

Insurance & Pension Law Update

GANADO
ADVOCATES

Issue No. 30 – April 2013

Welcome to Issue No. 30 of the GA Insurance and Pension Law Update

News

EIOPA Guidance on Solvency II

On the 27th of March 2013, EIOPA launched a public consultation on the Guidelines issued as part of the preparation for the implementation of Solvency II. For further information please refer to the Section titled 'Solvency II Watch' below.

MFSA Consultation Paper on the Financial Conglomerates Regulations

On the 22nd of March 2013, the MFSA issued a note for consultation on the proposed Financial Conglomerates Regulations which will partly transpose the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC regarding the supplementary supervision of financial entities in a financial conglomerate. Changes will also be made to the Insurance Business (Assets and Liabilities) Regulations and the Insurance Business (Supplementary Supervision of Insurance and Reinsurance Undertakings in an Insurance Group) Regulations, including *inter alia* the definition of 'insurance parent undertaking'.

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These draft documents have been circulated by the MFSA for the purposes of consultation. These proposals are not binding and are subject to changes and revisions following representations received from licence holders and other involved parties.

EIOPA Report on Colleges of Supervisors and 2013 Action Plan

On the 29th January the European Insurance and Occupational Pensions Authority ('EIOPA') published a report on the workings of the Colleges of Supervisors within the EU and an Action Plan for 2013. The Report and Plan underline the need for consistency and uniformity in the functioning of these Colleges, with a view to having a level playing field for supervised entities. Colleges of Supervisors are groups of national supervisory authorities, such as the Malta Financial Services Authority, tasked to guarantee an efficient and effective supervision of entities whose operations are spread across the Internal Market.

EIOPA 2013 Report on Good Practices related to the provision of information for Defined Contribution (DC) schemes

On the 24th January 2013 EIOPA issued the "*Good Practices on Information Provision for Defined Contribution Schemes – Enabling Occupational Defined Contribution Scheme Members to Plan for Retirement.*" The report is aimed at European and national policy makers who draft pension information for occupational DC schemes, where members bear the investment risk.

Bernardino's Speech at BIPAR Workshop

On the 31st of January 2013 at a workshop organised by the European Federation of Insurance Intermediaries ("BIPAR"), EIOPA Chairman Gabriel Bernardino delivered the speech "*IMD2 and Solvency II – The road to better policyholder protection and financial stability*".

Bernardino discussed his personal reflections about the current challenges in revising the insurance regulatory framework, namely IMD2 and Solvency II as well as the strategic reflections on achieving further consistency of EU regulation and supervision.

Bernardino claimed that EIOPA accepts the publication of the Commission's proposal to recast the existing IMD in July 2012. From EIOPA's perspective, it is important that the final legislative text creates a regulatory regime in the retail insurance market that can be effectively supervised both from a national and a European perspective.

Bernardino also made it clear that 2013 will be a crucial year for Solvency II. It is essential for policyholder protection and financial stability that Solvency II appropriately reflects the long-term financial position and risk exposure of undertakings carrying out insurance business of a long-term nature. Bernardino also made reference to EIOPA's plan of developing Guidelines that will ensure that national supervisory authorities will, in 2014, put in place certain important aspects of the new prospective and risk based supervisory approach.

Committee on the Internal Market and Consumer Protection's provides its feedback on IMD II

On the 19th December 2012 the Committee on the Internal Market and Consumer Protection issued an opinion for the consideration of the Committee on Economic and Monetary Affairs on the proposed IMD II - Opinion 2012/0175 (COD). The main areas highlighted related to tying and bundling, the remuneration rules as well as the scope of the directive.

LIBE's draft opinion on the proposal for a regulation of the European Parliament and of the Council on key information documents for investment products (PRIPs)

On the 11th February 2013, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) published its 12 recommendations on the PRIPs proposal, including clarifications on who is to assume responsibility for the contents of the key information document. The proposed amendments reiterate that the fundamental rights of individuals need to be respected and taken into account and is therefore essential that any administrative sanction and measure taken by a competent authority should be in writing and indicate the means for judicial review before a tribunal or administrative authority.

Captive Live UK Conference in London attended by GANADO Advocates

Dr. Beppe Sammut and Dr. Matthew Mizzi, both advocates at GANADO Advocates, attended the Captive Live UK 2013 conference held in London during February 2013. The conference included several sessions and talks on the latest developments in the insurance, reinsurance and captive industry and was attended by many of the larger insurers, reinsurers, captives, captive managers, insurance brokers, actuary's, international law-firms, investment managers, ICT specialist firms and specialist tax advisors.

GANADO Advocates Nominated for Captive Law Firm of the Year

GANADO Advocates was recently one of the four international law firms nominated for captive law firm (non-UK) of the year award at the inaugural UK Captive Services Awards 2013. Other awards presented at this event included onshore UK law firm of the year, captive manager of the year, reinsurance broker of the year and innovation in captive management. GANADO's reputation as the leading law-firm in Malta for insurance regulatory and corporate matters was recognised by a panel of judges who nominated the firm for this award.

The nomination is a testament to the firm's leading role in the Maltese insurance industry and to the contributions that the firm has made to the local industry, which ranges from assisting the legislator with drafting local protected cell company and captive legislation, to assisting in the establishment of the Maltese Insurance Managers Association (to which it also acts as Secretary General), and to servicing most of the local insurance market, including many of the foreign clients. It is the firm's intention to maintain its reputation of being one of the leaders in the insurance industry and to continue to service its clients with the best legal assistance and advice possible.

News

Name Change Announcement – Ganado Advocates

With effect from Monday 4th February, 2013 Ganado & Associates, Advocates changed its practice name to GANADO Advocates. Our new name reflects the name by which the firm has come to be known among clients and colleagues, and we have taken the opportunity of a rebranding exercise and a website re-launch to reflect this reality.

We continue to deepen legal advisory resources and focus on our international practice which is dominated by shipping and aviation, financial services (banking, insurance and investments) and corporate law together with taxation, trusts, employment law and litigation, which support all practice areas.

Chambers & Partners, the internationally renowned independent legal guide, has re-confirmed GANADO Advocates' Band 1 (Top Tier) ranking in its 2013 edition of the Chambers Global guide for all practice areas covered for Malta.

Basing itself upon both peer and client interviews as well as independent research, Chambers Global ranks law firms and individual lawyers in bands (where they are listed alphabetically) from 1-6, with 1 being the best. Chambers Global's 2013 guide provides reviews and rankings for Maltese law firms and lawyers in the Financial Services and Corporate/Commercial practices. [Click here](#) to view the Chambers Global 2013 guide for Malta.

Solvency II Watch

EIOPA Guidance on Solvency II

On the 27th of March 2013, EIOPA launched a public consultation on the Guidelines issued as part of the preparation for the implementation of Solvency II. These Guidelines set out the appropriate steps that re/insurance undertakings are to take in preparation for the implementation of Solvency II and seek to ensure that there is a consistent and convergent approach with respect to the preparation of Solvency II by all national authorities. The Guidelines are addressed to all EU national authorities who should 'make every effort to comply with the Guidelines'.

The Guidelines seek to ensure the proper management of undertakings and are comprised of four consultations which include interim measures for:

1. System of governance (including risk management);
2. Forward looking assessment of the undertaking's own risks (based on the ORSA);
3. Pre-application for internal models; and
4. Submission of information and reporting to the national competent authorities.

Therefore, national authorities are to implement elements from Pillar I (internal model pre-application), Pillar II (system of governance and ORSA) and Pillar III (reporting requirements). The Guidelines make it clear that each national authority is to determine how to implement and comply with the Guidelines in a manner which it thinks is appropriate. Notwithstanding the implementation of the Guidelines, national authorities are not required to

Solvency II Watch

take supervisory action where a undertaking is not complying with the interim measures, and therefore such undertakings cannot be held in breach of the requirements arising under Solvency II up until the Solvency II Directive as a whole is implemented.

The competent authorities of all member states are to send a progress report to EIOPA on the application of the Guidelines by the end of February following each relevant year; the first is to be submitted on the 28th of February 2015, which report is to be based on the period 1st January 2014 up until 31st December 2014. The public consultation ends on the 19th June 2013 and EIOPA intends to subsequently publish the final Guidelines in October 2013 with an implementation date starting 1 January 2014. Therefore, once the guidelines are approved in October 2013, then national authorities will have two months to implement the guidelines into their national regulatory and supervisory framework.

Recent Insurance and Pensions Judgments

C-424/11 Wheels Common Investment Fund Trustees Ltd and others v Commissioners for Her Majesty's Revenue and Customs

A judgment delivered by the Courts of Justice of the European Union ('CJEU') on 7th March 2013 has confirmed that the fund management services rendered to an investment fund pooling the assets of an occupational pension scheme is not exempt from Value Added Tax under EU law. The decision of the CJEU, on the other hand, means that an investment fund pooling assets of a private retirement scheme may be eligible. If the specific conditions and characteristics of the fund are such that it is a 'special investment fund' within the meaning of EU law, then fund management services rendered to that fund are exempt from VAT.

C-577/11 DKV Belgium SA v ABCTA

A judgment delivered by the CJEU on 7th March 2013 gave the green light to a Belgian law which requires that increases in premium payable under health insurance contracts is only allowed in limited circumstances. The Belgian law allowed an increase in the premium rate only if the consumer price index increases; or if the medical index increases; or if the competent supervisory authority is satisfied that the current premium rate will result in loss made by the insurer. It was held that EU laws on general insurance and the rules on free movement of establishment and services were not infringed.

C-32/11 Allianz Hungária Biztosító Zrt and others v Gazdasági Versenyhivatal

A judgment delivered by the CJEU on 14th March 2013 has held that certain agreements entered into by insurers and car dealers acting as car repair shops may run counter to EU competition law. In this case, the agreements in question stipulated that the hourly charge, payable by the insurer for repairs to vehicles insured by that same insurer, varies according to the number and percentage of insurance contracts the same dealer has sold as intermediary for that same insurer.

Legislative Update

L.N. 28 of 2013 entitled the **Consumer Credit (Amendment) Regulations, 2013** – 18th January 2013;

L.N. 61 of 2013 entitled the **Transfer of Pensions paid under the Social Security Act (Amendment) Regulations, 2013** – 15th February 2013;

L.N. 81 of 2013 entitled the **Financial Markets Act (OTC Derivatives, Central Counterparties and Trade Repositories) Regulations, 2013** – 1st March 2013;

L.N. 113 of 2013 entitled the **Investment Services Act (Marketing of Alternative Investment Funds) Regulations, 2013** – 8th March 2013;

L.N. 114 of 2013 entitled the **Investment Services Act (Alternative Investment Fund Manager) (Passport) Regulations, 2013** - 8th March 2013;

L.N. 116 of 2013 entitled the **Investment Services Act (Alternative Investment Fund Manager) (Third Country) Regulations, 2013** - 8th March 2013.

Recent MFSA Authorisations and Licenses

New Licences

Trustees & Fiduciaries

- Authorisation issued to Artio Trustees Limited to act as a trustee and to provide other fiduciary services (including acting as an administrator of private foundations).

Administrators of Private Foundations

- Authorisation issued to Mr. Jozef Charles Hendriks to act as an administrator of private foundations in terms of article 43(12)(b) of the Trusts and Trustees Act Insurance

Insurance

- Insurance Undertakings
 - Licence issued to Allcare Insurance Ltd to carry on business of in fourteen classes of the general business.

Recent MFSA Authorisations and Licenses

- Protected Cells
 - TVIS Cell has been approved as a cell of Atlas Insurance PCC Ltd

Pensions

- Retirement Schemes
 - Certificate of Registration issued to US Pioneer Retirement Plan.
 - Certificate of Registration issued to Pioneer Retirement Plan.
 - Certificate of Registration issued to Voyager Retirement Plan.
 - Certificate of Registration issued to US Voyager Retirement Plan.
 - Certificate of Registration issued to Harbour Retirement Scheme.
- Retirement Scheme Administrators
 - Certificate of Registration issued to Trireme Pension Services (Malta) Ltd.
 - Certificate of Registration issued to Harbour Pensions Limited.
- Asset Managers
 - Certificate of Registration issued to Curmi & Partners Ltd.

Licences Extended or Converted

Insurance

- Insurance Undertakings
 - Extension of licence issued to Axeria Assistance Ltd to carry on business of insurance and reinsurance in one additional class of the general business.
 - Axeria Life International PCC Limited, a company authorised to carry on business of insurance in terms of the Insurance Business Act (Cap. 403, of the Laws of Malta) has merged into Axeria Assistance Limited, a company which is also authorised to carry on business of insurance and reinsurance in terms of the Act. Consequently, Axeria Life International PCC Limited's authorisation ceased to be operative upon the effective date of the merger.
- Insurance Agents
 - Extension of licence issued to MIB Insurance Agency Limited to act as insurance agent on behalf of Aegis Syndicate 1225 in respect of one class of the general business

The Committee on Economic and Monetary Affairs lodges its views on IMD II

The Committee on Economic and Monetary Affairs drew up a report where it lodged its views on five key areas covered by the Commission's proposal on IMD II including the scope of the proposed directive, the registration and simplified declaration procedure, conflicts of interest and transparency, cross-selling, insurance investment products and delegated acts / level of harmonisation.

In its report the Committee affirmed that the scope of IMD II should not be extended to encompass sales of insurance contracts by insurance and reinsurance undertakings without the intervention of an insurance intermediary, claims management and insurance policies sold along with other services. In addition, the Committee stated that given the need to ensure the proportionality of the proposed measures, the sideline sale of travel insurance / reinsurance and car-hire insurance should be excluded. It also believes that the proposed simplified registration procedure for the provision of ancillary insurance mediation (applying in particular to travel and car-hire agencies) and claims management should be removed from the directive in order to allow for a level playing field to exist for all intermediaries.

The Committee suggested that the proposed IMD II should provide for minimum requirements in relation to the initial and continuing professional development of insurance intermediaries, applicable to all Member States based on the European Qualifications Framework. The form, substance and authentication requirements should however be left up to the Member States to decide. Similarly, the Committee believes that the directive should include minimum provisions regulating conflicts of interest and transparency which Member States may go beyond.

With regards to the proposed provisions relating to insurance investment products, the Committee remarked that Article 21 of the Directive should be amended to specify that consumers would simply be informed whether parts of the package may also be purchased separately. In principle the Committee agrees with the introduction of additional consumer protection requirements in relation to insurance investment products. However, account must be taken of the distinction between insurance and purely investment products, especially since unlike purely investment products insurance investment products are not freely negotiable at all times.

The Committee voiced its disapproval towards the proposed ban on commission-based services relating to the provision of independent advice. It suggested that harmonisation on this aspect should be kept to a minimum and that Member States should be free to adopt divergent provisions in relation to the disclosure of remuneration, in accordance with perceived market requirements.

The Committee also stated that the provisions contemplated in the proposed IMD II concerning delegated acts should be removed and that detailed arrangements determined by each Member States or through a co-decision procedure by the Council and Parliament in cases where a real need for harmonisation is shown to exist, should be opted for.

FERMA calls on the European Parliament to ensure that all insurance buyers are entitled to a minimum European standard of disclosure in IMD II

On the 19th March 2013 the Federation of European Risk Management Associations issued a press release where it called on the European Parliament to ensure that all insurance buyers are entitled to a minimum European standard of disclosure in the revised IMD II.

In the current draft only individual policyholders and small businesses will be automatically entitled to disclosure of the intermediary's remuneration. Buyers of insurance for large risks and a new category of professional customers are excluded and would have to depend on voluntary agreements.

Consequently, the President of FERMA, Jorge Luzzi, asked the legislators to consider business customer concerns and, as a minimum, provide them with a legal basis on which to request information from their intermediary. He affirmed that this would enable them to make fully informed decisions about their insurance coverage.

FERMA also pointed out that the threshold for defining large risks and professional customers is rather low and that many medium-sized businesses would be left without a legal right to information about their broker's remuneration if this proposal is adopted. It also called on the European Parliament to integrate in IMD II the principles agreed upon between FERMA and BIPAR in their non-binding protocol for information disclosure by intermediaries.

EIOPA encourages Supervisory Response to Prolonged Low Interest Rate Environment

Over the past few years EIOPA has highlighted the potential solvency risks arising from a prolonged period of low interest rates on insurance undertakings.

Following a stress test carried out by EIOPA in 2011 to assess the effects on the EU insurance sector of a prolonged period of low interest rates, EIOPA concluded that 5% to 10% of the included companies would face severe problems where their MCR ratio would fall below 100%. An increased number of companies would observe their capital position deteriorate, with MCR rates only slightly above the 100% mark, thereby making them more vulnerable to other potential external shocks.

The '*EIOPA Risk Dashboard*' has classified the effects of a prolonged low interest rate environment as a significant risk identified by national supervisory authorities. Furthermore, the EIOPA Financial Stability Report for the second half of 2012 highlighted the complex and uncertain financial and economic situation facing European insurers.

EIOPA affirmed that long-term interest rates are of crucial importance for life insurers since these undertakings typically have long-term obligations to policyholders that become more expensive in today's terms when market rates are low. Consequently, the financial position of these undertakings typically deteriorates under such conditions. This problem is even more pronounced where guaranteed rates of return have been offered to policyholders.

A prolonged period of low interest rates may also have an adverse impact on non-life insurers pursuing a business model where investment returns are used to compensate for

weak underwriting results. If underlying insurance business is being supported by investment returns this business model will be challenged by a prolonged low yield environment unless management action is taken to change the business model. Non-life insurers may also be affected in a situation where low yields do not provide sufficient returns to counteract the effects of inflation on longer tailed business.

Solvency I is mainly based on historic cost accounting and is not a risk-based framework. Consequently, the potential solvency impact under Solvency I is limited and may take some time to emerge in terms of solvency cover. The implementation of Solvency II would see a move to market value and a risk-based solvency requirement that would calculate the interest rate risk capital charge and discount insurance liabilities using risk free rates as a basis. In this context, EIOPA has warned insurers not to store up risks that may crystalize suddenly with the implementation of Solvency II.

Although some national supervisory authorities have already taken a range of different measures to deal with this matter, EIOPA has put forward a number of recommendations to national supervisory authorities as summarised below.

Firstly, EIOPA encouraged national competent authorities to actively assess the insurance industry in their jurisdiction in order to determine the potential scope and scale of the risks arising from low interest rates and to subsequently report their findings to EIOPA. National competent authorities should also intensify the monitoring and supervision of insurance undertakings identified as having a greater exposure to the risks posed by a low interest rate environment.

Secondly, EIOPA suggested that national supervisors challenge unsustainable business models at an early stage and urge insurance undertakings adopting these models to resolve their problems, actively engage with insurance undertakings in exploring private sector measures to address the risks raised by a prolonged period of low interest rates, measures to improve undertakings' own financial resilience and other measures that could be taken in relation to new contracts.

Finally, EIOPA proposed that national competent authorities who have taken or are considering taking measures that would be applied to all insurance undertakings in their jurisdiction facing these risks incorporate conditionality and exit features if needed. The respective national competent authorities should also notify EIOPA and its members of their intention to implement market-wide measures as this would allow better coordination of measures across jurisdictions, both in terms of timing and broad design. EIOPA will also subsequently be able to engage in a follow-up exercise with its members in 2014 in order to explore what action has been taken.

From Pillar to Post

The imminent (or not so imminent) implementation of the Solvency II regime will mark a radical overhaul to the regulatory landscape for insurance and reinsurance undertakings, with the establishment of the “three pillar” system, which adopts a risk based approach and which seeks to ensure that re/insurance undertakings are adequately capitalised and that risks are sufficiently measured.

A natural consequence of the enhanced three pillar system is the increased costs and regulatory requirements which insurance undertakings are facing in their preparation for Solvency II implementation. While the majority of the ‘larger’ players in the market have the necessary financial and structural resources to comply with the Solvency II requirements, pure captives and the smaller insurance undertakings will find that the costs of complying with Solvency II are rather burdensome, particularly in relation to Pillar II. Those pure captives and small insurers that do not have the financial, organisational or operational resources to conform to the Solvency II requirements may search and opt for alternative structures that better suit their needs.

The PCC has emerged as a structure offering smaller captives and smaller insurers with the opportunity to continue to write business while benefitting from the efficiencies of the PCC structure, and while sharing in the capital base of the PCC. Malta is the only full EU member state that has legislation in place regulating the PCC structure, which allows insurers to create separate and segregated cells within a PCC while allowing them to write business directly throughout the EU by means of the single passport, and allowing them to reap the benefits of their business as if they were a separate legal entity. The choice of utilising the PCC allows captives and insurers writing business through a cell to benefit from the decreased set-up and ongoing costs as well as shared capital requirements.

The advantages of the PCC structure become clearer once its legal nature is understood: a PCC is a single legal entity comprising within itself separate cells that are ring-fenced from each other. Creditors of a cell normally have a right of secondary recourse to the non-cellular assets (core) of the PCC, once all cellular assets of the cell to which the liability is attributable have been fully exhausted. On this basis, we are of the view that under Pillar I the PCC as a whole should meet the statutory Minimum Capital Requirement (‘MCR’), while each individual cell should meet the solvency capital requirement, provided each cell has secondary recourse to the core assets of the PCC. This is already the case under current solvency legislation, and it would be counter-intuitive were the PCC to be required to meet an MCR more than once.

Pillar II seeks to introduce an enhanced system of governance and insurance undertakings have been asked to identify the ‘critical’ functions within the company and are required to carry out an ORSA. Notwithstanding that these requirements are essential for the carrying on of business insurance in a more prudent and sound manner, they will create a more burdensome regime for the smaller captives and smaller insurers.

The PCC structure offers economies of scale and significant cost burden sharing, and grants cells access to a common pool of knowledge and expertise within the common management

Analysis

system at the core of the PCC. Even though corporate procedures relating to each cell may not necessarily be identical, a common approach may be adopted by the board of the PCC which permeates the structure as a whole. Furthermore, all transparency and reporting requirements under Pillar III may be carried out through board of the PCC, resulting in a cost effective structure which diminishes the burden on individual captives or insurers writing business through a cell.

Malta's legislative and regulatory set-up caters for the establishment of PCCs, whether through incorporation, conversion or redomiciliation, as well as through the creation of cells and the transfer of cellular assets from and to other PCCs. The PCC is being put forward as an advantageous alternative, offering a cost effective solution to the increased costs incurred as a result of the implementation of Solvency II, without sacrificing all the benefits of enhanced corporate governance and a more risk based approach under Solvency II.

This Article was submitted for the Captive Review Malta Report 2013

Queries and Suggestions

We trust that this issue of *GA Insurance & Pension Law – Update* was of interest to our readers, however, should you have any queries or suggestions to make, please feel free to contact **Dr. Matthew Bianchi** at mbianchi@ganoadvocates.com, **Dr. Mathew Brincat** at mbrincat@ganoadvocates.com or **Dr. Elizabeth Ganado** at eganado@ganoadvocates.com. We will be pleased to hear from you.

Further should you wish to stop receiving the *GA Insurance & Private Pension Law Update* please let us know by contacting mbianchi@ganoadvocates.com.

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