



Banc Ceannais na hÉireann
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Mr. Raymond Byrne
Director of Research
Law Reform Commission
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13 October 2015

RE: LRC Report on Consumer Insurance Contracts

Dear Raymond

The Central Bank of Ireland (Central Bank) welcomes the Law Reform Commission's (LRC) review of the laws that govern and regulate consumer insurance contracts in Ireland and the publication of its report on Consumer Insurance Contracts (Report) on 7 July 2015. In particular, the Central Bank has long advocated for the general consolidation of financial services legislation and supports the LRC's principal proposal to consolidate and simplify the legislative architecture governing insurance.

We note that a draft scheme of legislation entitled "*Draft Consumer Insurance Contracts Bill 2015*" (Bill) is included in the Report to facilitate consideration of relevant reforms. As you will be aware, the Central Bank made a formal submission to the LRC's Consultation Paper on Insurance Contracts (LRC CP65) in March 2012. We highlight in this new letter the areas of the Report where the Central Bank's Consumer Protection Code addresses your recommendations and the areas where the Central Bank supports the objectives of the LRC's proposals for reform. We provide other general observations (see attached Appendix).

The Central Bank's Consumer Protection Code

The Central Bank has a statutory role in the field of consumer protection of financial services and ensuring that the best interests of consumers are protected. In particular, the Central Bank supervises compliance with financial services legislation (including a number of codes issued by the Central Bank) and in this regard, there are aspects of the draft Bill that would relate to our function.

As you are aware, the Central Bank's Consumer Protection Code 2012 (2012 Code) came into effect on 1 January 2012, replacing the Consumer Protection Code 2006, and sets out requirements that regulated firms must comply with when dealing with consumers in order to ensure a similar level of protection for consumers, regardless of the type of financial services provider. We believe that a number of the Report recommendations concerning pre-contractual and post-contractual



information and claims handling may already be addressed in whole or in part in the 2012 Code, examples of which are set out below:

- Chapter 4 of the 2012 Code contains detailed provision of information requirements for regulated entities including in relation to the presentation and legibility of material provided by insurers to consumers. Provision 4.1 states that *“a regulated entity must ensure that all information it provides to a consumer is clear, accurate, up to date, and written in plain English. Key information must be brought to the attention of the consumer. The method of presentation must not disguise, diminish or obscure important information”*. This provision appears to address Recommendations 14 and 93 of the Report.
- Chapter 4 of the 2012 Code also requires regulated entities to provide information about the regulated entity and its regulated activities, information about products (including insurance products) and information about charges. We note that the Report calls for similar requirements for insurance undertakings in the form of Recommendation 89 of the Report.
- Chapter 7¹ of the 2012 Code deals with Rebates and Claims Processing and contains detailed requirements for regulated entities in their dealings with claims. This includes Provision 7.15, which provides that *“A regulated entity must ensure that any claim settlement offer made to a claimant is fair, taking into account all relevant factors, and represents the regulated entity’s best estimate of the claimant’s reasonable entitlement under the policy”*, and Provisions 7.7, 7.8, 7.16 and 7.18 of the 2012 Code, which specify timelines for insurers in dealing with certain matters during the course of the handling of a claim. These provisions appear to address Recommendations 71 and 73 of the Report.

Areas of the Report where the Central Bank supports the objectives of the LRC’s proposals

The Report contains several recommendations which would enhance the rights of consumers and beneficiaries, in particular a number of reforms to clarify the duties of the parties and make the claims process more straightforward and fair (in particular in terms of what is expected of policyholders). Moreover, the Central Bank supports the proposals of the LRC to consolidate and simplify the existing legislative architecture governing insurance, which is something the Central Bank has advocated for some time. Highlighted below are the recommendations of the Report whose objectives the Central Bank would support, subject to further work being required by Government, were it to advance the Bill:

1. The consolidation and simplification of the statute book;
2. Providing a more straightforward mechanism to allow third party beneficiaries intended to benefit under an insurance contract to make a direct claim against the insurer where this is appropriate (e.g. in the case of a corporate policyholder having entered an insolvency process);
3. Inclusion of an explicit provision in legislation in relation to:

¹ Provisions 7.6 to 7.21 of the 2012 Code do not apply to direct settlements issued by health insurers



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- a) Resetting the consumer's duty of utmost good faith by placing the onus more explicitly on the insurer to be clear on what information is required of the consumer (both before and during the policy);
- b) Providing for proportionate remedies for honest mistakes or omissions by the policyholder that are not relevant to the claim made; and
- c) Providing that, in circumstances (outside of fraud) where facts not disclosed by the policyholder are relevant to the claim, rather than an outright and total refusal in all cases, the insurer's right to refuse the claim would be explicitly subject to a compensatory and proportionate test, reflecting what the insurer would have done had it been aware of the full facts.

Should the reforms outlined in the Report proceed, we believe that a proper cost-benefit analysis should be conducted, including having regard to the experience in other jurisdictions where corresponding reforms have been made, as well as the experience of the Financial Services Ombudsman and the Injuries Board. The Central Bank looks forward to the opportunity to consider the proposals fully and provide detailed submissions in respect of such proposals, and how they can be implemented, in the event that this draft Bill is progressed by Government.

We would be mindful, however, that the LRC's proposals on limiting the insurer's ability to exercise subrogation (while no doubt aimed at cases where this objective is laudable from a social perspective) could prove a costly and legally difficult reform, resulting in increased litigation and costs.

We hope that the high level observations on the Report's recommendations, provided in this letter and the attached appendix, are of assistance.

Should you have any queries on the above, please contact Catherine Rooney on 01 2244511.

Yours sincerely

Colm Kincaid
Head of Consumer Protection
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Appendix - High Level Observations on specific aspects of the Report

Pre-contractual duty of disclosure

The Central Bank supports the recommendation to place the onus more clearly on the insurer to be clear on what information is required of the consumer (both before and during the policy). However, we wish to bring to your attention existing provisions of relevance in the 2012 Code and Life Assurance (Provision of Information) Regulations 2011 (S.I. 15/2001) including:

- the general requirements set out in Chapter 4 regarding the clarity of information being provided to the consumer as set out above;
- provisions 4.21 – 4.22 which provide that a regulated entity must provide information on the main features and restrictions of a product to a consumer prior to offering, recommending, arranging or providing the product and provide each consumer with the terms and conditions attaching to a product or service before the consumer enters into a contract for that product or service;
- general principle 2.5 which provides that a regulated entity must ensure it seeks from its customers information relevant to the product or service requested; and
- in the life insurance context, Regulation 6 of the Life Assurance (Provision of Information) Regulations 2011 (S.I. 15/2001) provides that specific information (to be set out in a clear and accurate manner and in a specified format) is to be provided by an insurer or insurance intermediary before a client signs a proposal or an application form for a policy of life assurance. The information to be provided is set out in Schedule 1 of S.I. 15/2001.

Post-contractual duties

While we support the objective of the Report's recommendation to replace the post-contractual duty of good faith with specific statutory duties, including a duty on insurers to handle claims and complaints promptly and fairly, it is worth noting that Provisions 6.13 – 6.15 of the 2012 Code contain requirements with respect to post-contractual information and Chapter 7 sets out detailed requirements for regulated entities when dealing with claims. We note that certain provisions contained in the draft Bill place specific statutory duties on consumers, including a duty on consumers to pay premiums within a reasonable period (Section 14). The Central Bank cannot impose rules or duties on consumers through its rule-making powers. Furthermore, we wish to highlight that certain of the provisions of Section 9 of the draft Bill appear to relate to matters outside the scope of any of the Central Bank's rule-making powers, e.g., provision regarding interpretation favourable to the consumer in the event of ambiguity or that the required terms of contract does not preclude the addition of other contract terms being agreed. These provisions appear to be solely contract law matters.

Unfair and otherwise onerous terms

In March 2012, the Central Bank outlined, in its submission to the LRC's Consultation Paper in Insurance Contracts (CP 65), that, in its view, the existing European Communities (Unfair Terms in



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Consumer Contracts) Regulations 1995 (S.I. 27/1995) ('Unfair Terms Regulations') deals adequately with the issue of unfair terms in consumer contracts. The Unfair Terms Regulations include a power for the Central Bank to apply to court for a term to be declared unfair.

The Central Bank notes the LRC's proposals to adapt existing legislation on unfair terms to insurance contracts. We believe that such proposals must be considered in conjunction with the proposed *Consumer Rights Bill* published by the Department of Jobs, Enterprise and Innovation in May 2015, which seeks, among other things, to revise and strengthen provisions on unfair terms in consumer contracts.

Renewal of the Insurance Contract

We note that the Report recommends that the requirements currently contained in the *Life Assurance (Provision of Information) Regulations 2001*, as to what the insurer must provide annually in writing to the consumer, should be amended to add the matters set out in the Central Bank's 2008 consultative review of the 2001 Regulations. Upon review of this recommendation and the corresponding Section 11 of the draft Bill, it appears that Section 11(1) of the draft Bill broadly reflects Regulation 5(1) of the *Non-Life Insurance (Provision of Information) (Renewal of Policy of Insurance) (S.I. 74/2007) Regulations*. Section 11(3) and (4) of the draft Bill appears to broadly reflect the provisions of Regulation 9 of the *Life Assurance (Provision of Information) Regulations 2001* (S.I. 15/2001); however there are additions to the information to be provided on an annual basis which is based on the outcome of the Central Bank's 2008 review. The *Life Assurance (Provision of Information) Regulations 2001* will now need to be reviewed in light of work at EU level on a legislative proposal on Key Information Documents for Packaged Retail and Insurance based Investment Products (PRIIPs). The PRIIPs Regulation was adopted in December 2014 and will come into effect in December 2016.

Cancellation of contract of insurance

Where an insurer cancels an insurance contract, we support the inclusion of an explicit provision in legislation in relation to refunding the balance of the premium for the unexpired period of insurance without any further cost to the consumer.

Cooling off periods

The Central Bank supports the recommendation that a consumer should be entitled to avoid an insurance contract by giving written notice, subject to a number of exceptions. In this regard, we wish to highlight that the European Communities (Distance Marketing of Consumer Financial Services) Regulations 2004 (S.I. 853/2004) provide cooling off periods for life and non-life insurance products provided on foot of distance communication. In addition, in relation to life assurance contracts, Regulation 45(3) of the European Communities (Life Assurance) Framework Regulations 1994 (S.I. 360/1994) provides for a 30 day cooling-off period after the date on which the policy was issued. Section 10 of the draft Bill appears to provide an additional cooling off period to the



category of insurance contracts currently not covered, i.e. face-to-face non-life contracts. This, in our view, would appear to be a positive step.

Regulations and Codes of Practice

The Central Bank welcomes the LRC's proposal that further details concerning any formalities in a consumer insurance contract (in addition to those recommended in the Report), such as prescribed notices, notification and forms, should be set out either in Regulations to be made by the Minister or in a Code of Practice to be issued by the Central Bank of Ireland. However, the recommendation fails to reflect the trend which favours providing the Central Bank with powers to make technical regulations of this nature in the financial services regulatory area (including existing powers to do so under Central Bank (Supervision and Enforcement) Act 2013). Moreover the distinction in this part of the Bill between the role of the Minister and that of the Central Bank, and its consistency with existing respective roles of the Central Bank and Minister, is unclear.

Effect of Codes of Practice

The status of statutory and non-statutory codes in litigation has been a matter of debate for some time. The Central Bank supports the LRC's proposal that relevant provisions in statutory codes of practice should be admissible in evidence in any litigation or dispute resolution process. However, we would have a concern about a legislative reform on this matter being limited to one financial services sector.

Roles of the Financial Services Ombudsman and Injuries Board

In our view, the Report does not appear to envisage significant roles for the Financial Services Ombudsman (FSO) and Injuries Board in the reform of the laws governing consumer insurance contracts. The FSO has explicit jurisdiction to consider a complaint against a regulated financial service provider under a broad range of headings which go beyond simply whether or not the conduct complained of was contrary to law, while the Injuries Board provides an avenue to many claimants to pursue compensation without the associated legal cost incurred through litigation. The LRC Report focusses on Court judgements made under litigation cases relating to insurance contracts. In our view, many of the points of flexibility and fairness sought in the Report might be catered for by the FSO and Injuries Board and, therefore, the views and experience of both bodies on the utility and drafting of the reforms proposed must be sought.

Developments in EU Legislation

While the Report comments on EU influence on reforms of consumer contract law, it does not refer to current relevant legislative developments at EU level which, while they do not directly regulate insurance contracts, address some of the areas of reform which the LRC is recommending. In particular, the following legislative developments, which introduce strong disclosure requirements, should be considered in the event that the draft Bill is progressed:



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- **Insurance Distribution Directive (IDD, formerly IMDII)** – published by the European Council in July 2015, the IDD seeks to upgrade consumer protection in the insurance sector by creating common standards across insurance sales and ensuring proper advice. The Directive includes mandatory pre- and post-contractual disclosure requirements for insurance distributors and specifically a requirement to provide a standardised Product Information Document for non-investment-based insurance products.
- **Key Information Document for Packaged Retail and Insurance Based Investment Products (PRIIPS)** – adopted by the European Council in December 2014, the Regulation on Key Information Documents (KIDs) for Packaged Retail and Insurance-based Investment Products (PRIIPs), seeks to improve market transparency for consumers of such products. The Regulation, which applies to PRIIP manufacturers and persons advising on or selling PRIIPs, lays down uniform rules on the format and content of the KID and on the provision of the KID to retail investors in order to enable them to understand and compare the key features and risk of the product. The Regulation applies to all investment products provided to retail investors, including life insurance policies with an investment element.

