Global Insurance Updates: Topical issues and news from the international insurance markets

December 2024

DLA PIPER

Introduction

Welcome to the third edition of Global Insurance Updates: a publication from our insurance team that brings you snapshots of the latest legal developments from global insurance markets, covering key regulatory, transactional, and claims-related topics, among others, from across multiple jurisdictions.

On this occasion we feature insights from our teams in the UK, Australia, Belgium, New Zealand, Canada, France, Italy, Luxembourg, the Netherlands, and the US. We also include a report from our Nigerian partner firm Olajide Oyewole LLP on deepening insurance penetration in Nigeria via regulation of price comparison sites.

Should you wish to explore any of these updates further – their authors will be happy to pick up the conversation with you. You can find their names and contacts at the top of each article. Of course, this list of countries is not exhaustive of DLA Piper's insurance sector coverage – we pride ourselves in being among the largest insurance law firm teams in the world and all of us are keen to share our industry-focussed information and learnings with you in the interests of our clients. However, if you have queries about developments in countries or markets not covered by this issue, please get in touch and we will be delighted to connect you with our colleagues.

We hope you find Global Insurance Updates useful, and we look forward to bringing you snapshots from different parts of the world with our next edition in 2025.

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The New Insurance Act overhauls the insurance laws in New Zealand

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Hailed as a "once in a generation reform," the Contracts of Insurance Act 2024 (Act) passed its third reading in Parliament, with the government signaling it will be law before the end of 2024. The Act covers the entire insurance industry – life, health, general and travel – replacing five statutes (some that are over 100 years old) with one single piece of legislation.

The Act is poised to benefit policyholders while imposing greater pre-contractual obligations on insurers. However, policyholders must remain vigilant regarding their disclosure duties and understand the new exclusions that may apply.

The Act excludes reinsurance contracts from its scope, maintaining the autonomy of commercial parties in choosing the governing law for their contracts.

We draw attention to some of the key changes in the Act below.

Genetic testing in life and health insurance

One of the most significant new areas addressed in the Act is the issue of genetic discrimination when placing health or life insurance. While the Act stops short of banning genetic discrimination, it gives the government broad powers to regulate how genetic data is used in insurance underwriting. These regulations could significantly affect life and health insurers in the future.

Disclosure obligations

The Act significantly alters the disclosure obligations for policyholders. For consumer contracts, policyholders are only obligated to exercise reasonable care to avoid misrepresentations. This change places more responsibility on insurers to ask targeted questions and closely evaluate responses. When making disclosures to an insurer, dishonest representations by policyholders will be taken as showing a lack of reasonable care, rather than fraud.

The standard of care on whether a policyholder has taken reasonable care not to make a misrepresentation is that the insurer should take additional steps if a non-answer is given, or an obviously incomplete or irrelevant answer.

For non-consumer contracts, policyholders must provide a "fair presentation of the risk," ensuring that all pertinent information is disclosed honestly. While this shift reduces the burden on policyholders, concerns remain regarding the clarity of these obligations.

Reasonable remedies

The Act introduces a framework where neither party can void a contract based solely on a lack of utmost good faith. Insurers will have limited options for breaches of disclosure obligations, and what they can do will depend on the specifics and timing of the misrepresentation for a consumer contract. Where the insurer proves that, without the misrepresentation or breach, they would not have agreed the contract or a variation to the contract or would only have agreed on different terms, then it will be a "qualifying misrepresentation" or "qualifying breach," entitling the insurer to remedies under the Act.

The Act has introduced a new remedy for insurers if a policyholder has committed a "qualifying misrepresentation" (ie an insurer would have entered into a contract with different terms). An insurer may now charge a higher premium for the remainder of the contract and/or reduce proportionally the amount to be paid on a claim made.

New insurer duties

The Act introduces a range of new responsibilities for insurers, aligning their regulation more closely with that of lenders and financial product issuers. Among these responsibilities is the requirement for insurers to ensure consumer insurance contracts and insurance contracts for life and health insurance are worded and presented in a "clear, concise, and effective manner." Additionally, insurers will need to make specific information publicly available, such as claims acceptance rates and settlement timelines.

Intermediaries and reinsurance

Specified Intermediaries (including intermediaries who receive a commission or consideration directly/indirectly from an insurer) now have a duty to inform insurers about representations made during contract negotiations. Intermediaries who fulfil their duties to pass information to insurers will now not breach any contract, including their contract with the policyholder. Additionally, any compensation a court may order for breaching these duties is now subject to agreements between the insurer and intermediary, allowing intermediaries to limit or cap their liability under these duties.

For more detailed advice on how the Contracts of Insurance Act may affect you, contact the team at DLA Piper in New Zealand.

Australian mandatory merger clearance regime – what insurers can expect and what to prepare for

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In the biggest overhaul of merger control laws in over 50 years, Australia is moving from a voluntary to a mandatory merger clearance regime. If the Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024 (the Bill), currently before the Senate becomes law, acquisitions that meet certain thresholds will need to be approved by the Australian Competition & Consumer Commission (ACCC), from January 1, 2026.

The amendments will have repercussions across the insurance sector, for insurers operating in Australia and for players looking to merge into the Australian market.

Which mergers will require approval?

From January 1, 2026, acquisitions of shares and assets meeting specified monetary thresholds must be notified and approved by the ACCC. Transactions pending ACCC approval will be suspended, and transactions without prior approval will be void and subject to steep penalties.

Notified transactions will be assessed under the current test of whether they substantially lessen competition – though the new test will be extended to transactions that create, strengthen, or entrench substantial market power. Further, the ACCC can aggregate the impact of similar transactions over the past three years. All notified transactions will be publicly available on a new ACCC register, though confidentiality can be requested for surprise hostile takeover bids.

Relevance to insurance M&A

It's expected that most M&A activity by Australian insurers and insurance brokers will be captured by the new reforms due to the proposed monetary screening thresholds. Acquirers in this space generally have large turnover and will have to notify their transactions and await formal approval before proceeding, despite the fact that the relevant markets, particularly for insurance brokers, may be highly fragmented.

Parties using a growth by M&A model (such as most of the large insurance brokerage houses) will now have the viability of that model tested as their current ability to move quickly and without compliance cost burden will be affected by:

- a minimum notification and determination period of 30 business days (which will require parties to include a "condition precedent" to completion under the relevant sale document);
- a filing fee of between AUD50,000 to AUD100,000 per transaction, along with legal fees to support the notification – this is in addition to other existing M&A costs, like seeking Foreign Investment Review Board (FIRB) approval by foreign investors;
- internal compliance to monitor the aggregation of value of historical transactions with those that are planned to ensure compliance with the three-year look-back test period.

Insurers with aggressive consolidation strategies may also face substantive hurdles, as the ACCC seeks to test the limits of the new laws (which it has indicated it will use to target roll-up strategies).

Our expectation is that there will be an uptick in M&A across the broader Australian insurance market during 2025 in advance of the reforms taking effect on January 1, 2026. Applications that haven't received the regulator's green light by the end of 2025 will have to reapply under the new process, so acquirers will have the opportunity to apply under the new process from July 2025. From 2026 onwards, many insurers and brokerage houses with large M&A pipelines will be affected by the notification process.

In advance of the reforms coming into effect insurers should:

- collaborate with external legal counsel to establish precedent merger notification mechanisms for sale documents;
- prepare a standardized ACCC notification form for "routine" transactions to simplify and partially automate the notification process – this will require regular analysis of the relevant market and the acquirer's position within it;
- implement processes to ensure accuracy in documents and emails related to transactions, which may need to be produced for notified transactions; and during the second half of 2025,
- consider if new transactions completing in 2026 need a condition precedent for notification to ensure compliance if not completed by December 31, 2025.

To the extent these new costs cannot be passed on to relevant sellers (via effective reductions in the purchase price), it's possible that the growth by M&A model may change, producing a decrease in individual valuations (where demand lessens), and a greater focus on large portfolio acquisitions and consolidation of existing market leaders.

However, there may be a silver lining for smaller acquirers that don't meet the thresholds, who may fare better in M&A, offering more compelling bids in competitive sales.

NAICOM's insurance web aggregator guidelines: Deepening insurance penetration in Nigeria

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In a significant move to enhance insurance accessibility and penetration in Nigeria, the National Insurance Commission (NAICOM) issued the Insurance Web Aggregators Operational Guidelines (Guidelines) on February 1, 2022.

UNDERSTANDING WEB AGGREGATORS

A web aggregator (also known as price comparison websites) is a company (registered under the Companies and Allied Matters Act 2020 and licensed by NAICOM) that maintains or owns a website and provides information pertaining to insurance products. It offers price/features comparisons on products of different insurers and generates leads for insurance companies.[1]

The Guidelines set out a comprehensive regulatory framework for web aggregators to enable prospective insurance policyholders to select and purchase insurance products on safe and fair platforms.
With insurance penetration in Nigeria recorded as below 1% in 2023, the introduction of the Guidelines aims to transform the landscape of insurance marketing and distribution. It also ensures that web aggregator activities, that have so far been unregulated, come under the purview of NAICOM, the insurance regulator, while guiding the relationship with other players in the insurance sector.

[1] As defined in the Guidelines

The Guidelines categorize insurance market operators into two groups: insurers and web aggregators and regulate the activities for enhanced consumer protection through transparency. Web aggregators have to obtain a bi-annual operating license from NAICOM,[2] while insurers have to obtain a No Objection/Approval from NAICOM before engaging a web aggregator.[3]

The Guidelines also offer a structured approach for the operations of web aggregators and insurers. For example, web aggregators must employ a sophisticated Lead Management System in transmitting customer data to insurers.[4] And they mustn't display endorsements of insurance products on their websites.[5] This fosters a market environment that discourages anti-competitive practices, ensuring that consumers have access to a secure and diverse range of insurance products

IMPACT ON INSURANCE PENETRATION

With Nigeria's insurance penetration rate stagnating, the Guidelines are positioned to invigorate the market. According to a 2022 Insurance Industry Report, Nigeria's gross premium income (GPI) was roughly NGN520.1 billion. However, NAICOM recorded a GPI of NGN470.7 billion in the first quarter of 2024, indicating an encouraging shift in market dynamics which it attributes to new regulatory measures.

Before the Guidelines were issued, the activities of web aggregators were largely unregulated and fraudulent practices were rampant. The introduction of the Guidelines encourages insurance companies to adopt targeted online marketing strategies, reorienting consumer attitudes toward insurance. This digital shift is critical in a country where traditional marketing channels have proven insufficient to boost insurance uptake. The Guidelines also align with NAICOM's broader strategic agenda for 2024-2027, which emphasizes enhancing insurance accessibility and improving the effectiveness of traditional and alternative insurance distribution channels.

As Nigeria's population is projected to exceed 233 million by 2025, the insurance sector stands on the brink of substantial advancement. By regulating web aggregators, NAICOM hopes to further enhance consumer trust in digital insurance services and broaden the reach of insurance coverage across the country.

CONCLUSION

NAICOM's Insurance Web Aggregator Guidelines are a pivotal step in addressing the long-standing challenges of insurance penetration in Nigeria. The Guidelines are expected to usher in a new era of consumer engagement in the Nigerian insurance market, by using technology and fostering competitive practices.

[2] Section 4.3 and 6.0 (vii) of the Guidelines

[3] Section 4.2 of the Guidelines

[4] Section 7.3.1 (vii) of the Guidelines

[5] Section 7.3.2 (iii) of the Guidelines

COVID-19 BI claims in England and Wales: Judgments in 2024 and what's on the horizon

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Introduction

The Supreme Court's judgment in the *FCA Test Case* in January 2021 clarified the interpretation – in the context of COVID-19 in the UK – of a representative sample of 21 non-damage business interruption (NDBI) insurance wordings, affecting an estimated 370,000 policyholders. While wide-reaching on those issues it did address, the Supreme Court's judgment in the *FCA Test Case* didn't deal with *all* of the issues relating to COVID-19 related NDBI claims. Since January 2021, further litigation has tested the boundaries of the Supreme Court's judgment, with 2024 being no exception. 2024 saw cases consider:

- the meaning and scope of terms such as "statutory authority" and "policing authority";
- aggregation of underlying losses;
- the treatment of furlough payments/ government support;
- causation in the context of "denial of access" clauses;
- rectification;
- "at the premises" wordings; and
- outwards reinsurance issues.

Below is a brief outline of the relevant cases in chronological order:

JANUARY 2024

***Gatwick Investment Limited & Ors v Liberty Mutual Insurance Europe SE* (2024) EWHC 124 (Comm)**

On Prevention of Access (Non-Damage) clauses, aggregation and furlough payments

The Commercial Court held that central government and its secretaries of state each constitute a "statutory authority" for the purposes of the relevant Prevention of Access (Non-Damage) insuring clause, so respond to claims in respect of BI losses arising out of the COVID-19 pandemic.

Insured entities operating multiple premises through a single insured entity can only recover once per occurrence, while different insured legal entities (either through different policies, or through one composite policy), can recover for each occurrence.

Upholding the findings of the Court *Stonegate* (2022) EWHC 2548 (Comm) in insureds have to account to insurers for payments received as a result of furlough payments/government support, reducing any indemnity due from insurers.

APRIL 2024

***Bellini (N/E) Ltd t/a Bellini v Brit UW Limited (The Corporate Capital Provider of Lloyd's Syndicate 2987 for the 2019 Year of Account)* (2024) EWCA Civ 435**

On rectification

Bellini v Brit concerned an extension with a "physical damage" trigger. The insured sought to argue that something had "gone wrong with the language," so that it was necessary to correct the error through contractual construction. The Court of Appeal confirmed that the policy wording was clear that physical damage was required for BI cover to be triggered, and it dismissed the insured's claim. The fact that the cover was consequently limited did not justify rewriting the contract. The DLA Piper team in London acted on behalf of the defendant insurer, Brit.

SEPTEMBER 2024

***London International Exhibition Centre PLC v Allianz Insurance PLC & Ors* (2024) EWCA Civ 1026**

At the premises coverage

The wordings of the policies in each case had the commonality of providing cover for disease occurring (or in some cases manifesting itself or being suffered) at the premises of the policyholder.

The court held that the necessary causal link for BI losses due to COVID-19 is satisfied if at least one person with COVID-19 was present at the premises. The term "Public Authority" includes government measures, not just local authorities.

SEPTEMBER 2024

***UnipolSai Assicurazioni SPA v Covéa Insurance PLC* (2024) EWCA Civ 1110**

On reinsurance

The Court of Appeal, in the first COVID-19 NDBI reinsurance case, was asked to consider (i) whether losses suffered by underlying insured operators of children's nurseries ordered to close by the government could appropriately be said to have been "occasioned" by a "catastrophe"; and (ii) how an "hours clause" in the reinsurance applied. Neither of these issues had previously been the subject of judicial consideration by the English courts or elsewhere.

The Court of Appeal ruled that COVID-19 constituted a "catastrophe" under a property excess of loss treaty. Losses were directly occasioned by this catastrophe, and the "hours clause" applied to all losses first occurring within the relevant 168-hour period.

OCTOBER 2024

***International Entertainment Holdings Limited & Ors v Allianz Insurance PLC* (2024) EWCA Civ 1281**

On "policing authority"

The central issue was whether the Secretary of State could be said to qualify as a "policing authority." The Court of Appeal unanimously decided that the Secretary of State did not qualify as a "policing authority." The policyholder's claim was dismissed, marking a narrow victory for insurers, as all other issues were decided in the insured's favour.

Looking ahead

Given the myriad of issues arising out of NDBI clauses in the context of COVID-19, many issues continue to be litigated, and 2025 looks set to be another busy year.

Our team at DLA Piper acts as Lloyd's monitoring and coordinating counsel to the PICG group for UK and Rest of the World COVID-19 claims, which means we have an overarching global view of all material developments relating to COVID-19 claims. This enables us to provide clients with international knowledge and detailed input, to help achieve successful outcomes in claims arising not just in the UK (as evidenced by our involvement in Bellini), but anywhere in the world.

Italian regulator amends IVASS regulations to simplify pre-contractual information

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On June 20, 2024, the Italian Institute for Insurance Supervision (IVASS) issued Order no. 147/2024. It revises the provisions concerning pre-contractual information outlined in IVASS Regulation No. 40/2018 and 41/2018.

The new provisions aim to enhance the effectiveness of information provided to policyholders by simplifying documents, ensuring they're clear, comprehensive and concise. They're also aimed at better protecting policyholders throughout their relationship with distributors.

These measures emphasize the need for contracts and documents to be clear and complete. They also try to ensure consistency between pre-contractual information and general contract terms, especially regarding key clauses. The new rules also aim to reduce organizational burdens on distributors and ensure alignment with evolving European and national regulations on sustainable finance.

Here we look at the most relevant amendments.

Amendments to IVASS Regulation no. 40/2018: New templates for intermediaries

- Unified Pre-Contractual Model (*Modello Unico Precontrattuale* (MUP)): all pre-contractual information from the distributor has to be provided in a unified format, differentiated based on the type of product distributed, such as Insurance Based Investment Products (IBIP and non-IBIP), replacing Annexes 3, 4, 4-bis and 4-ter.
- Frequency of updating pre-contractual documents: during renewal or when concluding a new contract, distributors have to provide or send the information specified in the MUP only in the event of significant changes.
- Direct distribution: insurers can now directly deliver the required pre-contractual documents in the event of direct distribution.

Amendments to IVASS Regulation no. 41/2018: Changes to the Additional IPID

- **Simplification of Additional Insurance Product Information Document (IPID)**: three new formats (life, non-life, motor liability, and multi-risk insurance) have been introduced, focusing on insurance covers, exclusions and limitations, target clients, costs, mandatory information pursuant to Article 185 of the Insurance Code (solvency, claims, applicable law), and the tax regime.
- **Coordination among policy documents**: the new Additional IPID for IBIPs will now be coordinated with the Key Information Document (KID), promoting a synergistic reading of the two documents and facilitating the comparability of IBIPs with other products.
- **Page Limit**: there's now a maximum page limit of three pages for the Additional IPID.

Sustainable finance

The measure completes the adjustments needed to comply with European regulations on sustainable finance in IVASS's regulatory provisions, continuing the effort that began with Measure No. 2023/131.

Specifically, the measure aims to:

- incorporate updates introduced by the Regulatory Technical Standards (RTS) specified in Delegated Regulation (EU) No. 2022/1288, and further detailed in subsequent Delegated Regulation (EU) 2023/363; and
- ensure alignment with distributor disclosure requirements (Regulation No. 40/2018) and achieve similar alignment with manufacturer disclosure requirements (Regulation No. 41/2018).

Timeframe

Within 12 months, companies and distributors have to prepare the Unified Pre-contractual Module (MUP) for IBIP and non-IBIP products, as well as Additional IPID for life, non-life, motor liability, IBIP and multi-risk insurance products.

Our team at DLA Piper in Milan regularly assists insurers and intermediaries with navigating regulatory changes, including the drafting and review of policy wordings and pre-contractual documentation.

D&O insurance: Claims trends and impact of new legislation in Belgium (cyber, ESG and tort law)

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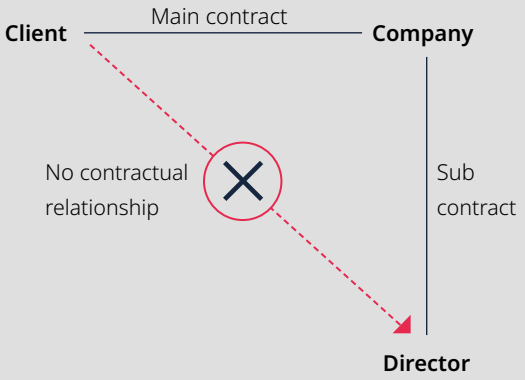
The playing field of D&Os has changed over the past few years. Companies and their directors have been put under increased scrutiny from shareholders, creditors, employees and other stakeholders on many different levels.

The COVID-19 pandemic forced companies to make a sudden shift to an online office environment, although they weren't prepared nor equipped for the drastic change. The increase in online activity, combined with often subpar protective measures, made many companies the perfect target for cyberattacks, resulting in numerous data breaches. These data breaches may result in an increase in third-party liability claims, and possibly even directors' liability claims, for failing to provide adequate protection against data breaches.

The recent Network and Information Security 2 (NIS2) directive and the Digital Operational Resilience Act (DORA) further emphasize the importance of cybersecurity and D&Os' responsibility in this regard.

The increased awareness of climate change and increased importance of environmental, social and governance (ESG) criteria also made companies and their directors rethink their corporate strategy. The many European legislative initiatives, such as the Corporate Sustainability Reporting Directive CSRD, which is being transposed into Belgian law through a draft bill of October 24, 2024 and the Corporate Sustainability Due Diligence Directive (CSDDD), underline the need for companies (and their D&Os) to actively put ESG-matters on the corporate agenda. Failure to do so can affect D&O liability.

A recent reform of Belgian tort law will further affect the liability risks faced by D&Os. This reform (which will apply to faults committed after January 1, 2025) redefines the possible third-party liability of subcontractors. The contractual relationship of the concerned parties can be summarized as follows:



A company will often rely on subcontractors (such as employees or directors) to perform (some of) its contractual obligations towards its own clients. The poor performance of the director can often directly affect the contractual performance by the company towards the client, causing damages to the client. The client would ideally try to claim (contractual) damages from both the company and its director to increase its chances of recovery.

Under current Belgian tort law, directors (effectively subcontractors to the company) benefit from a "quasi immunity" from such direct liability claims by a third contracting party in the event of a company breaching its contractual obligations, including in respect of damages resulting from the director's poor performance.

The idea is that the client cannot claim such contractual damages (based on a contract with the company) from the company's director, with whom the client has no contract. These direct claims are only possible when the director's poor performance is both of a contractual and extra-contractual nature and the damage is purely extra-contractual. Basically, this will only be the case when a criminal offence is committed (which will rarely be the case, hence the quasi-immunity of directors).

The upcoming and reformed Belgian tort law has put an end to this quasi-immunity. It explicitly allows direct claims towards subcontractors. Directors can now be faced with liability claims from clients of the company, based on management errors which caused damages to the company's client.

Directors can only rely on three defense mechanisms. First, the director can rely on the same limitations and exclusions of liability that are included in the contract between the company and the client (to the benefit of the company). Second, the director can rely on the limitations and exclusions of liability that are included in their own contract with the company. Third, not all management errors will trigger the liability of the director (even if they cause damages to a third party): a director will still only be liable for manifest management errors (as it is the case now), which require decisions, acts or behavior that are manifestly outside the range of which normally prudent and careful directors, placed in the same circumstances, might reasonably act differently.

These defense mechanisms ensure that D&O liability remains manageable, as contractual limitations of liability can already largely limit possible direct claims from clients of the company.

The reform of Belgian tort law further defines the possible scope of director's liability. Directors will be urged to:

- include sufficient limitations of liability in their contracts with the company;
- review the contracts between the company and the client (and ideally insist on exclusions of liability towards subcontractors); and
- ensure adequate insurance coverage in their D&O policy.

SFDR and ESG in Luxembourg for life insurance companies: Where do things stand?

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The Sustainable Finance Disclosure Regulation (SFDR) plays a crucial role in advancing the EU's sustainability objectives. The SFDR applies broadly to financial market participants (FMPs), notably life insurance companies in Luxembourg, which offer insurance-based investment products (IBIPs) and other entities meeting certain thresholds such as pension providers and distributors of IBIPs.

Key SFDR requirements

Life insurance companies, as essential FMPs, play a significant role in promoting sustainable investment by integrating Environmental, Social, and Governance (ESG) factors into their practices. So they have to inform potential clients about sustainability factors in their products before policy signing.

Public website disclosures must outline sustainability policies, report adverse impacts, and ensure alignment with sustainability objectives. Article 3 of the SFDR mandates that these entities disclose how sustainability risks are incorporated into investment decisions.

FMPs must publish detailed due diligence policies covering identification, prioritization, and mitigation in view of principal adverse effects. Firms not considering adverse impacts must explain why, particularly if they have over 500 employees.

Applicability of SFDR to life insurance companies

On April 30, 2024, EIOPA highlighted the need for transparency in SFDR compliance, urging insurers to set clear sustainability goals and avoid vague claims or misleading advertising.[6] Similarly, the European Supervisory Authorities (EBA, EIOPA, ESMA) published in October 2024 their third report on Principal Adverse Impact (PAI) disclosures, noting improvements in quality and accessibility but stressed that full compliance with SFDR standards remains a work in progress.[7]

In July 2024, the prudential insurance regulator in the Grand Duchy of Luxembourg: the *Commissariat aux Assurances* (CAA) conducted a study to assess the involvement of Luxembourg's life insurance companies in sustainability and SFDR, effective from March 2021.[8] In the study, the CAA pointed out that the regulation requires life insurance companies to disclose sustainability information and classify investment products, combating greenwashing and enhancing transparency. The CAA's analysis considers criteria such as the existence of sustainability policies and investment choices, categorizing companies into four levels, based on their integration of sustainability factors. The study encourages life insurance companies to improve policy transparency, including the disclosure of "principal adverse impacts" annually, aligning with SFDR requirements.

In line with these efforts, Luxembourg's sustainability labelling agency, LuxFLAG, has introduced the ESG Insurance Product Label, specifically tailored to life insurance products, particularly unit-linked policies.

The label aligns with SFDR requirements by mandating that at least 66% of new products' offered funds and 50% of invested funds qualify as Article 8 or 9 products, promoting sustainability characteristics or objectives. For existing products, the thresholds are 50% and 33%, respectively.

Insurers must also adopt responsible investment strategies, adhere to exclusion policies, and provide detailed sustainability disclosures. This initiative complements regulatory efforts by encouraging transparency and fostering the integration of ESG principles, ensuring that life insurance companies contribute meaningfully to sustainable finance while addressing greenwashing concerns.

Challenges in implementing SFDR[9]

Implementing SFDR poses several challenges for life insurance companies. The vagueness of "sustainability" remains a significant issue, as SFDR Article 2(17) outlines that investments must contribute to environmental or social objectives without clear criteria. Distinguishing between Article 8 and Article 9 products also proves difficult, as investors often struggle to understand the differences in asset allocation and objectives.

Additionally, the Taxonomy Regulation (TR) provides a framework for classifying activities as "green" or sustainable, requiring FMPs to disclose ratios of activities aligned with sustainable objectives. The lack of standardization for impact measurement and reliance on inconsistent ESG data further complicates compliance.

Despite these challenges, the SFDR offers life insurance companies an opportunity to enhance client transparency and trust. By adopting sustainable investment strategies, these companies can benefit from long-term financial growth, positioning themselves as leaders in sustainable investing.

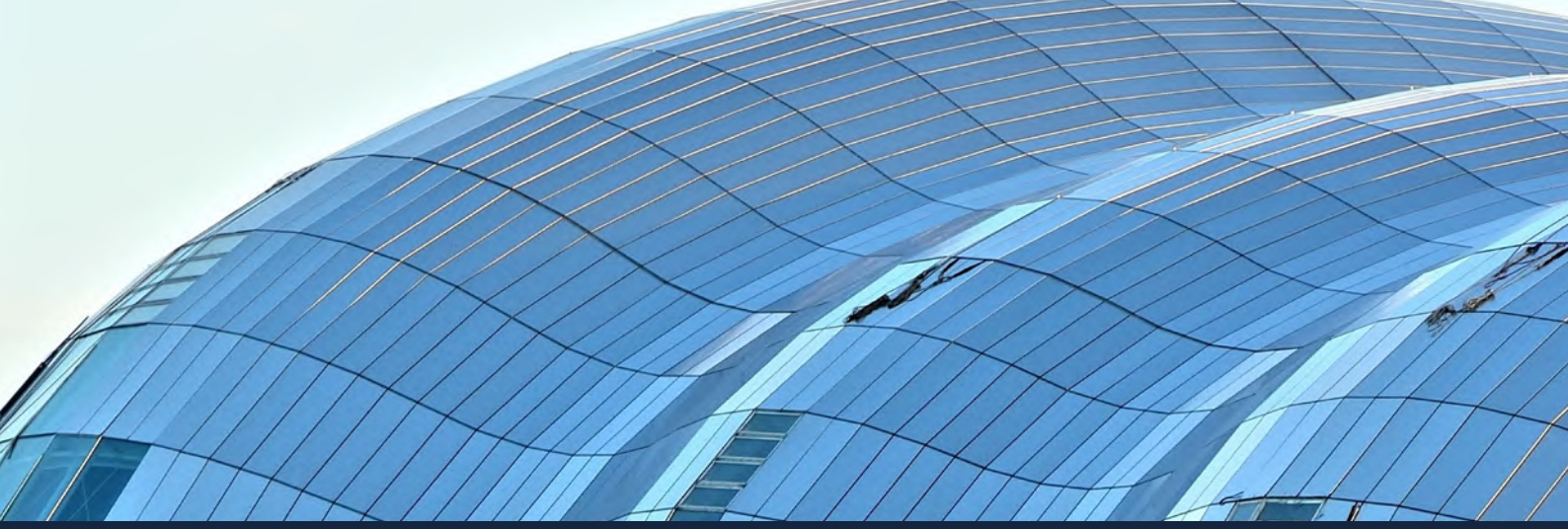
DLA Piper in Luxembourg advise life insurance undertakings and intermediaries on a regular basis regarding regulatory compliance and ESG. If you have any questions regarding the above please contact David De Cubber.

[6] "Opinion on sustainability claims and greenwashing in the insurance and pensions sectors," EIOPA, April 30, 2024.

[7] "Principal Adverse Impact disclosures under the Sustainable Finance Disclosure Regulation," Joint Committee of the European Supervisory Authorities, October 30, 2024.

[8] "*Note d'information 24/9 relative à l'étude de l'implication des entreprises d'assurance-vie en matière de durabilité,*" CAA, July 2, 2024.

[9] "The current Implementation of the Sustainability related Financial Disclosures Regulation (SFDR)," European Parlement, July 2024, pp. 45-46, 57-59.



Dutch AFM publishes guidance on the role of the policyholder in group insurance structures

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On March 14, 2024, the Dutch Authority on Financial Markets (AFM) issued guidance on the role of a policyholder in collective or group insurance products. Under a group insurance policy, an insurer covers the risks of multiple insureds, while engaging only one entity as the (group) policyholder. This policyholder adds customers to the policy who accept the existing terms and conditions and become insured under the (group) policy only.

The benefit of this structure is that it will only result in one set of terms and conditions, one policy and one contracting party. It was assumed in many EU jurisdictions that the policyholder cannot be seen as an insurance intermediary, eliminating the need for a license as an insurance intermediary, but this has now changed. Further to this changed position, group policyholders may come in scope of the license requirement that applies to insurance intermediaries. And insureds under a group policy may benefit from the same customer protection rights (eg (pre)contractual information requirements) that used to apply predominantly to policyholders, ie the contracting party of the insurer.

The Dutch AFM guidance was influenced by two significant European Court of Justice (ECJ) rulings from 2022, which affect the distribution structure of group insurance offerings. Since, in practice, many insurers engage in partnerships making use of group insurance policies, market participants will welcome the long-expected guidance from the AFM elaborating on the potential applicability of the license obligation for policyholders in a group insurance structure.

Due to the discrepancies between the ECJ rulings and the AFM guidance that used to be market practice in the Netherlands, the AFM's interpretation of the ECJ rulings was long-awaited.

The key takeaways from the ECJ rulings are:

- Policyholder as Insurance Intermediary: The ECJ determined that a legal entity offering its customers membership to a group insurance policy, in return for payment, should be regarded as an insurance intermediary. This means such entities might need to get a license.
- Dual Role Possibility: The ECJ clarified that it's possible for a party to be both an intermediary and a policyholder, which was not the common understanding in the Netherlands before these rulings.
- Remuneration as a Decisive Factor: Contrary to previous Dutch practice, the ECJ emphasized that receiving remuneration is a key factor in determining whether a license is required for insurance intermediaries.

Ancillary insurance intermediaries: Exempted from the license obligation

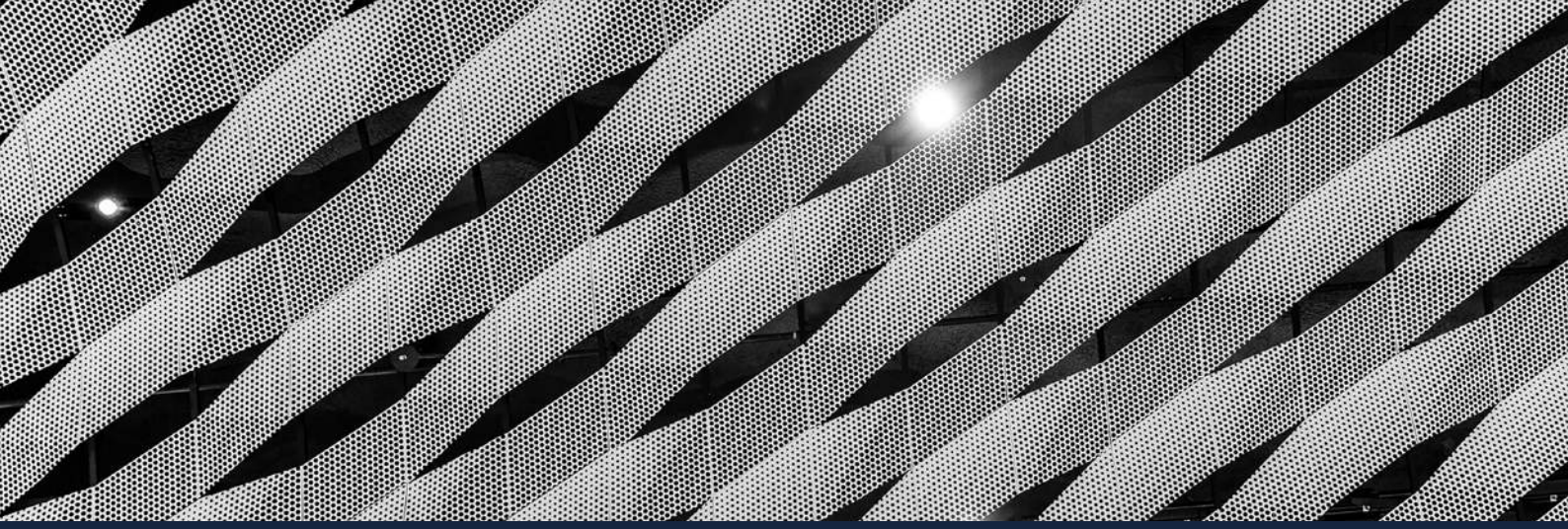
Ancillary insurance intermediaries may be exempt from the license obligation if certain conditions are met. In the Netherlands, this exemption applies if (i) the insurance is complementary to a good provided by the intermediary, covering risks like breakdown or loss of that good, or (ii) if it covers the non-use of a service provided by that intermediary.

Additionally, the premium must not exceed EUR600 annually or EUR200 for services lasting three months or less. With a strict interpretation of the legal framework, however, the exemption would only be available if the insurance policy in question covers the risk of the non-use of the service provided by the group policyholder. In most cases that we've seen in practice, the policyholder offers a service and the insurance policy doesn't (just) cover the non-use of the service provided by a policyholder but (also) the risk of breakdown or loss of a good. Even if the exemption would be available, conduct requirements for insurance intermediaries would still apply.

If you or your company offers coverage under a group insurance contract (either as an insurer or a policyholder), you should consider whether this distribution structure is compliant.

The AFM has announced a transitional period and expects policyholders qualifying as intermediaries and unable to rely on an exemption to obtain a license no later than October 1, 2025. Obtaining a license as an insurance intermediary can be an onerous and time-consuming matter. We advise you submit a license application with the AFM in a timely manner, taking into account AFM's consideration period of 13 weeks, which is, in practice, often longer.

Our team in Amsterdam is happy to advise you on the above in your specific situation, including the applicable conduct requirements for exempted ancillary insurance intermediaries and the license application process.



The duty of insurance distributors to provide advice in the French Life Insurance Sector

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The duty of insurance distributors to provide information and advice is at the heart of current concerns in France. In the case of life insurance, Law n° 2023-973 of October 23, 2023 (Green Industry Law (*Loi Industrie Verte*))[10] has had an effect on this area.

General principles

Under French law, the duty to advise is defined as follows: the distributor "shall advise on a contract that is consistent with the requirements and needs of the prospective policyholder or subscriber and shall specify the reasons for that advice"[11] (Articles L. 521-4, I and L. 522-5 of the French Insurance Code, (FIC)).

Before concluding an insurance contract, the distributor has to specify in writing the prospective policyholder's, requirements and needs. And it has to provide objective information on the insurance product proposed in a comprehensible, accurate and non-misleading form to enable the prospective policyholder to make an informed decision.

[10] Law no. 2023-973 of 23 October 2023 on green industry, available here

Life Insurance specificities

In the case of life insurance contracts, the requirements placed on the distributor are more rigorous.

To advise on a contract that's consistent with the requirements and needs of the prospective policyholder, the distributor has to specify the reasons for the advice and ask policyholders about their financial situation and investment objectives, as well as their knowledge and experience in financial matters.

Recent changes to the duty to advise for life insurance contracts

Two recent orders have been issued in relation to the Green Industry Law and supplement the duty to provide life insurance advice.

A DUTY TO PROVIDE ADVICE RENEWED EVERY TWO OR FOUR YEARS DURING THE LIFE OF THE CONTRACT

The Order of June 12, 2024, which came into force on October 24, 2024, extends the duty to provide advice in respect of capitalization contracts and certain life insurance contracts. It stipulates that the insurance distributor should update the information collected to ensure the contract remains appropriate or adequate to the requirements and needs expressed by the policyholder:

- every four years if the contract hasn't been the subject of any transactions, or if it hasn't been the subject of scheduled operations (scheduled payments, surrenders or assets switching); and
- every two years if a personalized recommendation service has been provided to the policyholder.

If the policyholder doesn't respond or refuses the distributor's request, a further period of two or four years elapses before a new update request can be made.

The duty to advise must also be renewed following a transaction that affects the contract "significantly." These include:

- payments, surrenders or assets switching (excluding scheduled transactions and surrenders carried out pro rata to the units invested, and early surrender due to an accident/death):
  - greater than or equal to EUR2,500 and 20% of the outstanding balance of the contract for contracts with an outstanding balance of less than EUR100,000;
  - greater than or equal to EUR30,000 and 25% of the outstanding balance of the contract for contracts with an outstanding balance of more than EUR100,000;
- surrenders, payments or assets switching concerning certain units of account listed in Article L. 132-5-4 of the FIC.

SWITCHING ASSETS BETWEEN UNDERLYING UNIT LINKED IN LIFE AND CAPITALIZATION POLICIES

The Green Industry Law introduces a definition of what qualifies as an arbitration mandate (*mandat d'arbitrage*), now set out in Article L 132-27-3 of the FIC. An arbitration mandate is an agreement whereby the policyholder to a life insurance or capitalization contract, acting as principal, entrusts a natural person or legal entity, acting in the course of its commercial or professional activities and as agent, with the power to decide on switching assets between underlying unit linked.

Following the Order of June 12, 2024,[12] once the arbitration mandate has been signed, the distributor will now have to ensure, every four years, that the asset allocation profile remains consistent with the policyholder's requirements and needs.

To complete the scheme, Decree no 2024-572 of June 21, 2024,[13] specifies the mandatory content of the arbitration mandate agreement.

These new obligations, set out in the Order of June 12 and Decree of June 21, have been applicable in France since October 24, 2024.

[12] Order of June 12, 2024, setting the frequency at which the intermediary or the insurance or capitalization undertaking verifies the appropriateness of the allocation profile as part of the arbitration mandate for life insurance and capitalization contracts, available here.

[13] Decree no. 2024-572 of June 21, 2024, defining the content of the arbitration mandate agreement and the information sent to the principal for life insurance and capitalization contracts, available here.

Major US regulator initiatives address AI systems and insurer investments

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US regulators have undertaken major initiatives in response to innovation in the insurance industry. This article examines two significant developments in US insurance regulation: the emerging frameworks for AI oversight and updated regulation of insurer investments, particularly in response to increased private equity participation in the insurance sector.

Regulatory Developments in AI and Insurance

The National Association of Insurance Commissioners (NAIC) Model Bulletin on AI Systems (Bulletin), finalized by the NAIC in December 2023, has been adopted in at least 18 US jurisdictions. The Bulletin creates standards for using AI in insurance and is an effort to set clear expectations for state Departments of Insurance regarding insurance companies' use of AI. The Bulletin is intended to balance the potential for AI related innovation with the imperative to address the unique risks associated with AI systems.

Under the Bulletin, insurers have to comply with all applicable insurance laws, such as laws concerning unfair trade practices, when action or decisions that affect customers are supported by the use of AI systems. The Bulletin includes requirements related to a governance framework and internal control framework and makes insurers responsible for due diligence related to AI for third-party vendors.

At the state level, the New York Department of Financial Services (NYDFS) issued a circular letter in July 2024, addressing the use of external consumer data and information sources (ECDIS) and artificial intelligence systems (AIS) in insurance underwriting and pricing. The NYDFS circular letter is the most comprehensive state insurance regulatory effort addressing AI and has significant implications for the insurance industry, especially in the areas of data governance, algorithmic accountability, and consumer protection. The NYDFS circular letter creates obligations for insurers to comply with fairness principles through a comprehensive assessment meant to protect consumers from unfair discrimination. Like the Bulletin, the NYDFS circular letter also creates certain requirements regarding governance frameworks and controls. However, the focus of the NYDFS guidance is solely on underwriting and pricing, which is considerably narrower than the Bulletin.

In 2024, Colorado focused on developing regulations to implement Senate Bill (SB) 21-169, which requires insurers to test external data sources used in developing algorithms and predictive models for unfair or unlawful discrimination. The law requires the Commissioner to adopt rules by type of insurance and insurance practice. Colorado Reg. 10-1-1, adopted in November 2023, established governance and risk management requirements for ECDIS, algorithms and predictive models used by life insurers. Colorado is expected to extend the application of that regulation to other lines of business in 2024 or early 2025. In the meantime, SB24-205, adopted by Colorado in May 2024, enacted comprehensive requirements related to AI for developers and deployers of what are characterized as high-risk AI systems, which specifically excludes insurers that are subject to SB21-169.

In September 2024, California enacted legislation, SB 1120, which regulates the use of AI, an algorithm, or "other software tool" in utilization review and utilization management functions by healthcare service plans or disability insurers. The recently enacted California law mandates that only licensed healthcare professionals can make medical necessity determinations, ensuring AI tools may not independently deny, delay, or modify healthcare services based on medical necessity.

Investment regulation and private equity oversight

There are a series of NAIC initiatives designed to recalibrate financial oversight of insurers to ensure regulatory treatment of insurer investments is commensurate with investment risk.

The NAIC adopted a "principles-based bond definition" effective from January 1, 2025. This bond project involves a series of revisions to accounting rules. The purpose of the bond project was to incorporate consideration of substance, rather than legal form, into assessments of financial instruments.

Effective in 2026, the NAIC authorized new procedures for regulators to challenge a credit rating provider rating. The amendment grants discretion to the NAIC's Securities Valuation Office (SVO) related to the process for assigning certain NAIC designations. The SVO produces NAIC designations for insurer-owned securities. NAIC designations represent opinions of gradations of the likelihood of an insurer's timely receipt of an investment's full principal and expected interest. As a result of the amended procedures, structured debt securities, such as collateralized loan obligations and mortgage-backed securities, may be subject to increased investment-risk review on a security-by-security basis.

These initiatives have been, to some extent, the result of concerns over increasing participation of private equity (and private credit) in the insurance industry. The NAIC is expected to continue its work examining its list of regulatory considerations related, but not exclusive to, private equity owned insurers.

Quebec's approach to defense costs and policy limits erosion

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Defense costs and policy limits under Quebec law

In Quebec, the long-held legislative approach to liability insurance has been the protection of injured third parties. This approach arises from section 2500 of the Civil Code of Quebec (CCQ), which provides that "The proceeds of the (liability) insurance are applied exclusively to the payment of injured third persons."

Another key component of Quebec law in this regard is the payment of defense costs under liability policies, provided for under Article 2503 CCQ:

"legal costs and expenses resulting from actions against the insured, including those of the defense, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance."

This establishes the rule that defense costs are borne by the insurer over and above the proceeds all of insurance coverage. Accordingly, under Quebec Law, the payment of defense costs by an insurer generally doesn't erode the insurer's limit of coverage under the policy.

On June 2, 2021, section 2503 of the CCQ was modified so the government can, by regulation, determine categories of insurance contracts that depart from the rules set out in Articles 2500 and 2503 of the CCQ. This development came about from the tightening of the Quebec insurance market, as Quebec businesses were facing difficulties in securing liability insurance coverage due to increasing insurance premiums, especially for D&O liability coverage. The Quebec government was also facing pressure from interest groups and corporations to harmonize Quebec's regulatory framework with that of the rest of Canada and promote contractual freedom in the insurance market.[14]

The regulatory exceptions

The ensuing regulation, "Regulation respecting categories of insurance contracts and classes of insureds that may derogate from the rules of Articles 2500 and 2503 of the Civil Code" (Regulation), was published on April 20, 2022, and entered into force on May 5, 2022. It provides for limited exceptions to the otherwise mandatory rules of Articles 2500 and 2503 of the CCQ.

The Regulation's first section provides that certain insureds can be covered by a contract that departs from the rules set out in Articles 2500 and 2503 of the CCQ. They include drug manufacturers, certain investment funds, and the directors, officers or trustees of those entities.

The Regulation's second section provides that an insured can enter into a contract departing from Articles 2500 and 2503 of the CCQ where the total coverage under all the civil liability insurance contracts subscribed by that insured is at least CAD5 million, and the insured meets one of the following conditions:

- the insured is a large business for the purposes of the Act complying with the Québec sales tax within the meaning of the Taxation Act;
- the insured is a reporting issuer or a subsidiary of such a reporting issuer within the meaning of the Securities Act;
- the insured is a foreign business corporation within the meaning of the Quebec Taxation Act or the Federal Income Tax Act; and
- the insured is a director, officer or trustee of any entity referred to in any of paragraphs 1 to 3 above, even if the entity itself is not insured under a contract that departs from Articles 2500 and 2503 of the CCQ.

A contract of insurance that departs from the rules under Articles 2500 and 2503 of the CCQ cannot have a duration of more than a year, and the insured will have to meet the criteria set out by the Regulation at every renewal.[15] Further, if the director, officer or trustee also pursues activities as a member of a pension committee, those activities must be covered under a contract that doesn't depart from the rules set out in Articles 2500 and 2503 of the CCQ.

Lastly, where a minimum amount of civil liability insurance coverage is specified by law, proceeds of insurance must be applied to the payment of injured third persons before any other payment.[16]

Conclusion

By allowing certain categories of insureds to subscribe policies where defense costs erode the policy's limits, the Regulation provides a degree of flexibility to the Quebec liability insurance market. It will be interesting to monitor how effective the Regulation is in reaching the policy objective of controlling insurance premiums and harmonizing Quebec's insurance market with the rest of Canada in the coming years.

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[14] Insurance Bureau of Canada, *Mémoire sur le projet de Règlement sur les catégories de contrats d'assurance et d'assurés pouvant déroger aux règles des Articles 2500 et 2503 du Code Civil*, October 2021

[15] Regulation, art. 3

[16] Regulation, art. 5