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e-insurance and new technologies in insurance law

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# Online Insurance Intermediaries

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## E-insurance vs insurance intermediaries undertakings? NO

- Mediation to which IMD 2 applies:
  - a) insurance intermediary undertakings
  - b) professional claims managers
  - c) loss adjusters
  - d) the staff of insurance companies carrying out mediation
- E-commerce removes only the unnecessary **legal obstacles** as to the proper functioning of the EU internal market
  - Its target is **not to replace the profession of intermediaries!**

## E-insurance vs insurance intermediaries undertakings? NO

(cont.)

- The direct selling of simple insurance products by the insurers is easier via internet
- But many simple insurance products do not fall under IMD 2 regulations (art. 1, para. 1)
  - ☞ can be conducted by non-professional intermediaries
  - ☞ thus, for those products, replacement of the intermediaries is not an issue!
- Online aggregators do not replace intermediaries
  - ☐ rather help intermediaries to bring online insureds / applicants for insurance who are looking for 'comparative shopping'
  - ☐ the insurance contract can still be closed via the intermediary

## E-insurance intermediation and freedom of services: two different matters

- Online insurance intermediation → the best way to simplify:
  - cross-border transactions via **FoS**
  - more so, cross-border transactions via **FoE**
  - even more so, national transactions within each single **MS**
- ECJ case law: criteria for the obligation to work under establishment within EU
  - duration/regularity/periodicity/continuity of the services
  - **the criteria also apply to the online business**

## E-insurance intermediation and freedom of services: two different matters *(cont.)*

### ■ Reasons of establishment obligation as to online business

- Internet mainly covers the **sales** of insurance products and applies **less** to **other legal relationships** of insurance intermediaries – when permanently working in a MS - with customers, the State and other stakeholders
- Customers keen on having the alternative of a parallel, physical communication with the insurance intermediary
  - ◆ EU- level compromise regarding FoS, where the services are provided without regularity
    - customers can be advised via the respective register whether the intermediaries are providing their services on a FoS or a FoE basis.

## E-insurance intermediation and freedom of services: two different matters *(cont.)*

- IMD 1 & 2 apply to all **customers** and not only to customers who purchase insurance intermediation services for reasons outside their trade and profession, i.e. not only to **consumers**
  - **Consequence:** e.g. a customer – **not “consumer”** - of insurance broker services cannot bring proceedings against the broker of a policy before the Court of its domicile, if the insurance covers risk in another MS (Regulation 44/01 on jurisdiction etc. provides only to consumers the right to bring proceedings in the Court of their domicile). The establishment constitutes jurisdiction according to local law and covers this gap in favour of the non-consumer customer. Again FoE is necessary while e-commerce cannot fill this gap
  - In FoE cross-border passport transactions the intermediary must notify the competent Authority of his home MS and provide the following information (in addition to the notifications provided for FoS service):
    - a) programme of operations of establishment
    - b) the responsible persons for the management, and
    - c) its address in the host MS

## What distinguishes the border of the online market? Geographical, technological and regulatory means

- **EU/EEA regulation:** Insurance intermediaries providing cross-border services in the Internal Market fall under the passporting rules
  - registration in the home country-MS is the passport
    - ◆ The register shall indicate the MS/MSs in which the intermediary conducts cross border business
- The IMD does not:
  - apply to insurance mediation **services** provided in relation to **risks** and commitments **located outside the EU** (1<sup>st</sup> case)
  - regulate mediation **activities carried out in 3<sup>rd</sup> countries** (2<sup>nd</sup> case)

In both cases, **geography** and **technology** are the borders as to the conduct of the business, but **regulation** is the border as to the **qualification of the insurance intermediary** in the 1<sup>st</sup> case, taking into consideration that only then the intermediary provides services in risk located both inside and outside the EU.

## Online FoS vs «traditional» FoS ? Yes

- IMD2 specifically submits national restrictions on online passporting intermediaries to the rules of the **E-Commerce Directive**
  - Insurance intermediaries, unlike insurance undertakings, are not included in the Annex of exceptions to article 3(3) of the E-Commerce Directive
- The E-Commerce D allows limited exemptions and derogations of the freedom to provide information society services:



- Thus, FoS **via traditional means** can be subjected to more restrictions than the online services as long as they are dictated by the scope of the **general good**



## Online FoS vs «traditional» FoS ? Yes (cont.)

- The following areas could fall within the scope of **general good** as recognised and interpreted by the ECJ:



*The list is not definitive and the Court may add to it at any time*

- The national restrictive measure must be taken on a case-by-case basis against a specific financial service provided by a given operator (intermediary)

## Is a FoS notification necessary to all MS where the site of the intermediary is accessible? No

- EIOPA's list of examples to test whether the intermediary must proceed with a FoS notification:
  - When the intermediary sends information on specific products, conditions of cover, etc. to selected groups of clients
  - When the intermediary's website is general and not only in the language of its MS
  - When it is addressed to specific groups of clients or clients in specific MS

## Is a FoS notification necessary to all MS where the site of the intermediary is accessible? No *(cont.)*

- Behaviour examples (based on ECJ decisions) that correspond to the **criteria of solicited business** in online transactions:
  - ❑ Intent to direct apparent from the intermediary's website and overall activity
  - ❑ International nature of the activity
  - ❑ Use of foreign language or currency and possibility to contract in such language or currency
  - ❑ Mention of itineraries from other MS for going to the place where the intermediary is established
  - ❑ Mention of telephone numbers with an international code [!]
  - ❑ Outlay of expenditure on an internet referencing service to facilitate access to the intermediary's site of consumers domiciled in other MS
  - ❑ Use of a top-level domain name (such as .eu or .com) other than that of the intermediary's home MS
  - ❑ Mention of international clientele from various MS

## Is a FoS notification necessary to all MS where the site of the intermediary is accessible? No *(cont.)*

- ECJ criteria of non-solicited business in online transactions – i.e. the insurance intermediary is not considered as directing its activity to another MS only by:
  - The mere accessibility of the merchant's website in the MS where the consumer is domiciled
  - The mention of an email address and of other contact details
  - The use of a language or a currency which are generally used in the MS where the merchant is established
  - ◆ **However, if the intermediary starts working on a FoS basis (irrespective of internet), it will have to notify their national Supervisory Authority irrespective of the above criteria**

## Is a FoS notification necessary to all MS where the site of the intermediary is accessible? No *(cont.)*

- If the host MS law provides more protection than the IMD (which is possible because IMD is a minimum harmonization Directive) this would result in the national intermediaries being treated in a stricter way compared to EU intermediaries



national law on competition and equal treatment could help avoid this



national measures may not result to the distortion of the internal market



the national stricter measures must always be viewed under the EU principle of proportionality.

## 3<sup>rd</sup> country online vs EU online insurance intermediaries?

### Rather Yes

- For the online consumer, it is difficult to distinguish **differences between solicited and unsolicited insurance / intermediary online business**
  - Online insurance activities, covering risk **located in a MS other than that in which the insurer covering the risk is established**, are subject to FoS proceedings. So should respective activities of insurance intermediaries
    - ◆ All the EU insurance intermediaries who sell their services online to MS/ MSs other than their home MS, should follow notification proceedings and appoint tax representatives

## 3<sup>rd</sup> country online vs EU online insurance intermediaries?

### Rather Yes *(cont.)*

- ❑ Online insurance intermediaries of **3<sup>rd</sup> countries** who provide services in the EU, without establishment but under “**the principle of FoS**”, are subject to national law (art. 1, para 3., sec a, IMD2)
  - ☞ In order to avoid distortion of competition, IMD provides that MS law shall guarantee that all persons “**carrying out mediation activities**” in the market shall be treated equally
    - but this does not cover unsolicited services while “**the principle of FoS**” has meaning only within EU cross border transactions
      - ❖ But, shouldn't “carrying out mediation activities” also include the unsolicited business?

## 3<sup>rd</sup> country online vs EU online insurance intermediaries?

### Rather Yes *(cont.)*

- ❑ The **active consumer** who volunteers in proceeding with purchases of services of providers situated in 3<sup>rd</sup> countries, does not need to be protected by EU legislation
- ❑ The **passive online consumer**, contrary to the non-online passive consumer, can be easily misled by a 3<sup>rd</sup> countries intermediary, if the latter **has the intention to conduct business in a MS** and in essence **fulfill the criteria that the ECJ has set as evidence of the merchant's (intermediary's) intention to direct his/her activity to the MS** of the consumer



## 3<sup>rd</sup> country online vs EU online insurance intermediaries?

### Rather Yes *(cont.)*

## Applicable law

### ***Hypothesis:***

- A 3<sup>rd</sup> country law provides less requirements than EU law (MS law) as to the insurance broker. The 3<sup>rd</sup> country broker in order to gain higher commission renews the policy of its client/resident in a MS, with a 3<sup>rd</sup> country insurer who is very low rated, without disclosing it to the customer and knowing that the latter insurer could declare bankruptcy.



When the insurance event occurs the insurer has actually declared bankruptcy.

- Suppose that according to 3<sup>rd</sup> country law & practice, such conduct should not trigger liability on tort by the broker, while according to the law & practice of the MS country it might constitute liability on tort.

## 3<sup>rd</sup> country online vs EU online insurance intermediaries?

### Rather Yes *(cont.)*

### Applicable law *(cont.)*



#### **Solution:**

In the stage of characterisation, the judge will decide whether broker's behaviour constitutes tort by treating the latter as an autonomous concept, as directed by Rome II Regulation, and not necessarily on the basis of his *lex fori*. If it is found to be a tort, then, according to Rome II Regulation, the applicable law will not be the *lex loci delicti commissi*, but the *lex loci damni*, i.e. the MS law. Broker will be judged by a regime more strict and rigorous than that of his own country. Speaking from broker's point of view he should insert in the brokerage agreement an applicable law clause designating the law of his country. This can happen irrespective of whether the 3<sup>rd</sup> country broker deals with the risk located inside or outside the MS country.

## Policy provided via internet by the intermediary and conclusion of the insurance contract by e-commerce: two different matters


- Communicating via internet with insurers / intermediaries and receiving policies via email, is not electronic conclusion of contracts, is not e-commerce
- Electronic conclusion of the contracts presupposes (ECD) that:
  - ❑ the online intermediary has to **acknowledge the receipt** of the recipient's order without undue delay and by electronic means
  - ❑ the order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are **able to access** them
  - ❑ the intermediary must provide the contracting consumer with appropriate, effective and accessible **technical means** allowing him to identify and correct input errors, prior to the placing of the order
  - ❑ the intermediary has to maintain the information and insurance documents in a **durable medium**, which enables customers to store info addressed personally to the customer in any way that is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

## Some remaining remarks

- Under the ECD the online insurer / intermediary has to provide information **additional to the email address** which allows rapid communication in a direct and effective manner - not necessarily a telephone number
- The information communicated by the online intermediary must enable the customers to **evaluate the extent of their future commitments**, protecting them against the conclusion of an unfavourable contract
- ECJ C-298/07 of 16.10.08 (Bundesverband der Verbraucherzentralen...vs deutsche Internetversicherung AG) ruled that ECD should be interpreted so that the online intermediary has to announce its telephone number only upon request. However, if the intermediary has declared, based on IMD2, that it also provides advice to customers, the ECJ judgment may not apply

## Some remaining remarks *(cont.)*

- As transactions with the online intermediary can **affect the disclosure obligation** of the applicant during the pre-contractual period, lack of personal contact could lead to limited application of the sanctions for breach of disclosure obligation
- IMD 2 proposes that the information to be provided by the intermediary to the customer shall be communicated on paper, or using a **durable medium** other than paper, but **appropriate** in the context of the business conducted, or by means of a website
  - It is a matter of interpretation on EU level what the term 'appropriate' indicates and the relevant prerequisites
- When the insurance intermediary informs the customer that it provides advice on the basis of a fair analysis, this should be derived from a sufficiently large number of insurance contracts **available on the market**

 Which market?

- ◆ Seems rather that **the market must be that of the host MS**, taking into consideration the required notification with the Supervisory Authority before conducting business in another MS on a FoS basis



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**Thank you!**

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