Irish Private Health Insurance Market post ECJ's VHI Decision

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The ECJ's recent decision in Commission v Ireland (Case C-82/10) is likely to have significant effect on the private health insurance market in Ireland.

Article 6 of First Council Directive 73/239/EEC provides that a Member State must make the taking-up of the business of direct insurance in its territory subject to an official authorisation. The VHI, however, was expressly exempted from the application of Article 6 on the proviso that its capacity did not change from the date the derogation was granted. In Commission v Ireland, the ECJ adjudged that the VHI's capacity changed by reason of national legislation enacted in 1996 which empowered the entity to enter into new lines of business and, consequently, the derogation granted to the VHI ceased to exist as of that time. As such, Ireland has effectively permitted the VHI to operate in the Irish private health insurance market for 15 years without adequate regulation.

One would think that Ireland would seek to bring this anomaly to an end as quickly as possible. This, however, is not the case. Instead, it would appear that the State has turned a blind eye to Article 6 in that the VHI continues to write private health insurance policies without having the requisite Central Bank authorisation to do so. The State is therefore allowing a continued breach of the EU non-life insurance directives.

Fall-out from the decision

It is apparent from the ECJ's decision that Ireland must now take all reasonable steps to ensure compliance with the EU insurance directives. What is not certain at this time is the wider effect this decision will have on the private health insurance market in Ireland.

(i) Ramifications for the State

The ECJ's decision is likely to cause a serious burden on the State's coffers, particularly given the absence of a temporal restriction on its judgment. On account of this absence, it is arguable that any current or past competitor of the VHI may succeed in obtaining damages against the State where such loss can be proven, on the balance of probabilities, to be attributable to the State's lack of compliance with the EU insurance directives.

In addition, both Ireland and the VHI (as an emanation of the State) have a duty of loyal co-operation to the EU and European Commission under Article 10 of the Treaty on the Functioning of the European Union. By continuing to breach the EU non-life insurance directives (notably Article 6), Ireland is running the risk of further EU-level sanction. Equally, by writing policies in the knowledge that it is not authorised to do so, the VHI itself may be found to be acting in breach of EU law.

(ii) Ramifications for the private health insurance market generally

We can expect a seismic shift in the balance of power in the private health insurance market as policyholders leave the State-run ex-monopoly for its 'bona fide' rivals. If the VHI is to unravel, new market entrants can be anticipated. It is also possible that we might see mergers involving existing health insurers.

(iii) Ramifications for VHI policyholders

There would appear to be a question mark over the enforceability of policies entered into by the VHI since 1996 given the VHI's lack of authorisation by the Central Bank. In addition, given the superiority of EU-law (i.e. Article 6) over national legislation, it would appear that the authority to enter policies of health insurance granted to the VHI under its grounding legislation may now be defunct. Perhaps directly related to this issue, it would appear that a significant portion of the VHI policyholders (particularly business customers) are seeking to change provider.

What next for the VHI?

The VHI is in a state of limbo: the State appears satisfied to let it continue to operate as a private health insurer without it having the requisite Central Bank authorisation to do so. Policyholders are therefore being left at potential risk as regards the enforceability of their policies. It is the interests of policyholders that must be central to the State's next move for the VHI.

It would appear that the State has several options in this regard, some more viable than others:

(i) The State may sell off (or simply close) those parts of the VHI's business which have caused its change of capacity, thereby allowing it to fall within the scope of its derogation under Article 4 once more. Whether or not an entity may lose its derogation from EU legislative requirements and subsequently re-qualify for it is uncertain;

(ii) The State may somehow raise the funds required by the VHI to meet solvency requirements and subsequently seek Central Bank authorisation, in line with the EU directives; or

(iii) The State may seek to transfer the VHI's policies to an entity with requisite authorisation from the Central Bank, in line with Article 12 of the European Communities (Non-Life Insurance) Framework Regulations, 1994.

Whatever option the State should choose it is apparent that if its current tactic is pursued the State is leaving itself open to further sanction at EU level and continuing claims from the VHI's competitors.