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Loss adjusters: should divergence across EU member states be dealt with?

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Abstract

Under the Solvency II regime, loss adjustment has become an important aspect in the functioning of insurance companies. Following the Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 1 (IMD 2). In this context, the present article touches on loss adjusters and the controversial issue of the regulation of their standards of professionalism under a uniform EU regulatory framework. It begins with defining loss adjusters as the specialists who are appointed to investigate the circumstances of an insurance claim made under an insurance policy and to advise on the amount that should be payable to the policyholder for settling such claim and continues with describing the activities which are included in their scope of business. The article further provides an overview of the regulatory framework of loss adjusting services in Europe through the Solvency II Directive and describes the European Commission's proposal to include loss adjusters in the expanded definition of insurance mediators and, therefore, within the scope of the revised Insurance Mediation Directive 1 (IMD 2). The article focuses on the serious concerns raised as to whether IMD 2 is the proper vehicle for the regulation of the loss adjusting profession.

Key Words: Loss adjusters, loss adjusting services, insurance claims, Solvency II, EIOPA Guidelines, IMD 1, IMD 2 (recast)

1. INTRODUCTION

Under the Solvency II regime insurers must enhance the operational efficiency of their claim handling procedures (whether performed by in-house departments or outsourced to loss adjusters). Consequently, loss adjustment has become one of the most important aspects in the functioning of insurance companies. However, the introduction of EU uniform rules on the professional requirements of loss adjusters remains a controversial matter.

2. DEFINITION AND ROLE OF LOSS ADJUSTERS

2.1. Definition and categories of Loss Adjusters

There is no statutory legal definition of the profession of loss adjusters and the services they provide. An insurance claims adjuster can be described as a specialist who is appointed to investigate the circumstances of an insurance claim made under an insurance policy and to advise on the amount that is payable to the policyholder in order to settle that claim. In the Charter of the Chartered Institute of Loss Adjusters (hereinafter: CILA),¹ a loss adjuster is defined as "a person whose predominant activity is the investigation, management, quantification, validation and resolution of property, casualty or any other losses (whether insured or not) arising from any contingency and the reporting thereof."²

¹ Incorporated in United Kingdom by Royal Charter in 1961, the Chartered Institute of Loss Adjusters is an organisation of individual members. The Institute sets the professional and ethical standards for those who work in the handling of losses.

² CILA's Charter, Article 1, available at: <http://www.cila.co.uk/about-us/charter-and-by-laws/charter.>, 30.10.2013.

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Insurance claims investigated by loss adjusters include both property claims (e.g. fire loss, building damages etc) and liability claims (i.e. personal injury or third-person property damage from liability situations, such as car accidents, alleged negligent behavior etc). Depending on the insurance claims that they handle, adjusters can be multi-line or all-lines. Multi-line adjusters may handle property and liability claims, whilst all lines adjusters may handle any type of claim (e.g. professional liability, excess liability, physicians, hull and machinery, ocean marine, etc).

In some European countries there are adjusting companies which undertake the management of insurance claims upon instructions from insurance companies,³ whereas in other European countries, loss adjustment services are an integral part of the insurance undertaking business (in-house adjusters). A combination of both systems is also common, as undertakings maintain an in-house loss adjusting department but delegate the investigation and settlement of complex claims to external specialized experts. Policyholders also appoint their own loss experts to negotiate claims on their behalf (often referred to as loss assessors). For the provision of their services, loss adjusters are paid fees according to the complexity of the case.

2.2. Role of Loss Adjusters

Loss adjusters are expected to have a fair and just approach of insurance claims that enables insurance companies to process the claim without delay. The scope of their business may vary according to the mandate they are given and may include the following:

- (a) visiting the sites of the loss for investigation of the circumstances of the claim;
- (b) interviewing customers about the claim for evidence of possible causes;
- (c) gathering evidence, such as security camera films and police reports;
- (d) requesting detailed reports from specialists, if required;
- (e) completing the paperwork required;
- (f) assessing the extent of the physical damage/loss;
- (g) checking whether the loss or damage is covered by the terms of the insurance policy, whether the sums insured on the policy are adequate and whether the amount claimed by the policyholder is fair and reasonable;
- (h) negotiating settlement payments;

³ For instance in the United Kingdom, indicatively see <http://www.insurance-directories.com/productdetails.aspx?id=69&name=Loss+Adjusting.>, 20.10.2013.

- (i) pointing aspects of the claim which the policyholder may have overlooked, advising on repair techniques and organizing clean-up or salvage operations;

- (j) making further investigations in case of suspected fraudulent claims;

- (k) drafting a report including the findings and recommendations to the insurance company;

- (l) advising claimants how security and safety could be improved to avoid further losses or incidents.

3. EUROPEAN REGULATION OF LOSS ADJUSTERS

It is a common understanding that loss adjusting services must be based on professionalism and independence to ensure an impartial and accurate assessment of claims. Therefore, loss adjusters should meet certain professional requirements and standards of professionalism. However, currently there is no European uniform regulation of loss adjusting experts. In Europe the provision of loss adjusting services depends on local practices and the structure and maturity of the relevant national insurance market.⁴ As a matter of fact, the standards of professional conduct of loss adjusters are mainly self-regulated through codes of ethics established by their representative associations, whilst national regulation of professional requirements is not so common in all EU member states. Insurance companies also set out guidelines regarding the provision of loss adjusting services and the professional requirements that must be met for the expert to be employed by them. These guidelines are not of a statutory character but dictate the professional standards expected from the insurance industry. The entry into force of the Solvency II framework may, however, indirectly regulate the conduct of business of loss adjusters as elaborated below under paragraph.

3.1. Self-regulation

Given the serious competition distortions threatening the stability of their profession throughout Europe, European loss adjusting associations have established the European Federation of Loss Adjusting Experts (hereinafter: FUEDI). FUEDI, which currently comprises fourteen members associations

⁴ Letter of FUEDI dated 13.02.2013 addressed to the Committee on Economic and Monetary Affairs of the European Parliament available at: <http://www.expert-cea.com/c/lettre-fuedi-fevrier-2013>, 20. 10. 2013.

and three provisional members,⁵ is recognized by the European Commission as the representative body for all professional loss adjusters in Europe. Among FUEDI's main objectives are the promotion of the independent and impartial profession of loss adjusters, the maintenance of high standards of professional conduct and competence and the unification of standards of education and expertise through its member countries.⁶ FUEDI insists that all its members ensure that they achieve a minimum level of education. To this end, for a uniform professional training of its members, the Federation promotes educational programs in member countries.⁷ The attendance of these programs from the members of the national associations is a good starting point. However, from a regulatory point of view, obligatory participation in such programmes or admission requirements for the exercise of loss adjusting could ensure a uniform level of professionalism throughout Europe. In particular, self-regulation is common in highly competitive markets, whilst in countries where there is a lack of a competitive environment, it is ambiguous whether there is a motive for high-level education of loss experts. Therefore, an EU uniform level of professionalism cannot be achieved merely through self-regulation. Whether such an EU-wide regulation of loss adjusting services is desirable is a matter of dispute, as elaborated below.

3.2. Application of Solvency II Directive to Loss Adjusting services

Loss adjusting services which are carried out by insurance companies, as part of their main scope of business, fall within the scope of the Solvency II Directive.⁸ Solvency II Directive establishes coordinated rules relating to the supervision of insurance companies, with a view to promote the protection for policy holders. According to the Directive's recital under number 17, Solvency II

⁵ *Members associations*: Austria (AFILA), Belgium (GEBCAI), Denmark (DALAX), France (CEA), Germany (BTE), Italy (AIPAI), Luxembourg (CEL), Netherlands (NIVRE), Poland (SNELS), Portugal (CNPR), Russia (NAIA), Spain (AESPER), Sweden (SOFIS), United Kingdom and Ireland (CILA) – *Provisional members*: Czech Republic (CKSLPU), Greece (HALA), Romania (ROLAA), available at: <http://www.fuedi.eu/members.htm>, 23. 10. 2013.

⁶ Available at: <http://www.fuedi.eu/>, 23. 10. 2013.

⁷ Available at: <http://www.fuedi.eu/education.htm>, <http://www.fuedi.eu/adjusted.htm>, 23. 10. 2013.

⁸ Directive 2009/138/EC of the European Parliament and of the Council, of 25 November 2009, on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), p. 1–155.

requires “member states to provide supervisory authorities with the resources to fulfill their obligations set out by this directive. This encompasses all necessary capacities, including financial and human resources.” Following postponements, the timeline for the transposition of Solvency II Directive in the member states is 30 June 2013 and for its implementation by insurance companies 1 January 2014. However, in early October 2013, the European Commission proposed the extension of the date for first application of Solvency II to 1 January 2016.⁹

3.2.1 General governance requirements

Loss adjusting services which are undertaken by insurance companies fall under the “general governance requirements” set out in article 41 of Solvency II Directive, which provides that: “all insurance and reinsurance undertakings must have in place an effective system of governance which provides for sound and prudent management of the business.” This system, being subject to regular internal review, “shall at least include an adequate transparent organizational structure with a clear allocation and appropriate segregation of responsibilities and an effective system for ensuring the transmission of information. The system of governance shall be proportionate to the nature, scale and complexity of the operations of the insurance or reinsurance undertaking.” Of course, the Solvency II Directive provides the core values of regulation but the exact effect of these general requirements on loss adjusting can only be identified through Level 2 measures.

3.2.2 Outsourcing provisions applied to loss adjusters delegated by insurance undertakings

Loss adjusting services that are delegated by insurance undertakings to third parties fall under the outsourcing provisions of the Solvency II Directive.¹⁰ In particular, Solvency II sets the following supervisory

⁹ Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).

¹⁰ Solvency II Directive, articles 13 (28), 38, 41, 49 and 50. According to article 13 (28), “outsourcing” is defined as “an arrangement of any form between an insurance or reinsurance undertaking and a service provider, whether a supervised entity or not, by which that service provider performs a process, a service or an activity, whether directly or by sub-outsourcing, which would otherwise be performed by the insurance or reinsurance undertaking itself.”

requirements which are applicable to outsourced loss adjusting services (Solvency II Directive, art. 38):

outsourced loss adjusters must cooperate with the supervisory authorities of the insurance undertaking in connection with the loss adjusting service;

the insurance undertakings, their auditors and the supervisory authorities must have effective access to data related to the outsourced loss adjusting services;

the supervisory authorities must have effective access to the business premises of the service provider and must be able to exercise those rights of access.

Furthermore, as provided by article 49 (3) of Solvency II Directive, insurance undertakings must “notify the supervisory authorities prior to the outsourcing of critical or important functions or activities as well as of any subsequent material developments with respect to those functions or activities.”

3.3.3 EIOPA Guidelines

Based, among others, on articles 40 to 49 of Solvency II Directive, the European Insurance and Occupational Pension Authority (hereinafter: EIOPA)¹¹ published the Guidelines on System of Governance on 31.10.2013.¹² These Guidelines must be put in place by the competent authorities from 1.1.2014 so that insurance undertakings take the appropriate steps to fully implement Solvency II.¹³ Guideline 13 provides that „national competent authorities should ensure that the undertaking has a policy on the fit and proper requirements”, including “a description of the fit and proper procedures for assessing other relevant personnel not subject to the requirements of article 42 of Solvency II Directive according to internal standards, both when being considered for the specific position and on an ongoing basis.” Regarding the outsourcing of key functions, Guideline 14 provides that national competent authorities should ensure that (a) “the undertaking applies the fit and proper procedures in assessing persons employed by the service provider or sub service provider to perform an outsourced key function” and (b) “the undertaking designates a person

within the undertaking with overall responsibility for the outsourced key function who is fit and proper and possesses sufficient knowledge and experience regarding the outsourced key function to be able to challenge the performance and results of the service provider.”

It is evident that the Solvency II framework relies upon the insurance industry to accommodate procedures which fulfill the above criteria of assessing the standards of professionalism required from persons performing outsourced key functions, such as loss adjusters.

4. PROPOSAL FOR THE APPLICATION OF INSURANCE MEDIATION DIRECTIVE 2 TO INDEPENDENT LOSS ADJUSTERS

As already mentioned above, independent loss adjusters are not directly regulated by Solvency II Directive. Therefore, following the introduction of Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 2 (IMD 2).

IMD 1 sets out the professional requirements and the registration and notification formalities that must be observed by insurance intermediaries.¹⁴ As currently in force, IMD 1 expressly excludes from its scope of application the management of insurance claims on a professional basis, loss adjusting and expert appraisal of claims, given that these activities are not considered insurance mediation [art 2 (3)]. Insurance mediation, as defined by IMD 1 [art. 2 (3)], includes “the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.” Furthermore, these activities, when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking, are not considered insurance mediation and do not fall within the scope of IMD 1, but will be regulated by Solvency II Directive as outlined above.

In line with the provisions of Solvency II Directive, from early 2010 the European Commission put forward the drafting of a proposal for the revision of IMD 1, taking into account the consequences of Solvency II

¹¹ EIOPA is the European Insurance and Occupational Pensions Authority, one of three European Supervisory Authorities. EIOPA is part of the European System of Financial Supervision consisting of three European Supervisory Authorities and the European Systemic Risk Board. It is an independent advisory body to the European Parliament, the Council of the European Union and the European Commission. See: <https://eiopa.europa.eu/>, 29.10.2013.

¹² Available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/guidelines/System_of_Governance/Final_EN_SoG_Clean.pdf, 29. 10. 2013.

¹³ Guidelines on System of Governance, paragraph 1.6.

¹⁴ Directive 2002/92/EC of the European Parliament and of the Council of 9. 12. 2002 “on insurance mediation” (IMD), p. 3–10.

for policyholders. During the preparatory work for IMD 2, loss adjusters themselves advocated for the establishment of a mutual recognition regime (sectoral passports) in order to boost their cross border trade.¹⁵ Moreover, several consumer organisations suggested that transparency and regulatory consistency should be applied for all market players.¹⁶ Following the completion of the impact assessment work, in 2012 the European Commission published its proposal for the revised IMD 2.¹⁷ In broad terms, the IMD 2 project “aims to expand the scope of application of IMD to all distribution channels (e.g. direct writers, car rentals, etc.); identify, manage and mitigate conflicts of interest; raise the level of harmonisation of administrative sanctions and measures for breach of key provisions of the current IMD; enhance the suitability and objectiveness of advice; ensure sellers’ professional qualifications match the complexity of products sold; simplify and approximate the procedure for cross-border entry to insurance markets across the EU.”¹⁸ In light of the above, the proposal brings ancillary sellers and after-sales businesses, including loss adjusters and claims handlers within its scope. In particular, the activity of the professional management of claims and of loss adjusting is included in the definition of insurance mediation.¹⁹

4.1. Simplified registration procedure – declaration of activities

Article 4, paragraphs 2 and 3, of the Proposal provides that loss adjusters (if this is their sole activity) are excluded from the registration procedures set out in article 3 and under a simplified procedure they must submit a declaration to the competent authority of their member states whereby they inform the competent

¹⁵ Letters from FUEDI to the European Commission, available at: www.fuedi.eu, 30. 10. 2013.

¹⁶ Annexes to the impact assessment accompanying the proposal for revision of the Insurance Mediation Directive, available at: http://ec.europa.eu/internal_market/insurance/docs/consumers/mediation/20120703-impact-assessment_annex_en.pdf, 30. 10. 2013.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

¹⁸ Paragraph 1.1 of the Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

¹⁹ Paragraph 3.1 of the Explanatory Memorandum, Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), Strasbourg, 3.7.2012, COM (2012) 360 final, 2012/0175 (COD).

authority of their identity, address and professional activities. Insurance undertakings must only use the services of loss adjusters who have fulfilled this registration procedure (IMD 2, art. 14).

4.2. Professional requirements

According to recital under number 22 of the Proposal of IMD 2, “the professional knowledge of persons carrying on the activities of the management of claims, loss adjusting or expert appraisal of claims needs to match the level of complexity of these activities. Continuing education should be ensured.” In light of this, article 8, paragraph 1, of the Proposal provides that loss adjusters must “possess appropriate knowledge and ability”, as determined by their home member states, “to complete their tasks and perform their duties adequately, demonstrating appropriate professional experience relevant to the complexity of the products they are mediating”. Furthermore, member states shall ensure that loss adjusters “must update their knowledge and ability through continuing professional development in order to maintain an adequate level of performance.”

The Commission is empowered to adopt delegated acts in accordance with articles 8 (8) and 33. Those delegated acts shall specify:

(a) the notion of adequate knowledge and ability of the loss adjusters;

(b) appropriate criteria for determining in particular the level of professional qualifications, experiences and skills required for carrying out loss adjusting services;

(c) the steps that insurance intermediaries and insurance undertakings might reasonably be expected to take to update their knowledge and ability through continuing professional development in order to maintain an adequate level of performance.

Member states must publish the general good rules for loss adjusters and EIOPA must collect and publish information about such rules (IMD 2, art. 9).

4.3. Objections to the application of IMD on Loss Adjusters

The European Economic and Social Committee of the European Parliament, in its opinion on the “Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast)” dated 13. 12. 2012, pointed out that further consideration of some of the proposals before their implementation should take place. This is because, according to its opinion, including the professional management of claims and loss adjustment in the definition of mediation

activities seems “strange.”²⁰ In the same direction, in its draft report dated 14. 12. 2012,²¹ ECON has proposed several amendments to the IMD 2 proposal. As EPON explains in the Explanatory Statement that is included in the Draft Report, the management of claims either by insurance undertakings themselves or by third parties (by insurance outsourcing contracts) falls within the scope of Solvency II Directive. Therefore, ECON argues that only activities which are not governed by an outsourcing agreement fall outside the Solvency II Directive. According to ECON, this by itself is not a justifiable reason for the inclusion of claims management in IMD 2. ECON’s approach, however, is rather formalistic; the protection of the policyholder’s interests must be met regardless of whether the expert provides services on behalf of the insurance undertaking or whether the expert is employed by the policyholder himself. Solvency II clearly does not cover the latter.

Another argument expressed by the Committee on Legal Affairs, in its opinion addressed to the Committee on Economic and Monetary Affairs dated 21 March 2013,²² is that loss adjusting activities are already sufficiently covered by national legislation and do not relate to the sales and administration of insurance products. In the same direction, the Committee on the Internal Market and Consumer Protection, in its opinion for the Committee on Economic and Monetary Affairs on the proposal for IMD2 dated 30.4.2013,²³ has expressed its concern for the introduction of new occupations, such as loss adjusters, which are irrelevant to the activities regulated under IMD. In

²⁰ Opinion of the European Economic and Social Committee on the „Proposal for a Directive of the European Parliament and of the Council on insurance mediation” (recast), p. 95–98.

²¹ Draft Report on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), Committee on Economic and Monetary Affairs, Rapporteur: Werner Langen, (Recast – Rule 87 of the Rules of Procedure), dated 14.12.2012, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARG+PE-502.060+01+DOC+PDF+V0//EN&language=EN>, 20. 10. 2013.

²² Opinion dated 21. 3. 2013 of the Committee on Legal Affairs for the Committee on Economic and Monetary Affairs on the proposal for a directive of the European Parliament and of the Council on insurance mediation (recast) (COM(2012)0360 – C7-0180/2012 – 2012/0175(COD)), available at: <http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARG&reference=PE-504.065&format=PDF&language=EN&secondRef=02>, 30. 10. 2013.

²³ Available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2BCOMPARG%2BPE-502.077%2B02%2BDOC%2BPDF%2BV0%2F%2FEN>, 30. 10. 2013.

line with the Parliament Committees, Insurance Europe²⁴ has expressed, in October 2012, its objection to the extension of the scope of IMD 2 to loss adjusting services, given the technical nature of these activities and their regulation under the Solvency II regime.²⁵

Evidently, these arguments raise concerns as to whether a Directive purporting to primarily regulate the sale of insurance products is the appropriate legal instrument for the introduction of a coordinated set of rules to an industry that is largely divergent between member states. In other words, it is questionable whether IMD 2 itself is the proper vehicle for the regulation of loss adjusting or whether these activities should be separately dealt with at EU level.²⁶ According to the press, this argument may have resulted in the exclusion of loss adjusting from the scope of application of IMD 2.

5. CONCLUSION

EU regulation of loss adjusting through IMD 2 is a matter of dispute. Nonetheless, the Commission’s approach to include loss adjusters in the expanded definition of insurance mediators has raised awareness over an industry which has been overlooked at EU level. It is indeed questionable whether IMD 2 is the proper vehicle for the regulation of the loss adjusting profession and arguably a separate legal instrument could better focus on the particularities of these activities. For instance, loss adjusters specialized in large risks address their services in a global market and their clients, if other than the insurer, are not typically policyholders whose interests need the standard of protection that the IMD intends to provide to policyholders.

²⁴ Insurance Europe is the European insurance and reinsurance federation. Through its 34 member bodies — the national insurance associations — Insurance Europe represents all types of insurance and reinsurance undertakings, eg pan-European companies, monoliners, mutuals and SMEs. Available at: <http://www.insuranceeurope.eu/about-us>, 30. 10. 2013.

²⁵ Letter of Insurance Europe dated 4. 10. 2012, available at: <http://www.insuranceeurope.eu/uploads/Modules/Publications/insurance-europe-key-messages-on-imd2.pdf>, 30. 10. 2013.

²⁶ The French CEA through FUEDI in its letter dated 12.7.2013 and addressed to the ECON Committee insisted that the provisions related to the loss adjusting experts activities must not be withdrawn from the proposal of the IMD2, despite opposite recommendations of EP ECON Committee, however also notes that IMD may not be the appropriate instrument, available at: <http://www.expert-cea.com/c/lettre-cea-juliet-2013>, 30. 10. 2013.

SUMMARY

Loss adjusters should meet certain professional requirements and standards of professionalism. The profession of loss adjusters, which has been overlooked at EU level till recently, is mainly self-regulated or regulated according to guidelines set out by insurance companies; national regulation of professional requirements is rather uncommon in EU member states. Under the Solvency II regime insurers must enhance the operational efficiency of their claim handling procedures, whether performed by in-house departments or outsourced to loss adjusters. Following the introduction of the Solvency II Directive, a dialogue has begun as to whether loss adjusting services should be regulated through the revised Insurance Mediation Directive 1 (IMD 2). Despite the European Commission's proposal to include loss adjusters in the expanded definition of insurance mediators and, therefore, within the scope of the revised IMD 2, serious arguments have been raised whether IMD is the appropriate legal instrument for the introduction of a coordinated set of rules to an industry that is largely divergent across EU member states.

Key Words: Loss adjusters, loss adjusting services, insurance claims, Solvency II, EIOPA Guidelines, IMD 1, IMD 2 (recast)

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