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Insurance & Reinsurance

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Trends & Developments

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Trends and Developments

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The main trends in insurance and reinsurance in Austria in 2019 were the continuing efforts of (re)insurers in IT, data collection (and regulatory compliance to do with that data), and also further insurtech business activities. The main topics were the efforts to comply with the new insurance-mediation rules and case law developments.

Despite a lot of hype about insurtechs in Austria, so far only a few new market participants or products have become visible. Instead many insurers have engaged with or invested in insurtech start-ups in order to open the doors to co-operation and to facilitate their own adaptation to new technology. So far, no new risk-carrier insurtech seems to have arrived in Austria. The most visible insurtechs in the market concern the distribution or management of insurance products. So, some of the new services offered are insurance-comparison or online-brokerage services.

Although the Austrian regulator (Finanzmarktaufsicht, FMA) emphasises its technology-neutral status, it also highlights that the regulations apply to all market participants and there will be no exceptions made for insurtechs. However, the regulator intends to provide regulatory guidance in relation to technology-driven questions in order to allow interested parties to evaluate risks for new technology-based business models. The FMA offers a contact point for co-ordinating regulatory questions for fintechs which may also be used for insurtechs. It also intends to offer a “regulatory sandbox” in order to allow selected entities to build their business models for some time.

Analyses in 2019 show that Austrian insurers consider their biggest concerns to be regulatory risks and connected costs, change management, adapting to modern technology (in particular IT), low interest rates and cybercrime. Generally, the strong competition in markets for established insurance products is seen as problematic; but the same applies to changing customer behaviour, in particular increasing expectations concerning the quality of services and less customer loyalty. Direct distribution, by way of online services, increased and will continue to do so. Insurers expect increasing data volumes and investment in digital analysis capacity to help, for example, to better segment customer and risk groups. So far, more segmented insurance products are rather limited. For example, motor vehicle insurers offer pay-as-you-drive and pay-how-you-drive products and health insurers grant optional premium reductions or other

benefits, subject to health or fitness checks, visiting a gym or providing health or fitness data.

Cyber insurance continued to be a topic in 2019 and will be so in 2020. In January 2019 the Association of Austrian Insurers (Verband der Versicherungsunternehmen Österreichs) published template terms and conditions for cyber insurance. However, this will likely have no relevant impact on the terms and conditions used for cyber insurance in the Austrian market which often have significantly different wordings. Typically, definitions of insured events, coverages and risk exclusions differ between the market participants. Still, most Austrian enterprises have not yet acquired cyber insurance. A report shows that only 19% entered into cyber insurance, while more than 65% had contact with cyber incidents, most prominently malware and phishing. Although much growth was and is expected in cyber insurance, so far customers seem to be reluctant.

Focus of the Regulator

In its publication “Facts and Figures, Trends and Strategies 2020” the FMA explains the focus of its supervision for 2020 and beyond. The FMA warns that “escalating trade wars, political conflicts in many regions of the world, and the threat of multilateralism mean that the danger of a geopolitical recession is looming.” The FMA has defined certain areas of increased supervision and inspection, such as the use of digitalisation in addressing risks, further development of collective consumer protection, strengthening the resilience of financial services providers against crises and improving the governance of the supervised entities.

The FMA will continue to conduct those analyses of the industry which it presently does, such as those regarding cost transparency in the performance presentation in unit-linked life insurance. It will focus on compliance with the requirements of cost transparency and the provision of proper information to customers. As regards insurance distribution, the FMA will also monitor distribution models where consumer protection regulations can be bypassed by supervised entities in order to prosecute practices to the detriment of investors and consumers. Banks’ compliance with the legal requirements for the sale of insurance policies will also be audited. In particular, the FMA will focus on the internal governance structures of supervised entities, including with respect to data and adaptations to changing business models. The FMA will further look at IT

security and IT strategies, including the risks resulting from digitalisation and the concentration risks resulting from the digital interconnectivity of market participants. Also, the FMA will conduct stress tests in the insurance industry.

Anti-money laundering (AML) audits and a strict “zero tolerance” approach in relation to the prevention of money laundering will be continued by the regulator, which will also include crypto assets. In this respect the FMA will also focus on online sales of insurance products.

New Legislation

After a very active 2018, in which many relevant changes to legislation (in particular by way of implementation of the Insurance Distribution Directive (IDD)) were introduced to the insurance industry, fewer legislative changes happened in 2019. However, the IDD was implemented in two steps, one by (mainly) amending the Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*) for insurance distribution by insurers which became effective on 1 October 2018, and another by amending the regulations on insurance agents and brokers in the Trade and Industry Code (*Gewerbeordnung*) which became effective (for the most part) on 28 January 2019. Since then an intermediary may only be either a broker or an agent. In addition, rules of conduct that became effective in June 2019 have been published which – for the first time – also provide rules limiting remuneration for intermediaries. In July 2019 the curricula for training content, as required to comply with training obligations in the IDD, were published.

The Bilateral Agreement between the European Union and the United States of America on prudential measures regarding insurance and reinsurance was implemented in Austria on 22 September 2019 by way of Section 19a of the Insurance Supervisory Act.

Life Insurance: Cancellation Right

Cancellation rights of policyholders in life insurance are still a topic in Austria. Following the decision of the European Court of Justice (ECJ) in *Endress v Allianz*, the Austrian Supreme Court (*Oberster Gerichtshof*) allowed policyholders a cancellation right for an unlimited time if the insurer provided incorrect information on the cancellation right (Case No 7Ob 107/15h). While further Austrian requests for preliminary rulings were pending at the ECJ, new rules on the cancellation right were implemented in the Insurance Contract Act (*Versicherungsvertragsgesetz*). With effect from 1 January 2019, Section 5c of the Insurance Contract Act now provides for a cancellation right for consumers and entrepreneurs within a period of 14 days for non-life insurance and of 30 days for life insurance. The cancellation period starts on the day on which the insurance contract has been entered into and certain specifically listed

information has been provided in writing to the policyholder. The information required includes the insurance certificate; the terms and conditions, including any provisions on fixing or amending the premium; and instructions on the cancellation right (for which the law also provides a model form). The policyholder must declare any cancellation in writing, which needs to be dispatched prior to the end of the cancellation period. Also, the consequences of a cancellation were newly laid down in Section 176 of the Insurance Contract Act. Generally, the new provision requires that the insurer has to pay the surrender value to the policyholder. It now also provides for rules on what the insurer has to pay, if it did not provide the policyholder with all the required documents and information under Section 5c of the Insurance Contract Act in time. In particular, if the policyholder has not been fully informed about its cancellation right:

- in cases of cancellation within the first year the policyholder shall receive all the premiums paid;
- in cases of cancellation in the second, third, fourth or fifth year the policyholder shall receive the surrender value without deduction of agreed costs for entering into the policy and any other agreed deductions; and
- in case of cancellation after the fifth year the policyholder receives the surrender value less any agreed deductions.

Since then the opinion of the Advocate General in the joined cases C-355/18 to C-357/18 and C-479/18 of Austrian requests for preliminary rulings in connection with the cancellation right has been delivered, on 11 July 2019. The opinion states that an indication of a specific form may be required, that late information on the cancellation rate would not start the cancellation period and thereby eliminate the cancellation right through its expiry, that the policyholder may still exercise its cancellation right even if he or she has already received the surrender value due to termination of the policy, that the policyholder must not always receive only the surrender value in case of cancellation, and that interest on the repaid premium must not be limited to three years prior to bringing a legal action in court. While some of the statements in the opinion may fit well with the newly amended Section 176 of the Insurance Contract Act, there is still some doubt over whether all the new provisions are now in line with the (to be expected) case law of the ECJ.

In the meantime, the Supreme Court submitted further requests for preliminary ruling to the ECJ concerning the cancellation right, such as whether or not the insurer also has to repay the insurance tax. This topic will continue to be of interest for some years.

Credit Insurance

Typically, not many credit insurance cases make it to the Supreme Court. However, Case No 7Ob 20/18v shows that

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banks will need an express consent from the borrower in order to validly insure its repayment. Contrary to earlier case law, the Supreme Court confirmed (on the basis of new decisions) that any disclosure of information of the bank's customer to third parties (such as a credit insurer) would require an explicit and express consent of the customer. If such consent has not been provided, no rights are transferred or subrogated to the insurer. As the credit insurer cannot receive the insured claim by way

of statutory assignment, it may only acquire claims against the insured bank's customer by assignment under the contract with the bank.

This decision indirectly confirms one earlier decision of the Supreme Court, pursuant to which a credit insurer has no statutory right of subrogation.

Benn-Ibler Rechtsanwälte GmbH was founded in March 2010 in Vienna. In summer 2016, a branch office was opened in Salzburg. The firm covers almost all areas of commercial law with a strong emphasis on digitalisation. In particular, strong practice areas include real estate and infrastructure, corporate and commercial matters, M&A, insurance matters, regulatory

matters (in particular public procurement, financial, insurance and business regulation), finance matters, litigation and arbitration, and white-collar criminal defence. The firm has also developed a focus on digitalisation projects, compliance matters and data audits.

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Ingo Braun is partner at Benn-Ibler Rechtsanwälte GmbH and has a wide legal practice. His practice covers insurance law, warranty and product liability, agents and brokerage, regulatory matters, data protection, employment matters, corporate and commercial law, and asset finance. He specialises in all areas of insurance law. Ingo frequently speaks on topics relating to insurance, data protection and IT security and writes articles on data protection (eg, the chapter on Article 6 of the GDPR in the Austrian Yearbook on Data Protection, 2018) and asset finance.

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