

THE INSURANCE AND
REINSURANCE
LAW REVIEW

NINTH EDITION

Editor
Peter Rogan

THE LAWREVIEWS

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PREFACE

It is hard to overstate the importance of insurance in personal and commercial life. It is the key means by which individuals and businesses are able to reduce the financial impact of a risk occurring. Reinsurance is equally significant: it protects insurers against very large claims and helps to obtain an international spread of risk. Insurance and reinsurance play an important role in the world economy. It is an increasingly global industry, with emerging markets in Asia and Latin America developing apace.

Given the expanding reach of the industry, there is a need for a source of reference that analyses recent developments in the key jurisdictions on a comparative basis. This volume, to which leading insurance and reinsurance practitioners around the world have made valuable contributions, seeks to fulfil that need. I would like to thank all the contributors for their work in compiling this volume.

One of the defining features of 2020 has been the covid-19 pandemic, which has inflicted terrible human misery around the world. The insurance industry, like most other aspects of the economy, has been badly impacted by the pandemic. Although the financial loss to the industry seems likely to be manageable, it has undoubtedly raised issues about the suitability of a range of policy wordings for the modern commercial environment, while also raising a range of legal issues related to, for example, causation and the quantification of loss. The different jurisdictions represented in this book will have different responses to these developments so it is vital to hear from the lawyers in each of those countries on the factors that will govern the international response.

The year 2020 looks likely to have been a very bad year for insured losses from natural catastrophes, with record numbers of severe windstorms and wildfires. These losses reinforce the continuing concern that climate change will see a long-term increase in the number and severity of such losses. From a legal perspective, the changing nature of natural catastrophes will raise issues of policy construction in relation to, for example, aggregation clauses and the obligation on reinsurers to follow their insured's underlying settlements.

The past year also saw no respite in the number or scale of cyber events, including the data breaches at MGM Resorts and California University and global organisations such as the World Health Organization. Events such as these test not only insurers and reinsurers, but also the rigour of the law. Insurance and reinsurance disputes provide a never-ending array of complex legal issues and new points for the courts and arbitral tribunals to consider. Aggregation will also be an area of uncertainty in relation to the treatment of all losses of this kind, and again different jurisdictions are likely to provide different responses.

Most recently, the courts in England and Wales have held that cryptocurrencies such as bitcoin are 'property' for legal purposes.

Looking ahead, 2021 is likely to see new developments and new legal issues. In particular, the impact of insurtech on the way in which insurance is underwritten, serviced and distributed will continue to present challenges around the world. This is reflected in our chapter on artificial intelligence.

I hope that you find this volume of use in seeking to understand today's legal challenges, and I would like to thank once again all the contributors. Finally, I would like to thank Simon Cooper, a consultant at Ince and a colleague of many years, for his huge contribution to finalising this ninth edition of *The Insurance and Reinsurance Law Review*.

Peter Rogan

Ince

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AUSTRIA

Philipp Strasser and Jan Philipp Meyer¹

I INTRODUCTION

Despite some peculiarities and unique developments, both Austrian insurance law and the Austrian insurance market are still predominantly influenced and shaped by external factors. Unsurprisingly, many market and legal developments are driven by European Union law or recommendations and proposals by EU Institutions such as the European Insurance and Occupational Pensions Authority (EIOPA). The other major influence is German insurance law. This is because the better part of the Austrian Insurance Contract Act is still identical or at least very similar to its German archetype (despite comprehensive reform of the German Insurance Contract Act in 2007).² Thus, German literature and judicature in the field of insurance law are also of interest to courts and practitioners in Austria. For the same reasons, many insurance products are, at their core, adapted versions of products underwritten on the German market. Where this is not the case, local insurance products are often based on model insurance terms published by the Austrian Insurance Association (VVO). For some types of insurance, these model terms and conditions are market standard, usually incorporated with only minor changes.

II REGULATION

The Austrian legislature requires insurers to obtain a licence with the Austrian Financial Market Authority (FMA), which acts as supervisory authority pursuant to the Insurance Supervision Act (VAG).³ With the implementation of the Solvency II Directive,⁴ the supervisory environment for insurance undertakings has become more stringent. In particular, the new regulatory regime introduced stricter rules with regard to solvency and capital requirements as well as reporting duties. The FMA is vested with a wide range of powers to supervise insurance undertakings and enforce compliance with the aforementioned

1 Philipp Strasser is a partner and Jan Philipp Meyer is an attorney-at-law at Vavrovsky Heine Marth Rechtsanwälte GmbH.

2 The Austrian Insurance Contract Act (Versicherungsvertragsgesetz of 2 December 1958, Federal Legal Gazette 1959/2, commonly abbreviated to VersVG) stems from the 1908 Version of the German Insurance Contract Act (Versicherungsvertragsgesetz of 30 May 1908 [National Legal Gazette, Reichsgesetzblatt 1908/263], recast on 30 November 2017 [Federal Legal Gazette 2007/2631] commonly abbreviated to VVG).

3 The current version was recast in 2016 and published in Federal Legal Gazette 2015/34.

4 Directive 2009/138/EC.

supervisory regime. For example, pursuant to Article 272 VAG the FMA may request a wide range of information from insurers as well as the provision of documents deemed to be relevant at any time.

The requirements for obtaining a licence in Austria are set out in Article 8 VAG. According to this provision, insurance and reinsurance undertakings are required to operate under the legal form of either a stock company, a *societas Europaea* or a mutual insurance company. Moreover, the administrative headquarters have to be located in Austria and certain other conditions such as the minimum capital requirements⁵ must be fulfilled. Insurance undertakings holding a licence within the European Economic Area (EEA) can offer their products on the basis of the freedom to provide services pursuant to Article 56 of the Treaty on the Functioning of the European Union. This means that undertakings with an EEA licence can conduct business with a local branch upon notification to the FMA, without a domestic insurance licence. Foreign ownership is not restricted. However, if a foreign investor wishes to acquire an Austrian insurance undertaking, the VAG grants the FMA additional rights in the course of the authorisation process.⁶

Insurance mediation is a regulated trade pursuant to the Trade Regulation Act (GewO) and can be carried out by either insurance agents or insurance brokers, depending on their relationship to the insurer.⁷ Both insurance brokers and agents need to be authorised under and qualified in accordance with the GewO⁸ and details of these qualifications are publicly available via the Austrian Insurance Intermediary Register. In particular, brokers and agents need to pass a qualification examination to be permitted to market and promote insurance contracts. The time frame for obtaining a licence depends on the individual's prior knowledge. In total, three examinations have to be undertaken, dealing with legal and entrepreneurial issues as well as the specifics of particular insurance sectors. The subjects of the exams to be taken by aspiring insurance brokers differ from the corresponding versions for future insurance agents. Further, intermediaries are required to disclose whether they act as broker or agent according to the principle of status transparency. The brokerage of insurance services itself is governed by the Broker Act.⁹

In Austria, it is compulsory to maintain insurance coverage in a variety of contexts – especially for certain businesses and professionals. Arguably, the most relevant example (apart from areas covered by the Austrian social security insurance system) is the compulsory motor vehicle third-party liability insurance with a minimum insured sum of €7.6 million.¹⁰

5 Set out in Article 193 Paragraph 2 VAG.

6 If the FMA is of the opinion that the influence exercised by the acquirer or holder of a qualified equity holding is likely to operate against the sound and prudent management of the undertaking, it is authorised to take the measures appropriate to put an end to the situation, including appointing a government commissioner or even ordering the discontinuation of business operations (see Articles 27 and 284 VAG).

7 While insurance agents are in a constant business relationship with the insurer and permanently entrusted to conclude insurance contracts (Section 43 VersVG), insurance brokers are not (constantly) entrusted by an insurer and are therefore economically independent, fully representing the interests of the insured. As a consequence, the insurer must impute all declarations made by an agent, while brokers must predominantly protect the interests of the insured (see Section 27 Paragraph 1 Maklergesetz).

8 See Section 94 and 137 GewO.

9 Maklergesetz.

10 See Section 9 of the Motor Third Party Liability Insurance Act (Kraftfahrzeug-Haftpflichtversicherungsgesetz of 19 August 1994 Federal Legal 1994/651 commonly abbreviated to KHVG).

Moreover, professional liability insurance is compulsory for various freelance professionals such as lawyers, architects, engineers, public accountants, tax advisers and most medical professionals such as doctors and dentists.

III INSURANCE AND REINSURANCE LAW

i Sources of law

The most relevant source of insurance law is the Austrian Insurance Contract Act (VersVG).¹¹ The general provisions of the VersVG are set out in Sections 1 to 49 and cover all (regulated) types of insurance contracts. In addition to the general section, the VersVG sets out specific rules for different insurance branches such as indemnity, fire, personal liability, legal protection, life, private health and casualty insurance.¹²

However, the VersVG does not regulate every single aspect of an insurance contract. Also, it explicitly does not apply to certain types of insurance, including maritime insurance and all types of reinsurance contracts. Even for contracts covered by the VersVG, the Austrian Civil Code (ABGB)¹³ is an important supplemental source of law.¹⁴ In addition, certain provisions of the VAG may be of relevance for drafting and interpreting insurance contracts, as the VAG, for example, contains rules on the insurer's information obligations towards the insured.

As mentioned in the introduction, model terms published by the VVO play a key role with regard to the Austrian insurance market and, in this context, may be taken as a 'source of law' as well.

Court rulings are not considered to be a source of law, as they are generally only binding for the parties involved. However, judgments – especially when handed down by higher instance courts – can have considerable impact. This is because lower instance courts usually rule along with the line of jurisprudence set out by the higher instance courts. For this reason, the case law of the Austrian Supreme Court of Justice, the highest court on civil law matters in Austria, is of particular importance. Insurance related disputes are, at Supreme Court level, generally adjudicated by the court's seventh senate.

ii Making the contract

As stated above, the general legal framework relevant to insurance contracts (e.g., regarding formation, necessary content, the parties' rights and duties and termination) are regulated by the VersVG and the ABGB. Like any other type of contract, the conclusion of insurance contracts requires concordant declarations by the insurer and the insured. Despite the

11 See above, especially as regards the similarities to the German Insurance Contract Act and the importance of German insurance law, commentaries, literature and judicature.

12 Certain types of insurance contracts are regulated in special laws as is the case with (compulsory) motor third party liability insurance (Kraftfahrzeug-Haftpflichtversicherungsgesetz; KHVG).

13 Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie (Justizgesetzsammlung/Collection of Laws 1811/946).

14 When insuring consumers, certain provisions of the Austrian Consumer Protection Act (Konsumentenschutzgesetz; KSchG) and other consumer-specific statutory provisions have to be borne in mind as well.

general freedom of contract, the provisions of insurance contracts must not infringe on the boundaries set by mandatory law (e.g., violation of moral principles according to Section 879 ABGB) and must fulfil compulsory legal requirements, where applicable.¹⁵

The 'application model', typical for the Austrian insurance market, foresees that customers apply for insurance by sending an application (standard forms) to the insurance undertaking. The insurer accepts the application by sending back the insurance policy within six weeks. For the contract to be effective, a signed copy of the policy must be sent to the insured, usually on paper. Where explicitly agreed upon, pursuant to Section 5a VersVG, communication can also be handled electronically.

Prior to the taking out of insurance, comprehensive pre-contractual disclosure duties require the policyholder to provide information on all aspects relevant to the insurer's decision on whether or not (or under what conditions) to underwrite the specific risk. If the insured intentionally refrains from notifying the insurer of an important circumstance, the insurer has a right to terminate the insurance contract.¹⁶

iii Interpreting the contract

In principle, the interpretation of insurance policies and conditions does not differ from the interpretation of any other contract or general terms and conditions. This means that the ABGB is the main legal basis for interpreting insurance policies. Consequently, the most relevant provisions are the general provisions set out in Section 864a ABGB (exclusion of unusual content) and Section 879 ABGB (violation of moral principles).

While Austrian statutory law does not provide for insurance-specific principles of interpretation, the existing insurance-related case law must be taken into account. According to settled case law of the Austrian Supreme Court, insurance policies are to be interpreted objectively (i.e., based on their wording and its interpretation by an average and reasonably well-informed insured), unless a specific provision has been the subject of individual negotiation between the parties.¹⁷ Of course, the interpretation of a specific clause generally depends on the particularities of the individual case. Thus, despite extensive case law on the interpretation of insurance contracts, the individual meaning and scope of insurance conditions often give rise to controversy and disputes. While the principles on the interpretation of insurance conditions established by doctrine and case law do give guidance,

15 This, for example, applies for information obligations to be adhered to by the insurer according to the VersVG and VAG, such as those foreseen in Articles 128 to 136 VAG. These provisions aim at giving the policyholder a comprehensive and ideally complete picture of the contents of the contract or insurance product. Additional rules apply where the policyholder is a consumer. This, *inter alia*, includes a right of withdrawal (Section 5c VersVG) and the general rules of Austrian consumer protection law regulated by the KSchG.

16 The VersVG also foresees duties to disclose general risk-specific information during the insurance period as well as duties after the occurrence of a loss. After the occurrence of a loss, for example, the insured is only required to provide information at the insurer's request.

17 With regard to consumers, a contractual provision not individually negotiated is deemed to be unfair and thus invalid, if, contrary to the requirement of good faith, it significantly alters the balance of the parties' contractual rights and obligations to the detriment of the consumer. For instance, with regard to insurance contracts, the consumer's burden of cost must be as transparent as possible. Similarly, a contract stipulating a burden of proof for the consumer stricter than the general statutory rule is invalid. Section 6 KSchG provides a non-exhaustive catalogue of contractual provisions considered unfair.

certainty, to the degree possible, can ultimately only be determined by the courts. Therefore, experience and pertinent knowledge of the case law is needed to make use of the overlapping general principles and rulings.

The occurrence of an insured event will usually have to be determined based on the wording of the relevant policy. Although the definitions of an insured event vary in detail, most will contain at least three elements. The first element concerns the specification of the event triggering the insurance (e.g., the occurrence of the relevant misconduct, negligence or damage itself). The second element defines how this event is to be connected with the insured risk. Lastly, the third element divides the claims asserted by the third party into justified claims (thus triggering the insurer's duty to satisfy) on the one hand and, on the other, unfounded claims (triggering the insurer's duty to defend, where applicable, such as in liability insurance products).¹⁸ Most policies not only limit the maximum insurance payout per occurrence and in total per insurance period, but also contain a clause on serial loss. The latter deems multiple claims stemming from one and the same cause as one single occurrence.

iv Intermediaries and the role of the broker

The implementation of the Insurance Distribution Directive (IDD)¹⁹ has brought about profound changes, inter alia, as to the day-to-day practice of all insurance agents and insurance brokers,²⁰ as well as changes regarding the supervision of insurance intermediaries by the FMA. The IDD itself is broad in scope and, of course, not limited to the regulation of insurance mediation by insurance brokers and agents but rather also covers the distribution of insurance products as a whole. The Directive's main regulatory objective is to improve the protection of the insured. For this purpose, the IDD seeks to avoid any conflicts of interest as regards the intermediary's remuneration and imposes extensive disclosure and advisory obligations on the intermediary. Independent of the IDD's transposition into national law, the VAG already provides the FMA with a range of powers to supervise and control intermediaries (e.g., to sanction the unauthorised sale of insurance products).²¹ In addition, the Professional Association of Insurance Brokers, a sub-organisation of the Austrian Federal Economic Chamber, sets out professional standards mandatory to all Austrian insurance brokers. As from January 2017, a disciplinary commission supervises compliance with these standards.

18 On the topic of liability insurance, note that, with minor exceptions not relevant to typical insurance disputes, Austrian civil law does not recognise the common law principle of punitive damages – a fact that has a major impact on risks associated with liability insurance products. Instead, the Austrian law of obligations regards damages as a purely compensatory measure, not a punitive matter. Thus, both contractual and extra-contractual damages may only be claimed relating to an incurred or imminent loss, with the amount being limited to the actual prejudice suffered. This prejudice may include lost profit. As well as the occurrence of damage itself, the basic requirements of a claim for damages under Austrian law are cause, fault and illegality. The ABGB sets out these four basic prerequisites for both contractual and extra-contractual damages. Generally, the burden of proof lies with the party bringing the claim or invoking a fact.

19 Directive 2016/97/EU.

20 See above for a discussion on the regulatory environment for insurance agents or insurance brokers.

21 Article 329 VAG.

v Claims

Policyholders are required to notify the insurer without undue delay once a (potentially) insured event occurs²² and have to provide the insurer with any information or document required to establish the insured event or the extent of the insurer's obligation to pay.²³ The notice is to be addressed either to the insurer directly or to an authorised agent or broker responsible for the contract. When more than one insurance company is involved, notice to the lead insurer may suffice, depending on the terms of the contract. In addition to these general stipulations of the VersVG, the insurance conditions often contain further contractual rules in connection with providing notice. These may include definite time limits or form requirements. The notice itself does not have to contain an in-depth description of the event.

Where the conditions set out in the policy are not met, the insurer will usually deny coverage pursuant to Section 12 VersVG. Such a denial of coverage generally starts the three-year limitation period. One particularity of Austrian Insurance Contract law in this regard concerns the 'qualified denial of coverage' pursuant to Section 12 Paragraph 3 VersVG, which, provided all formal conditions are met, triggers a one year cut-off period. In this case, the insured has to bring a claim before a competent court before the end of this cut-off period, otherwise the insured is precluded from asserting the claim for coverage against the insurer once and for all.

The reasons for the emergence of insurance disputes and subsequent court proceedings are manifold. Many insurance-related causes of actions relate to an insured's reluctance to accept a denial of coverage. Building on the depictions above, the vast majority of insurance disputes (not necessarily specific to Austria) stem from the diametrical interpretation of insurance policies by the parties involved, especially as the complexity of policy wordings has grown considerably in recent years. This very general and common problem of a provision's unintentional room for interpretation is sometimes amplified by an idiosyncrasy of the Austrian insurance market. As already stated in the introduction, insurance conditions are often not tailor-made for the Austrian market in what would be a costly and time-consuming process, but rather are copied from other jurisdictions and only adapted cursorily. The fact that many insurance products have become more elaborate and complex owing to legal and market developments adds to the problem – this is especially true with respect to financial lines policies and industry insurance. Of course, many insurance-related disputes also concern the existence and legal consequences of breaches of obligations and duties by the insureds under the policy concerned (e.g., a subsequent rescission of the insurance contract or a possible revocation of cover by the insurer).

Litigation regarding reinsurance disputes rarely occurs; at this level, disputes are regularly settled amicably out of court.

22 Section 33 VersVG.

23 Section 34 VersVG.

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

The jurisdiction in international insurance disputes for Member States of the European Union is determined by the rules of the recast Brussels I Regulation.²⁴ The Regulation's Articles 11 to 14 stipulate as a general rule that claims against an insured can only be made in the Member State in which the defendant is domiciled. The insurer on the other hand can be sued in the Member State in which it has its domicile, a branch, agency or establishment. Further, proceedings can be brought against the insurer in the Member State where the insured as claimant is domiciled or, if multiple insurers are involved, in the courts of a Member State in which proceedings are brought against the leading insurer.

The relevant conflict of laws rules are, in principle and for the majority of cases, contained in the Rome I Regulation.²⁵ Article 7 Paragraph 3 Rome I limits the parties' freedom concerning choice-of-law clauses. Such clauses are generally only valid where they foresee jurisdiction of the courts of the Member State where the risk is situated or the country where the insured has his or her habitual residence, with special rules applicable to life insurance, compulsory insurance and specified activities. Limitations also exist with regard to consumers. Deviating choice-of-law clauses may, however, be valid for policies covering 'large risks' within the meaning of Council Directive 73/239/EEC.

With regard to arbitration clauses, the Austrian Code of Civil Procedure stipulates that the contracting parties can agree on an arbitration clause for both existing and future claims that may arise in connection with a defined legal relationship, which insurance contracts can naturally be considered to be. Any such agreement must be in writing.

ii Litigation

In general, Austria has a well-functioning and reliable judiciary and the courts are adept at dealing with complex factual and legal matters. The average length of court proceedings is reasonable and the quality of decisions is usually high. Therefore, it is no surprise that although alternative dispute resolution instruments have been promoted by counsellors in recent years, the vast majority of liability and cover disputes are tried before civil courts.

Depending on the amount at issue, the local district courts will hear cases in which the dispute value does not exceed €15,000, whereas the regional courts are competent when higher amounts are in dispute. The local jurisdiction is in either case based on the domicile of the defendant. Should one of the parties later file an appeal against a first instance court decision, the appellant may challenge the ruling before the courts of the second and third instance. At second instance, appeals are made either to higher regional courts, when appealing a judgment issued by the regional courts, or to the regional courts, when appealing a judgment issued by the district courts. The third and final instance is the Austrian Supreme Court. In addition to the general civil courts, Austria has specialised commercial courts. These commercial courts are particularly fit to handle complex commercial claims and, inter alia, competent to hear insurance and reinsurance disputes between businesses. A number of insurance contracts and conditions contain provisions pertaining to the territorial jurisdiction and even the international jurisdiction, which, if valid and binding, must also be taken into account when assessing the relevant jurisdiction for a claim or its defence respectively.

24 Regulation 1215/2012/EU.

25 Regulation 593/2008/EC.

Whenever a civil claim is filed in Austria, the claimant is obliged to pay a one-off court fee. Further court fees will accrue in appeal proceedings. These court fees are usually collected via automatic debit transfer from the law firm acting on behalf of the claimant. The court fee is non-refundable.²⁶ However, when the claimant fully prevails in court, he or she may be entitled to full reimbursement of the costs (including court fees). The amount of these fees is regulated by the Austrian Court Fees Act and mainly depends on the amount in dispute.

iii Arbitration

Austria has a long-standing tradition as an arbitration hub, especially for Central and Eastern Europe, and had already enacted legislation on arbitral proceedings in 1895; it adopted the UNCITRAL Model Law on International Arbitration in 2006.

The establishment of the Vienna International Arbitral Centre (VIAC) in 1975 furthered Austria's position as the preferred place for the settlement of east-west disputes. VIAC has administered over 1,700 proceedings since its inception and its caseload increases continuously. It administers both mediation and arbitration proceedings but is particularly renowned for its arbitration rules, the Vienna Rules. VIAC only deals with international cases involving at least one party with its place of business or normal residence outside Austria or cases concerning disputes with an international character.

A further relevant development regarding arbitration in Austria is the foundation of the Austrian Branch of the AIDA Reinsurance and Insurance Arbitration Society, known as ARIAS, in 2016.

Despite these developments, arbitration is still of minor relevance for insurance or reinsurance disputes. Even though a number of alternative dispute resolution services and arbitral institutions exist, currently the vast majority of insurance disputes are either settled informally or decided by state courts. However, arbitration clauses are becoming more popular for some types of insurance and the proportion of litigation and arbitration is also slowly changing for insurance disputes.

iv Alternative dispute resolution

As a Member State of the European Union, Austria transposed the Alternative Dispute Resolution Directive²⁷ into national law with the Alternative Dispute Resolution Act (AStG), which entered into force in 2015. The AStG regulates the alternative settlement of disputes arising from sales or service contracts between a company established in Austria and a consumer resident in Austria or elsewhere in the European Union before the bodies for alternative dispute resolution. Insurance contracts fall within the scope of application as they are not excluded by Section 1 Paragraph 2 AStG.²⁸

26 If the case is settled in the first court hearing, half of the court fee is reimbursed.

27 ADR Directive, 2013/11/EU.

28 In this regard, insurers are also affected by the information obligations towards the insured (see Section 19 AStG).

v Mediation

Austrian courts have launched pilot projects with the general concept of judges proposing the initiation of mediation proceedings prior to commencing litigation, where deemed appropriate. However, in insurance and reinsurance disputes, the courts cannot force parties to resort to mediation or otherwise reach an amicable agreement. For various reasons, most judges will still encourage the parties to reach a settlement before taking evidence. While the transposition of the EU Mediation Directive²⁹ into national law introduced the option to file a request for pretrial mediation prior to the formal initiation of legal proceedings (before the district courts), this procedural option is rarely made use of in practice. At any rate, participation in alternative dispute resolution proceedings is not mandatory as far as insurance-related disputes are concerned and there are no detrimental consequences in refusing requests or offers to reach an (amicable) solution using forms of alternative dispute resolution.³⁰

V YEAR IN REVIEW

Needless to say, the covid-19 crisis also had an overwhelming influence on the Austrian insurance and reinsurance market, affecting some areas of the market more than others. Apart from a rise in all kinds of disputes affecting legal expense insurance, the effects were especially perceptible with regard to business interruption insurance. Although the corresponding products available on the Austrian market vary in scope, the vast majority of the wordings do not seem to provide coverage for the effects of the covid-19 pandemic. Despite this, the topic was hotly debated between policyholders, insurers, intermediaries and legal practitioners.

Another type of insurance affected, probably even more in terms of the total potential loss, is directors' and officers' insurance (D&O). This is because the devastating economic effects of the pandemic have, in many cases, considerably increased the liability risks for executives and, inter alia, further heightened the importance of the obligation to establish an effective risk management system, assessing all relevant contractual relationships, applying for state aid in due form and time and, in particular, to implement sufficient safety and health precautions. The same applies *mutatis mutandis* for failing to file for insolvency in due time. Thus, when a large number of entities are facing critical situations at the same time (e.g., because of direct or indirect effects of the covid-19 pandemic), a rise in liability claims in relation to management can be expected. In fact, several covid-19-related claims have already been notified.

Despite the substantial influence of covid-19 on the economy, the Austrian insurance industry is still remarkably stable. Before the outbreak of the pandemic, the solvency capital requirement (SCR) ratio³¹ stood significantly above 200 per cent. By June 2020, after the first covid-19-related lockdown, the SCR ratio still stood at a median of 199.29 per cent.

29 Directive 2008/52/EC.

30 Nevertheless, there are some mandatory mediation requirements in other constellations (such as tenancy disputes).

31 The ratio that measures whether the company can absorb unforeseen losses and still fully meet its obligations to policyholders.

VI OUTLOOK AND CONCLUSIONS

In terms of regulatory developments, we can expect a strong focus on cyber resilience and a considerable impact in relation to climate protection on the Austrian insurance market in the coming years. The EIOPA guidelines on information and communications technology, which enter into effect on 1 July 2021, will be a further step towards an enhanced resilience to cyber-attacks, and aim at harmonising the European Commission's new digital finance strategy. In Austria, the FMA will specifically review the vulnerability of insurance undertakings to cyber risks as part of the Cyber Maturity Level Assessment in 2021.

In light of the European Commission's package of measures for sustainable finance, the FMA has recently reviewed the way in which environmental, social and governance (ESG) factors are considered by domestic insurers in the individual business processes. This review showed that sustainability risks are monitored and measured in about 36 per cent of Austrian insurance undertakings, while a further 36 per cent have at least started to develop strategies in this area. Further, a total of 48 per cent plan to consider giving greater significance to sustainability risks in the next three years. The numbers show that the importance of ESG factors can be expected to rise considerably in the coming years.

As in countries around the globe, the better part of the Austrian economy was in lockdown for a considerable period starting in March 2020. This entailed an enduring situation of uncertainty for many market participants. The stringent regulatory regime, as well as a historically low interest rate, will pose a challenge to the insurance market in 2021. On the other hand, the relatively low insurance density in Austria, compared with the EU average, and the aforementioned high equity capital suggests that the outlook for the Austrian insurance market as a whole is positive.

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