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addition of footnotes 1 & 2)

Dear Firm

Legal Expenses Insurance (LEI)

The European Commission is interested in how the United Kingdom has transposed the Council Directive 87/344/EEC of 22 June 1987 on Legal Expenses Insurance ([‘the Directive’](#)) into national law, primarily with regard to the freedom to choose a lawyer provisions. The Directive was implemented in the UK through the Insurance Companies (Legal Expenses Insurance) Regulations 1990 ([‘the Regulations’](#)).

The Commission has an interest in this because of a decision in the European Court of Justice (ECJ) in the case of Erhard Eschig v UNIQA Sachversicherung AG (C-199/08) on 10 September 2009 ([Eschig](#)). The ECJ ruling in *Eschig* made it clear that any provisions of a contract that detract from, or qualify in any way, the freedom to choose a lawyer, will not be compliant with the Directive¹.

The FSA are obliged to ensure that the Regulations are applied effectively and that customers are treated fairly.

Under the Regulations, the freedom to choose a lawyer arises in the following areas:

1. Principally under Regulation 6, where recourse is had to a lawyer to represent the insured in any inquiry or proceedings. It is important to note that freedom of choice arises *before* the commencement of any inquiry or proceedings²;

¹ The ECJ in *Eschig* dealt specifically with the question of whether an insurer is entitled to select the legal representative of all insured persons, where a large number of insured persons suffer losses as a result of the same event. The Court answered that question in the negative. The judgment also confirmed the broader principle that the freedom to choose a lawyer under Article 4 of the Directive is guaranteed, although this freedom is restricted to when recourse is had to a lawyer in any inquiry or proceedings, or whenever a conflict of interest arises.

² This freedom has been interpreted as being triggered at the time when efforts to settle a claim by negotiation have failed and legal proceedings have to be initiated (see *Sawar v Alam* [2001] EWCA Civ 1401 at paragraph 26). Once it becomes clear that recourse is to be had to legal proceedings and litigation is pending then the insured may instruct a lawyer of their choice. This is because, generally, recourse to a lawyer logically precedes the commencement of legal proceedings which the lawyer initiates on behalf of his client.

2. Whenever there is a conflict of interest; and
3. Finally, if firms have chosen the option in Regulation 5(4) where the insured is afforded the right to entrust the defence of his interest to a lawyer of his choice, then the freedom to choose a lawyer exists as soon as the right to claim under the policy arises, and cannot be curtailed.

It follows that any terms that detract from, or qualify in any way, the freedom to choose a lawyer as explained above, will not be compliant with the Directive and will be in breach of the Regulations.

In light of the *Eschig* judgment, firms are also reminded that the undertaking given by DAS to the FSA in July 2006 can no longer be relied on, and has been removed from our website. The undertaking has been removed because the freedom to choose a lawyer was qualified in the undertaking. Removal of the DAS undertaking from our website does not detract from the requirement that all firms should have fair terms in their standard contracts with consumers.

Next steps

We are asking all insurers who provide legal expenses insurance to inform us of the actions you have taken to ensure that the terms of your legal expenses insurance comply with the regulations following the ruling in *Eschig*. Responses should be sent to LEI@fsa.gov.uk by 30 September 2010 and copied to your relevant supervisory contact.

If you have any comments on the content of this letter please contact us at LEI@fsa.gov.uk. I will write to you again if we receive any further information from the European Commission on this issue.

Yours sincerely,



Ken Hogg
Director, Insurance Sector