is a risk, therefore, of inconsistency in the application of competition law enforcement powers in this respect depending on who is responsible for the case and which we would expect firms to find unhelpful. This is particularly the case given that jurisdiction in relation to enforcement under the CA98 may pass from the FCA to the CMA and vice versa over the course of a procedure.

On deciding whether an investigation should be opened, the draft guidance gives detail on the FCA’s/PSR’s prioritisation assessment: this mirrors the four factors the CMA applies (being i) impact, ii) significance of the case; iii) risk and iv) resources), as well as a consideration of whether other tools are available to achieve the same or a better outcome.

In terms of penalties, the FCA and PSR propose to follow the approach taken by the CMA when enforcing the CA98 or TFEU prohibitions.

Primacy of competition law
The Enterprise and Regulatory Reform Act 2013 (ERRA) reinforced a ‘primacy’ obligation on most sector regulators with concurrent competition law powers, i.e. that concurrent regulators should consider before exercising certain of their regulatory powers (here certain powers under FSMA or FSBRA) whether it would be more appropriate to proceed under CA98.

Although both the FCA and PSR state that they aim to decide which power is more appropriate as early as possible in the investigation process, they consider that they may still choose to act under both the CA98 and their regulatory powers, either in parallel or sequentially. Nevertheless, they note their general obligation to act reasonably and proportionately in deciding whether or not to do so. There is also nothing to prevent the CMA from enforcing CA98 after the FCA has opted to enforce FSMA (for example) in a given case.

This may be subject to some criticism from stakeholders who would have hoped that concurrency would have the benefit of having to deal with fewer regulators and less ‘piggy-backing’ by authorities in enforcing their separate powers under different sets of legislation with respect to the same conduct. However, conduct may result in the breach of more than one set of rules and dual enforcement is not new, with the LIBOR case being just one example in the area of financial services.

Market studies and investigations
This part of the draft guidance covers two aspects of the FCA’s/PSR’s practice with respect to market studies. Again, both authorities have flexibility to choose to use either the EA02 market study / market reference procedure, or to conduct a FSMA/FSBRA market review. Together with applying the CMA’s prioritisation principles, the decision as to whether to open a market study will depend on factors such as whether there are any forthcoming regulatory changes, or whether other tools are available to achieve the same or a better outcome. It is also reasonable to assume that the new tighter statutory timetable in EA02 market studies will be a factor.

Again, there are measures in the underlying legislation to prevent “double jeopardy” to the extent that the FCA/PSR cannot launch an EA02 market study if the CMA has launched a study into the same matter. If the CMA has launched or is about to launch a study under EA02, this will be taken into account in deciding whether or not to launch a FSMA/FSBRA market review. The regulators and CMA may also work jointly on a market study.

Again, the breadth of the authorities’ powers vary depending on which route they use to conduct a market study, with their powers under their concurrent competition jurisdiction being broader than under their respective regulatory powers. That said, both regulators can still make a market investigation reference under the EA02 to the CMA even if they did not use the EA02 regime to conduct the first phase market study.

Handbook changes
This is only relevant at present to the FCA, although the PSR is consulting on similar rules. The FCA Handbook applies to authorised firms only. In this context, the FCA proposes to make changes that it regards as merely clarificatory and accordingly considers that this has no impact on the existing obligations of regulated firms.
The FCA proposes to change the Supervision Manual by:

- Amending SUP 15.3.15 R which requires a firm to notify the FCA when it has been sanctioned or faced disciplinary measures from a statutory or regulatory authority, professional organisation or trade body, or becomes aware that an investigation has begun. The FCA proposes to make an explicit reference to ‘competition authorities’ for clarity.

- Introducing a new Rule and Guidance at the end of SUP15 to require a firm to disclose to the FCA under Principle 11 when it has or may have infringed competition law. The FCA considers that it will then be easier to address further changes that may be required in due course concerning competition law without impacting on other aspects of their guidance.

The new Rule requires that a firm must notify the FCA in writing if it infringes any applicable competition law as soon as it becomes aware, “or has information which reasonably suggests, that an infringement has occurred or may have occurred” (emphasis added). As expressed, this is an extremely broad obligation given that the judgement as to whether competition law may be infringed is complex and often requires extensive economic analysis before a judgement can be made. It is doubtful that the FCA wants or expects regulated firms to approach it in every case where the judgement may be a fine one in the ordinary course, for example, when considering commercial agreements.

The key sensitivity is accommodating leniency applications and the FCA has agreed that the Principle 11 notification can be made orally in such cases, but only where the leniency application covers the same subject matter. It is notable that this saving would not apply in circumstances where no leniency application is made and the FCA comments that its own disclosure obligation is compulsory whereas any leniency application is entirely voluntary.

The FCA is keen to stress that it considers this obligation is not new and always related not just to regulated activities but also non-regulated activities conducted by any member of the regulated firm’s group. It merely considered it helpful to be explicit in light of its new competition objective and concurrent powers. However, it is not clear that regulated firms routinely approached the FCA when they had information to suggest that they had infringed competition law, nor that any pre-existing process of the FCA addressed the associated risks with respect to leniency applications in cartel proceedings. To that extent, therefore, clarification of the way in which such notification may be provided is welcome.

Whilst the new Rule in SUP15 covers any competition law infringement, it is reasonable to expect that it will serve as an important means through which the FCA will be notified of cartel activity, as:

1) the FCA does not intend to operate its own leniency programme in parallel with the CMA’s; and
2) leniency information that the CMA (or European Commission) would share with the FCA would be expected to be subject to very strict use-restrictions.

As such, the new Rule in SUP15 will raise significant issues for actual and potential leniency applicants, which would require very careful consideration and it is likely to be advisable for firms to take external legal advice.

For further advice on the application of the FCA’s (and PSR’s) concurrent competition powers, please see contact details below.

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19. Pensions: update on the new pensions flexibilities and determinations on pension liberation from the Ombudsman

The new pension flexibilities have been big news. Even those who don’t normally show much interest in pensions know that something is happening.

From April 2015, members of defined contribution (DC) pension schemes aged at least 55 will be able to cash out their pension savings, subject only to their marginal rate of income tax. Radical changes are being made to the way pension benefits are taxed following an individual’s death, and to the level of charges by schemes used for auto-enrolment purposes.

The full consequences of these changes on the pensions market will take some time to sink in. There is plenty for trustees and providers to do. Many pension providers have already been developing new products specifically for the post-April 2015 pensions world.

What do trustees and providers need to do about the new choices?
Trustees and providers of DC pension schemes will need to decide what options should be made available to scheme members. For example, most occupational pension schemes are unlikely to offer drawdown because of the cost and additional administration. Drawdown is where a member designates funds in his pension pot to be used for providing a pension, without securing it with an annuity from an insurance company. The member chooses when to draw down funds. Members in a scheme that does not offer drawdown on retirement will have the option to transfer to one that does.
Trustees and providers of DC pension schemes will need to work out exactly what they tell their members about their retirement options. Not all trustees and providers will want to do the bare minimum set out in guidance from the FCA and the Pensions Regulator (which includes informing members of the free and impartial guidance to be provided under the Pension Wise brand). The best retirement outcomes result from lifetime planning, not just choices on retirement. Trustees and providers may take a variety of approaches. Some employers will take a pro-active stance, and agree to pay for face-to-face guidance or online tools to help their workers make the most appropriate pension choices throughout their career. Providers and consultants are already busy working on a range of services that could help workers decide how much to save and how to invest those savings. Lawyers will need to check that any guidance or advice provided is fair and accurate and complies with financial services requirements. If members’ pensions aren’t up to scratch when they come to retire, members may well check what they were told many years previously.

**The money purchase annual allowance**

The £10k money purchase annual allowance is an allowance which, once triggered for a particular individual, limits that individual’s annual DC pension savings for the rest of his or her life. It operates in a similar way to the standard £40k annual allowance that applies to savings in tax-registered pension schemes. It is designed to limit the extent individuals may obtain excessive tax relief by churning money in and out of a DC scheme from age 55 (especially by way of salary sacrifice). It is triggered when an individual accesses his pension savings in certain ways from April 2015. Providers, trustees and even individuals will be required by law to provide certain information about their savings once the £10k money purchase annual allowance is triggered. Providers and trustees will need to have systems in place to comply with the new regime.

**Taxation of death benefits**

From April 2015, benefits paid on the death of a member will generally be tax free if the member dies under age 75 (although, for example, any spouse’s pension from a final salary scheme will still be taxed at the spouse’s marginal rate). In addition, it will be possible for drawdown pensions to be paid not just to spouses and dependants, but also to other beneficiaries. This will allow pension schemes to be used (by those who have other sources of income) as a tax efficient vehicle for passing on wealth to future generations. Schemes will ensure systems are in place to cope with the tax changes, and consider whether, for example, to extend the range of persons that can take a drawdown pension following a member’s death.

**Default fund**

Most defined contribution schemes offer a lifestyle fund as the default investment fund. The purpose of a lifestyle fund is to ensure members are invested in low-risk assets at their intended retirement age. This investment strategy is unlikely to be suitable if a member intends to draw down income during retirement rather than buy an annuity. Consultants are currently working on a number of innovative solutions – such as establishing different default funds for different categories of members according to assumptions about what those members are likely to choose to do with their pension savings. The key here is to ensure that default strategies suit the majority, and that all members have all the information they need to opt out of the default if another strategy would be more appropriate for them. Communications need to be clear and accurate.

Trustees and providers must also check that the default fund meets the new requirements for schemes used for auto-enrolment – in respect of the charges cap and consultancy charges, and (from April 2016) active member discounts and commission. If the default fund isn’t going to meet the requirements, it will have to be switched. Trustees and employers will need to think sooner rather than later about how to implement any switch, what the cost consequences may be, and how the switch is to be negotiated with the fund provider. The big question is whether switches can be made automatically, without member consent. This will depend on the scheme rules. Again, if a switch is to be made, communication is key. Members will need to know why their savings are being moved around.

**Rapid change**

The changes to be implemented from April 2015 are designed to boost confidence in pensions, and to encourage more savers to invest more in pensions. That confidence will be lost if members receive poor communications, or find themselves in inappropriate default funds. Additional freedom and choice opens up more scope for poor decision making. Trustees, providers and advisers can all play a role in ensuring members understand their options.

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**Pension Liberation: an overview of three recent determinations from the Pensions Ombudsman that had been eagerly awaited**

**Overview**
The Pensions Ombudsman has published three eagerly awaited determinations relating to suspected pension liberation. In all three cases, complaints had been brought by members who had requested transfers from personal pension plans into arrangements that were purporting to be occupational pension schemes. The providers being asked to effect the transfers had refused in all three cases on grounds of suspecting that the intended receiving scheme was being used for pension liberation. Two of the complaints have been dismissed entirely by the Ombudsman; the third has been partly upheld.

The Ombudsman’s approach and comments have given rise to questions about how providers should deal with requests for transfers going forward – as well as what might happen as regards historic transfers that have subsequently been shown to have been made to schemes being used for pension liberation.

**The determinations**
The Ombudsman has made known that he has had in excess of 80 complaints made to him regarding transfers to schemes suspected of being used to liberate pensions. The vast majority of those are understood to be instances where the provider concerned has blocked a transfer request; a small number are complaints by unhappy individuals who have presumably lost all or part of their pensions after transfers were effected by the providers concerned.

The three determinations released on 9 January 2015 all related to providers who had blocked transfers.

In the first two cases, complaints against Aviva and Zurich were dismissed on the grounds that the members did not have a statutory cash equivalent transfer value right because the receiving schemes did not constitute occupational pension schemes for the purposes of the Pension Schemes Act 1993.

Specifically, the Ombudsman considered the receiving schemes could not be said to be for the purpose of providing benefits to, or in respect of, people with service in employments of a description – this was based on an inability from the scheme documentation to identify at least a closed list of classes of employment to which the schemes related. The Ombudsman proceeded to find in addition that there was no right to a CETV because the transfers, had they been made, would not have secured “transfer credits”, which are rights allowed to an “earner”. The members could not be “earners”, given they did not receive earnings from a scheme employer.

In the third case, a complaint against Standard Life, the Ombudsman ruled that the intended receiving scheme did meet the statutory definition of "occupational pension scheme" but, as with the other two decisions, the member concerned was not an "earner" in relation to it meaning there was still no statutory CETV right. The complaint was nonetheless partly upheld as Standard Life had not exercised a separate discretion under the scheme rules to make a transfer. Standard Life was directed to consider whether to exercise that discretion.

Just to underscore the decisions further, the Ombudsman also found in the complaints against Aviva and Zurich that the transfers, if they had proceeded, would have constituted unauthorised payments for the purposes of tax legislation.

**Conflict with approach taken by providers**
In all three cases, the outcomes reached were (broadly) what the providers would have been seeking, but the reasoning probably not. Indeed, the Ombudsman’s analysis was based effectively on his own consideration of the scheme documentation and employment position. By contrast, all three providers had adopted an approach of arguing that the transfers should not go ahead simply because, in essence, the receiving schemes were being used for pension liberation purposes. The Ombudsman was clear in his view that this was insufficient justification on its own for refusing to proceed with a transfer.

Justification hinges instead upon a need to show such a transfer would not constitute a recognised transfer and/or that there was no statutory right to a transfer. Moreover, the burden is, the Ombudsman has determined, on the relevant provider to satisfy itself that one of these requirements is not met. However, in order to make such an assertion with some force and foundation, the Ombudsman’s stance suggests that providers will need to undertake careful analysis of scheme documentation for the prospective receiving scheme – that is assuming such documentation can actually be obtained.
Potential consequences of the Ombudsman’s approach

In many ways the determinations should not have come as a surprise: the industry was expecting the Ombudsman to feel constrained by the strict legal requirements for providers to comply with transfer requests, and he has “tiptoed” around that problem by finding technical reasons as to why those legal requirements have not been met. In so doing, on the face of it, providers are being assisted with what most would consider to be the right outcome – in keeping with the Pensions Regulator’s stance of encouraging careful due diligence and extreme caution when faced with transfer requests. In reality though, the reasoning applied to reach those outcomes could be paving the way for further problems.

First, the approach introduces another layer of administration that needs to be undertaken when providers are faced with difficult transfer requests. What the Ombudsman has said is that it is effectively not good enough to have suspicions of pension liberation; this needs to be backed up with “legal” justification for refusing a transfer, which, based on the sort of analysis the Ombudsman has undertaken, requires sight and consideration of the receiving scheme’s documentation. It is doubtful whether many providers will have been undertaken that level of analysis already and introducing it now could be time-consuming and costly.

Furthermore, whilst the Ombudsman has undertaken the analysis himself with these three complaints, it is apparent that he will not continue to do so with every subsequent complaint put before him.

Secondly, the sort of problems identified by the Ombudsman with the scheme documentation that enabled him to reach the determinations he has done are potentially easily rectified – the “scammers” behind pension liberation set-ups could just adapt their approach and the wording in the scheme deed and rules to deal with the technical arguments raised by the Ombudsman.

The quid pro quo of the Ombudsman’s approach could therefore be that a provider might find a situation where it has genuine concerns about a prospective receiving scheme but struggles to find a technical basis to justify declining a transfer.

Thirdly, there are wider implications to consider in relation to those transfers that were completed to suspected pension liberation schemes. Some of those will be cases pre-dating the Regulator’s main Scorpion campaign in 2013, which was the catalyst for many providers adopting a more stringent due diligence process; some might post-date that campaign but have occurred where the relevant ceding providers simply did not feel there was adequate basis to prevent transfers. It is entirely possible that adopting the same sort of analysis that the Ombudsman has done with the complaints against Aviva, Zurich and Standard Life could lead to the conclusion that certain transfers have been made by providers to schemes that do not constitute occupational pension schemes and/or where there was no statutory right to a CETV.

This, in turn, creates a risk that the providers concerned will face complaints by members who did proceed with transfers and have subsequently lost out given all of the risks associated with pension liberation vehicles. There is already a sense within the industry of more complaints being raised along those lines in the weeks since the Ombudsman’s determinations in January.

As for the Ombudsman determining any of those complaints, it appears that we could be waiting until at least the summer given his recent indications. If such determinations do ultimately adopt the same approach, it remains to be seen whether they will go as far as leading to repercussions for providers such as pursuit of tax charges by HMRC and/or claims by the members concerned that they are still owed their pensions – much will depend on individual circumstances and, for example, whether an effective discharge was in place between the provider and the member. It is likely though that these complaints will, at the very least, cause additional cost and inconvenience for providers, many of whom will argue that they had no reason to have any concerns about the receiving schemes or any legal basis for blocking the transfers.

All in all, there will inevitably follow a period of uncertainty regarding previous transfers, whether allowed or blocked.

The future

As regards future transfer requests, the only realistic way of resolving these difficulties and simplifying a potentially burdensome process for providers – as well as giving members of the public proper protection against pension liberation scams – will be through what would surely be a relatively simple legislative change allowing transfers to be prevented when there are reasonable concerns that the prospective receiving scheme is being used for the purposes of pension liberation or other scams. The precise formulation of that change will require some thought, but it ought to be achievable and far preferable to the current uncertain position.

There is also, of course, always the hope for providers that the scammers will move on in any event come April this year and turn their attention to the target of 55 year olds looking to make the most of last year’s Budget freedoms, an easier target for the fraudsters given the lack of any need to meet CETV requirements. That particular conundrum might well form the subject of separate debate in the months to come.
20: Digital: recent debates on Big Data and Telematics

Big data and insurance – should there be a code of practice?

Association of British Insurers (ABI) chairman Paul Evans has called on the insurance industry to “anticipate regulators” and develop its own big data code of practice in a recent interview with the Financial Times, which makes a lot of sense. Click here to read the article.

A code could help insurance companies pre-empt regulators’ concerns by setting standards on the use of data and its disclosure, but it must remain flexible enough to allow insurers to reap the benefits of big data. This will also benefit consumers because ultimately they pay the price of fraud through increased premiums.

If the insurance industry is going to develop a code of practice governing the use of vital customer data then the code will have to be flexible enough to make sure the benefits of big data are not lost. Any code should also take account of the fact that while privacy and data protection laws are important, there are many other areas of law that are relevant to the use of big data in insurance.

From smartphones to in-car black boxes to online activity monitoring, people are increasingly leaving behind them a trail of rich data that can reveal a lot about them. That data could revolutionise the insurance industry by making sure that the risk of insuring a person or activity is better understood and is priced accordingly. This would mean more accurate premiums for customers and a more predictable business model for insurers.

Big data can help cut insurance fraud, lower the cost of insurance for low-risk policy holders and help providers to tailor products to a market’s needs. But regulators and policy makers are paying increasing attention to how that data is used.

So what are the issues that a code might cover? We can all imagine privacy and data protection issues, but the use of big data in insurance touches on a number of other important legal issues. As regulated businesses, insurers are under a general obligation to treat consumers fairly, and that extends far beyond simple compliance with data protection rules. It means that, in line with broader consumer regulations, insurers must avoid engaging in misleading practices. Rules on financial promotions will apply and they, too, demand fairness, clarity in insurers’ marketing and bans on promotions which are misleading.
The Commission said it is particularly keen to know more about how banks and insurance companies are using big data technologies now and their big data strategies for the future. Industry views on regulatory aspects, including rules on trust and privacy intellectual property rights, security and data ownership, are wanted by the Commission. It also wants to know how initiatives on research and innovation, infrastructure, interoperability, access to finance and skills can also help support the use of big data in the EU.

This is a good time for businesses to think about how they can engage with the Commission on big data issues. By explaining how they use big data in practice, they will help the Commission build an accurate picture of the benefits of big data to financial services and help persuade the law makers that regulations must be crafted in a way that balance effective use of data against protection of consumer rights.

Competition law might also apply if an insurer is dominant in its market and controls large amounts of consumer data. If they use that to differentiate their services and distort the market to the detriment of consumers, and if they cut off rivals’ access to the data, they might fall foul of competition law.

Aggregated or anonymised data is already widely used but to really target the right products and prices to individuals then data that is attached to that individual must be used. This raises not only questions of privacy and data protection, but wider questions of fairness, discrimination and transparency.

Plans for a code of practice are in their very early stages. A spokesperson for the ABI has said that it is not "actively working on a code of practice at the moment". Instead, the ABI is "at the planning and policy development stage in this area of work", the spokesperson said, adding that "industry use and management of data is a key emerging issue" and that the ABI is working with its members "to ensure we are on top of it".

A code could be useful in demonstrating to regulators that insurers are considering the consumer protection issues that all these laws raise. Because there is no doubt that regulators are increasingly interested in the issue.

The European Commission is hosting a round table event in Brussels on the issue of big data in financial services later this month in an effort to get a better handle on the issues and, in particularly, a feel for how big data is being harnessed in practice by banks and insurance companies.

The Commission wants input from the financial services industry on "how the EU can support the development of a data-friendly business environment". The Commission will be setting out a new action plan for Europe’s data economy later this year.

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Telematics insurance, market disruption and control of data: The purchase of telematics provider Insure the Box in January by an insurer with ties to Toyota raises the prospect of car makers gaining more control of telematics-enabled insurance markets. Car manufacturers have clearly woken up to the commercial potential of data produced by drivers.

Insurers may be alarmed by the prospect of car makers seeking to ‘own’ the relationship with motor insurance customers through opportunities presented by telematics technology. But in the context of Insure the Box, such alarm may be overstated. Insure the Box technology will only be fitted to new Toyota vehicles. That leaves a market of millions of existing Toyota cars already on UK roads without the pre-existing insurer tie-up. In short there is still a huge untapped market for insurers offering app-based telematics to capture a significant portion of the data available for themselves.

Even if the day arrives when all new vehicles are fitted with manufacturer-owned systems this is not necessarily a threat to insurers. With the right agreements in place there will still be opportunities. Car insurance is a legal requirement in Europe, so manufactures will have to allow insurers access to the data. Indeed many manufacturers already have established relationships with insurers. At BMW it is Allianz and at Citroen it is UK Insurance Limited. BMW’s partnership with Allianz, which has been operating a since 2009, now extends into 27 markets.

What insurers need to remain focused on is the ownership of the data that telematics systems generate and where they do not own it directly ensuring they have the ability to access and use it in a way that is revenue-enhancing for their business. Restrictions over the use of data can hamper the benefit that insurers get, and permission to use data more widely can offer commercial opportunities.

Regulators, though, are paying close attention to privacy and transparency requirements that govern the use of data. In the UK, the Association of British Insurers (ABI) guidelines are quite clear: those collecting data through telematics devices, regardless of what type of device is used to collect the data, have to spell out clearly to all drivers what information will be collected and how it will be used. This, of course, applies the EU-wide data protection legal standards to data generated through black boxes. Different attitudes to the use of data by insurers are emerging. In Italy, which has a 35% penetration of in-car devices, insurers are allowed to access the data to assign fault after an accident. In Germany, the Auto Industry Association last year hosted a roundtable of manufacturers, insurers and lawyers to draw up a policy on how telematics data can be used. The Germans are now pushing for their view – that the data first and foremost belongs to the driver and should not be sold on to advertisers and other third parties – to be adopted by both the EU and United Nations.

"Ultimately the person who generates the data, the driver, should have the final say over how it is used,” is how Martin Stadler, senior counsel to Allianz, summed up the German view to Reuters last month.
If more insurers are to capitalise on the opportunities that telematics-linked insurance products present, they need to understand not only the extent to which transparency and privacy legal requirements govern their use of data but also how to structure arrangements to commercially exploit the underlying data. Any strategy to claim proprietary rights over telematics datasets and/or databases should take into account the data portability rules currently being discussed as part of the EU-wide data protection reform agenda.

Under these proposed rules, owners of the rights to exploit data, be they in this context motor manufacturer, telematics technology provider or insurer, will have to ensure not only that they have the correct authorities in place from the driver to use the data they produce, but also that they can hand over the data they possess on an individual in a usable transferable format. These rules are designed to allow customers to switch service providers with ease. Factoring these rules in to a telematics-led investment strategy could mean that an insurer views the value of a data ownership or licensing arrangement very differently from a scenario where customer data is more difficult to transfer.

Then there are also the customer concerns. It seems that many customers are still convinced that the information collected on their driving habits will be commercially exploited without their permission by manufacturers and insurers. A quick glance at the comments section of any mainstream media article on telematics is enough to illustrate the gulf in trust which must be bridged if telematics is really going to take off. Yes, the systems can produce savings – Insure the Box puts these at an average of £620 per policy for UK motorists – but many drivers will not see this as enough compensation for the widespread commercial exploitation of their data.

There is clearly still a lot to play for in the drive to benefit from the abundance of data now available through telematics, and this week’s move by Toyota just signals that there will be more players entering the fray. It remains the case though that it is certainty over how and by whom data generated by a telematics device can be used and shared that is important. And at the end of the day that comes back down to how well agreements – be they box/app owner-to-insurer, or insurer-to-driver – are drafted.

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21. The Middle East: Dubai – One Year On, Continuing Progress with Mandatory Health Insurance

Background
The Dubai Health Insurance Law No.11 of 2013 governing the implementation of compulsory health insurance for all Emirati nationals, residents and visitors to the Emirate of Dubai was approved and came into effect in February 2014 last year.

The regulatory authority responsible for the oversight and implementation of the scheme, including licensing of market participants is the Dubai Health Authority (DHA). It impacts the whole of the Dubai Emirate including development areas and free zones with approximately three million residents will be ultimately covered by the insurance. The DHA’s Director-General highlighted fundamental goals for a system designed to provide ‘universal access to quality healthcare services and development of a competent health insurance system that is dynamic in nature, attracts investment and quality players that will further help drive the Emirate’s economy’.

This compulsory scheme follows other Gulf state initiatives including those of the Kingdom of Saudi Arabia, the United Arab Emirate of Abu Dhabi, and more recently Qatar. All these States have adopted their own models and requirements with some similarities and notable differences. For an example, the Kingdom of Saudi Arabia has adopted a model open to all private insurers. In Qatar and Dubai, compulsory schemes have been initiated very recently and at roughly the same time, but the former is currently restricting insurance coverage to the Qatar National Health Insurance Company whilst Dubai law provides for both the basic and enhanced insurance coverage to be offered by private insurers.

Implementation and Timetable
The roll out of the scheme was announced as a phased implementation, planned through to mid-2016. For Emirati nationals, there is a Dubai Government funded scheme structured in a similar way to private insurance schemes with annual cover limits, table of benefits included and list of services excluded. For residents and their dependents, funding is provided by private health insurance schemes. It is now expected that the actual scheme enrolment for Emiratis will be completed by 30 September 2015. Local companies with more than 1000 employees were the first target for coverage by 31 October 2014 with other smaller companies required to comply by 30 June 2016.

Insurance Benefits and Coverage
The health insurance coverage for employees must be provided on a ‘fully insured basis’ and covers both private and public hospitals in the Emirate of Dubai. The DHA has specified a minimum level of benefits that must be provided in any health insurance plan offered in Dubai (‘Essential Benefits Plan’) with specified benefits and policy exclusions.

The Essential Benefits Plan differs between residents and nationals with the latter having coverage also for preventative and therapeutic health services. The Essential Benefits Plan can be topped up with additional or enhanced benefits by insurers if they wish to make this available above the mandatory basic plans.

Under the scheme all spouses, dependents and domestic workers will need to be covered by the end of June 2016. However, employers will only be strictly responsible for their employees with sponsors required to secure insurance provision for their dependents and their domestic workers. Whilst the employer is not compelled to pay for coverage for spouses and dependents, the DHA is encouraging employers to do so ‘as a matter of good human resource practice and to ensure security for its workforce’. Employers and employees need to demonstrate compliance and provide evidence that they have local health insurance in place in order to obtain necessary trade licences and residency visas.

Licensing Requirements
The law requires licensing of all healthcare participants including insurers and insurance brokers, health service providers and claims administration providers. Licensing is through the DHA and licensed businesses must comply with certain regulatory requirements to receive the necessary annual DHA permits.

In order to receive a Dubai health insurance permit, insurance companies must meet on a continuing basis, financial, licensing, customer service and data security requirements as well technical requirements in relation to claims processing and reporting via the DHA electronic platform required for reporting and claims administration.

With regard to employees with salaries below 4000AED, insurance providers will be closely monitored by the authorities with regard to pricing and service and only a small number of ‘participating insurers’ approved by the DHA can offer policies to this segment.

Only licensed UAE insurers with a DHA permit can provide coverage and there is no exception for new or existing individual or group covers on global health insurance plans, so having a policy arranged outside Dubai is not allowed as a replacement for local cover. The DHA has stressed that it is illegal for insurance companies that are not licensed to operate in the UAE to market their products in the UAE.

Compliance Requirements
The DHA regulations cover an approved mechanism for settlement of payments for health insurance, terms and conditions for policies and approved health insurance standards. The DHA has established and updates a list of requirements for health providers which needs regular appraisal. This details compliance policies and procedures and also price tariffs for benefits. Medical records must be made available to members on request. Insurance providers must also retain all financial and statistical records and reports for health benefits provided for a specified period.

Insurance providers typically engage third party administrators and TPAs must also comply with DHA requirements and permits. They are also required to retain records. They must also make available a health provider network for beneficiaries and update information to policyholders about the service. Approved complaint procedures
must also be adhered to. Where there are disputes, an arbitration scheme will apply. Any violations of the law will attract censure including fines of up to AED 500,000 for persistent offences.

**Progress One Year On**

There had been significant planning in the run up to this significant change to the provision of Dubai health services and progress has been good. The DHA reported 70% compliance for the first phase of implementation aimed at ensuring coverage for larger companies by a date of 31 October 2014. Non-compliance was chased up with reminders with penalties in some cases. The second phase of compulsory arrangements is now targeting smaller companies with employees of 100 to 999. Compliant insurance arrangements must be in place by 30 June 2015.

As with Abu Dhabi, Dubai is operating an online clearing house for e-claims and every insurance claim in Dubai will be made electronically. This is helping the tracking of health information and healthcare research and analysis. It can be seen where money is being spent in the system and this will be useful in terms of measuring quality and productivity. This system will be important in helping improve servicing and reducing fraud.

The size of the market with increasing numbers of employees predicted year on year in line with Dubai's economic growth is attracting a large number of participants. So far there have been around 50 insurance licences issued with 2014 ‘participating insurers’ for low-paid workers limited to 7 insurers. The number of insurers is likely to increase over the next year.

With significant competition, it is likely that there will be pressure on pricing and capital pressures on insurers. Each year the DHA sets a price range for participating insurers that offer the Essential Benefits Plan, but for enhanced plans there are currently no restrictions on premiums that insurance companies can charge. The DHA is, however, intending to issue rules on pricing in 2015 with the objective of providing more stability in the market and preventing ‘price wars’ and excessive increases to renewal premiums.

Maintaining and improving service levels in this environment will be a challenge and it is too early to see yet how the regulatory authorities will address adverse conduct. The regulatory regime in terms of prudential and conduct of business rules and supervision remains relatively immature but the DHA is regarded as a very active regulator and compliance requirements are likely to be closely monitored. There are likely to be compliance issues and difficulties in the early years as companies fight for new business and possible reprimands and penalties for businesses that do not appreciate the requirements. Robust actuarial financial condition reporting will be key to ensure forward looking review of business levels, pricing and capital requirements are closely managed.

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22. Bermuda Form: a particular form of catastrophe insurance

As most readers will know, the Bermuda Form was the insurance industry’s response to the liability capacity crisis in the 1980s. Bermuda Form policies are designed to respond only to catastrophes. They do not afford cover for routine operational losses expected by policyholders. Nor do they tell policyholders how, and in what manner, to operate their business.

This, of course, is entirely reasonable and sensible. It is in the very nature of insurance, whether under New York Law, English Law or the law of most other jurisdictions, that insurance covers fortuities. To put it another way, an insurer may well agree to insure a property against fire damage but is most unlikely to agree to insure a burning property against fire damage.

If, therefore, a policyholder chooses to sell a product which is expected to cause injuries, then the insured is taking a business decision to run a known risk. It expects to generate profits in excess of its expected liabilities. In such circumstances, the policyholder accepts this as one of the risks of doing business and does not look to its insurance to cover such liabilities.

This topic is most clearly brought to light within the context of Bermuda Form policies. Under this form of insurance, where the substantive law is a modified form of New York Law and the procedural law is English Law, the requirement of fortuity underpins the contract. A policyholder, who manufactures a product which he knows or ought reasonably to know will give rise to an injury (or will be alleged to have given rise to injury) to certain users of that product, is not entitled to insurance cover unless he can demonstrate that the injuries in respect of which claims have been made against him are either vastly greater in order of magnitude or fundamentally different in nature to those which were, or are, deemed to have been expected. This is an entirely understandable limitation on the scope of cover since, without it, a policyholder will be entitled to continue marketing a product which he knew was likely to cause injury to users of that product and seek to pass on any liabilities which arose as a result to his insurance company.

There may be perfectly good reasons for continuing to market such a product with a known, or alleged, defect or hazard. For example, a drug manufacturer may continue selling a drug because the drug in question has a known therapeutic benefit which outweighs the risks to patients from a clinical standpoint. Such a decision is not, however, something for which cover is provided under the Bermuda Form policy. Liabilities stemming from a known problem are not fortuitous in any proper sense of the word. They are simply the only cost of doing business.

The Bermuda Form addresses this issue by only providing cover where a policyholder did not know about a hazard or defect in a product and did not expect injuries arising out of the use of that product. There is cover for all sums which a policyholder shall be legally liable to pay which results from an occurrence. In order to qualify as an occurrence there has to be use of the insured’s products which causes, allegedly causes or is deemed to cause personal injury or property damage which is neither expected nor intended by the insured.

This particular issue of expected/intended has been the subject of numerous disputes between insurers and policyholders.

The first issue to be addressed is the burden of proof. Who is responsible for proving whether or not certain injuries are expected or intended by the policyholder? In the writer’s opinion it is absolutely clear that, in order to bring itself within cover, the policyholder must establish that the injuries were “neither expected nor intended by the insured”.

The next question which arises is whether, in order to judge whether certain injuries were expected or intended by the policyholder, one should apply an objective test or a subjective test. It is often argued that if a subjective test is appropriate, then the insurance policy should simply have included the words “from the stand point of the insured” in connection with this provision. That would have made it clear but even today that clarification has not been made. Therefore, insurers argue that an objective standard applies. The converse argument is that where you are talking about the expectation of a policyholder, it is self-evident that you are talking about a subjective opinion and not an objective one.

Sometimes, this distinction can be significant. For example, if a company manufacturing a product does not carry out sufficient tests in relation to its product and therefore never finds out that it has the potential to cause significant injuries, can it bring itself within cover by saying that it did not expect any injuries? One would have thought that was unlikely. There has to be a certain degree of objectivity, in terms of the standard applied by all reasonable manufacturers of similar products, when determining whether an insured expected (or should reasonably have expected) a problem.

The question of the objective/subjective standard was looked at in the English case of Tioxide v CGNU in 2004. In that case, because it was clear on the facts that Tioxide expected its product to cause property damage, it was simply assumed that the subjective standard would apply. This case is often cited to support the application of the subjective standard in relation to the expected/intended defence under English law. In the writer’s view, this is wrong. The question of the applicable standard was never debated or addressed by the court. It therefore remains open for any English court to consider this issue if it is relevant. From a New York Law standpoint, cases can be found which support both propositions.
The final question is whether a policyholder, who expected injuries, can still recover some of his losses under the Bermuda Form. The good news is that he can, by bringing himself into the so-called “Maintenance Deductible”. That phrase, which you will not find mentioned anywhere in the Bermuda Form policy, refers to a clause which permits a policyholder to recover under the policy for losses arising out of injuries which were either vastly greater in order of magnitude or fundamentally different in nature from those which were expected. In other words, there may still be cover if the injuries which ultimately result in the legal liability are wholly different from anything which could or should reasonably have been anticipated by the insured.

I shall provide two short examples to explain this point. First, consider the case of a medical devices manufacturer of hip implants who first markets his product exclusively in France where he faces allegations or findings that one in every 1,000 implants causes osteolysis. He then decides to market that implant to the remainder of the world. The Bermuda Form policy will provide the insured manufacturer with cover to the extent (and only to the extent) that it is then faced with a vastly disproportionate number of allegations or findings that the implant causes osteolysis which it did not expect by virtue of its previous experience. So, if the worldwide experience is that three in every 1,000 implants allegedly causes osteolysis, then three times as many allegations of injury are now being made than were expected by the manufacturer. That is clearly vastly greater in order of magnitude. The real area of debate between insurers and policyholders is what sort of increase constitutes “vastly greater in order of magnitude”. A 300% increase is easy to agree upon. What about a 10% increase or a 20% increase? When dealing with millions of products, the cost of dealing with even a minor increase in allegations about the safety of a product could be very significant.

My second example deals with the question of injuries which are fundamentally different in nature to those that were expected. If the same medical device manufacturer, rather than being faced with allegations that the implant causes osteolysis, is now sued on the basis that there is an allergic reaction in some patients to the metal in these implants which results in blood clots and embolisms, then a fundamentally different type of injury is being alleged. In such a case the policy will respond to such a wholly unexpected development.

The Bermuda Form therefore offers a particular type of catastrophe insurance. It is not simply designed to provide insurance cover in excess of significant attachment points, but rather it is designed to respond to true liability catastrophes. It therefore responds to unexpected liabilities which an insured manufacturer, from its previous knowledge and experience, could not reasonably have foreseen. This brings us back to the concept of fortuity which underpins this type of insurance contract.

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23. Client Training Programme for 2015

In our continued commitment to sharing our knowledge with our most valued clients, our comprehensive training programme this year will include sessions covering the most important topics coming out of the regulators, legislators and the courts in the UK and Europe. Sessions currently scheduled are set out below.

Insurance Outlook, Pinsent Masons’ Insurance Legal Update, published at least three times annually, will also provide clients with a succinct round-up all of the latest developments for the insurance market from the UK, Europe and the Gulf together with key focus pieces on critical topics.

<table>
<thead>
<tr>
<th>Date</th>
<th>Description</th>
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| April         | **Regulatory Webinar**  
|               | A focus on the imminent 2015 FCA Risk Outlook and Business Plan  
|               | We will consider what items are high on the regulatory agenda for the months ahead.  
|               | Location: Dial-in  
|               | Contact: elaine.quinn@pinsentmasons.com |
| 28 April      | **Back to Basics Breakfast Seminar**  
|               | The Insurance of Multiple Claims  
|               | In this seminar we will consider the practical issues arising from the notification, investigation and defence of multiple claims across product lines.  
|               | Location: Old Library, Lloyds  
|               | Contact: caroline.fearnley@pinsentmasons.com |
| 20 May        | **Hot Topics Seminar**  
|               | In this seminar we will consider:  
|               | • The new Consumer Rights legislation which will consolidate consumer protection laws in the UK, including recent developments relating to the rules for unfair contract terms  
|               | • The 2015 FCA Risk Outlook and Business Plan expected to be published at the end of March. We will consider what items are high on the regulatory agenda for the months ahead.  
|               | Location: 30 Crown Place  
|               | Contact: lauren.taylor@pinsentmasons.com |
| 24 June       | **Hot Topics Seminar**  
|               | In this seminar we will consider:  
|               | • The effect of the PRA’s replacement of SUP 18 with a new Supervisory Statement in insurance business transfers  
|               | • Understanding the new regulatory reporting requirements under Solvency II  
|               | • Developments in the Senior Insurance Managers Regime and the Regulators’ increasing use of attestations.  
|               | Location: 30 Crown Place  
|               | Contact: lauren.taylor@pinsentmasons.com |
| September     | **Back to Basics breakfast seminar**  
|               | Claims topic to be announced nearer to the date  
|               | Location: Old Library, Lloyds  
|               | Contact: caroline.fearnley@pinsentmasons.com |
| 7 October     | **Regulatory Webinar**  
|               | Topic to be announced nearer to the date  
|               | Location: dial-in  
|               | Contact: elaine.quinn@pinsentmasons.com |
| November      | **Hot Topics seminar**  
|               | Topic to be announced nearer to the date  
|               | Location: 30 Crown Place  
|               | Contact: lauren.taylor@pinsentmasons.com |
| 19 November   | **Insurance Update from Professor Robert Merkin QC**  
|               | We are pleased to invite Professor Merkin QC back to Crown Place to provide his annual update on insurance and reinsurance cases from the year gone by.  
|               | Location: 30 Crown Place  
|               | Contact: lauren.taylor@pinsentmasons.com |
| 25 November   | **Hot Topics seminar**  
|               | Topic to be announced nearer to the date  
|               | Location: 30 Crown Place  
|               | Contact: lauren.taylor@pinsentmasons.com |
| November      | **Back to Basics breakfast seminar**  
|               | Claims topic to be announced nearer to the date  
|               | Location: Old Library, Lloyds  
|               | Contact: caroline.fearnley@pinsentmasons.com |
| November      | **Publication of Insurance Outlook**  
|               | |

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### 24. Calendar/looking ahead

A snapshot of some important dates in the calendar for insurance clients over the coming 12 months and beyond.

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<th>Development</th>
<th>Further detail</th>
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<td>FCA Improving Complaints Handling Consultation closes</td>
<td>Section 6</td>
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<td>31 March 2015</td>
<td>Solvency II (transposition date)</td>
<td>Sections 2 and 4</td>
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<tr>
<td>30 March 2015</td>
<td>Agreement on the Consumer Rights Bill expected</td>
<td>Sections 3 and 9</td>
</tr>
<tr>
<td>March 2015</td>
<td>Small Business, Enterprise and Employment Bill expected to receive Royal Assent</td>
<td>Section 3</td>
</tr>
<tr>
<td>March 2015</td>
<td>Interim Report from the new Government Fraud Taskforce expected</td>
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</tr>
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<td>April 2015</td>
<td>FCA’s Competition Powers to come into force</td>
<td>Sections 1 and 18</td>
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<td>June 2015</td>
<td>Trialogue negotiations between EU Council, Commission and Parliament on the Insurance Distribution Directive (IDD) due to be completed</td>
<td>Sections 4 and 14</td>
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<tr>
<td>June 2015</td>
<td>FCA Improving Complaints Handling Policy Statement expected</td>
<td>Section 6</td>
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<tr>
<td>June 2015</td>
<td>FCA Policy Statement with Final Rules on Guaranteed Asset Protection (GAP) Insurance expected</td>
<td>Section 1</td>
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<td>9 July 2015</td>
<td>Alternative Dispute Resolution Directive (transposition date)</td>
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<tr>
<td>September 2015</td>
<td>FCA Final rules on Guaranteed Asset Protection (GAP) Insurance expected to come into force</td>
<td>Section 1</td>
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<td>October 2015</td>
<td>Consumer Rights Bill expected to come into force</td>
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<td>1 January 2016</td>
<td>Solvency II (implementation date)</td>
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<td>9 January 2016</td>
<td>Alternative Dispute Resolution Directive (implementation date)</td>
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<tr>
<td>March 2016</td>
<td>FCA Improving Complaints Handling – expected implementation of new rules</td>
<td>Section 6</td>
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<td>August 2016</td>
<td>Insurance Act 2015 comes into force</td>
<td>Sections 3 and 8</td>
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<td>December 2016</td>
<td>PRIIPS KID Regulation Requirements come into force</td>
<td>Section 4</td>
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<tr>
<td>January 2017</td>
<td>MiFID II Regulatory Regime for investment services due to come into force</td>
<td>Section 4</td>
</tr>
</tbody>
</table>
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Correct as of 4 December 2014.