

Amendments
to the
Insurance
Compensation
Fund Regime

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Amendments to the Insurance Compensation Fund Regime

Introduction

The Insurance (Amendment) Act 2011 (the “**Act**”) was enacted on 30 September, 2011 and, once commenced, will update the existing legislation relating to the Insurance Compensation Fund (the “**ICF**”).

The main changes that will result from the Act are:

- (i) the introduction of “excluded risks”, policies of insurance in respect of which will not be subjected to the levy;
- (ii) the dis-application of the levy to policies that do not relate to “risks in the State”; and
- (iii) the introduction of new offences.

We have set out below an overview of the previous ICF regime, together with an outline of the changes that will be introduced on the commencement of the Act.

Legal Basis of the ICF

The ICF has its legal basis in the Insurance Act, 1964 (as amended) (the “**1964 Act**”). The original purpose of the ICF was to cover the cost of claims due to a person under a policy issued by an insurer in the State where that insurer was in liquidation. An “insurer” for the purposes of the 1964 Act is an undertaking that holds an authorisation under the European Communities (Non-Life Insurance) Framework Regulations 1994. The Insurance (No. 2) Act, 1983 extended the ICF’s applicability, allowing for the administrator of an insurer to apply to the High Court seeking funds “required to enable the administrator to carry on the business of the insurer and to perform his other functions under the [1964 Act] in relation to the insurer”. This extension was in response to PMPA entering administration in October 1983.

Current Financial State of the ICF

It is reported that ICF funding currently stands in the region of €40m. The joint administrators of Quinn Insurance Limited have indicated that there is likely to be a call in excess of €600m on the ICF during the course of that company’s administration. It is on this basis that the Central Bank is driving the introduction of a new 2% levy.

The Levy

To date the Central Bank was entitled to impose a levy of up to 2% of the gross amount of premiums paid or payable to an insurer in respect of all policies issued by that insurer in a given year where it felt that the state of the ICF was such that financial support should be provided for it. On the basis of the definition of “insurer” set out above, all income in respect of non-life insurance policies may have been subjected to the levy. However, political discretion was used to dis-apply the levy’s application to certain types of insurance policy. This position has changed under the Act insofar as it introduces a list of “excluded risks” which will not be subjected to the levy. Going forward, premiums relating to reinsurance, marine insurance and health insurance risks (amongst others) will not be subjected to the levy.

Prior to the Act, policies to which the levy may effectively have been applied need not have been issued in the State. This is to change on commencement of the Act, as outlined below.

Under the Act, the levy may be applied to the aggregate of the gross premiums paid to an insurer (the definition of which has been expanded to include an insurer duly authorised in another Member State) in respect of policies issued relating to “risks in the State”. Such policies may be in respect of a risk which relates to any of the following:

- (i) a building located in the State;
- (ii) a vehicle registered in the State;
- (iii) short-term travel insurance taken out in the State (i.e. with a duration of 4 months or less); or
- (iv) any other case provided the policy holder is an individual who is habitually resident in the State or, if the policy holder is a not an individual, the establishment of the policy holder to which the policy relates is in the State. However, this will not include a policy of insurance in respect of a building in another Member State, a vehicle registered in another Member State or travel insurance taken out in another Member State where the risk is situated in another Member State.

It should be noted that “premium” for these purposes is said to include a premium paid if the policy is issued in respect of risks both inside and outside of the State.

Application for ICF Funding

An application for ICF funding may be made by the liquidator of an insurer or the administrator of an insurer.

By the liquidator of an insurer:

Under the previous regime, subject to the approval of the High Court, the liquidator of an insolvent insurer may have been paid such amount out of the ICF as the High Court determined was due to have been paid by the insurer to a person under a policy. This amount was not permitted to exceed (whether as one payment or as the total of a series of payments) 65 per cent of such amount due or IR£650,000, whichever was the lesser amount.

This limitation applied to the liability of an insured to a third party. No payment was to be made to a body corporate or unincorporated body of persons unless the sum is due in respect of that body's liability to an individual or the liability of an individual to such body. A payment made out of the ICF to an insolvent insurer for these purposes was to be admitted in the proceedings for the winding-up as a proved debt of the insurer having priority to any sum remaining due under the policy.

Under the Act, such a payment will only be made if the amount due is in respect of "risks in the State", as outlined above. The financial limitation of payment will be set at 65 per cent of the amount due or €825,000, whichever is the lesser. Further, no payment will be made out of the ICF in respect of a liability (or portion thereof, where appropriate) which is payable by the Motor Insurers Bureau of Ireland.

The Act also provides that an application for ICF funding may be made (under the same conditions outlined above) to the High Court on behalf of an insurer authorised in another Member State which is in liquidation provided that insurer's liquidator has the same functions as the liquidator of an insurer in the State. Such an application may be made no more frequently than once every 6 months.

Where a person receives an amount from the liquidator of an insolvent insurer which is in excess of the amount due to them, that person will be under an obligation to repay that excess. Failure to do so is an offence and may lead on conviction on indictment to an unspecified fine and/or a term of imprisonment not exceeding 5 years. The Act also imposes personal liability on directors, managers, secretaries or other officers of an insurer (or a person purporting to act in such a capacity) where the offence was committed with that

person's consent, connivance or wilful neglect. In such circumstances the same penalties will apply.

By the administrator of an insurer:

Under the previous regime, funds may have been released to the administrator of an insurer where such funding had been approved by the High Court and the High Court was of the view that the funds were required to enable the administrator to carry on the business of the insurer and to perform his/her other functions under the 1964 Act in relation to the insurer.

Any such sum paid to the administrator became an unsecured debt of the insurer. However, the Minister for Finance was entitled to decide to waive such a debt with a view to facilitating the placing of the business of the insurer on a sound commercial and financial footing.

Under the Act, payment to an administrator of an insurer is subject to the Central Bank being of the opinion that at least 70 per cent of the business of the insurer has been in respect of risks in the State in the 3 years leading up to the administrator's appointment. If the 70 per cent threshold is met, funds may be provided to enable the administrator to carry on the business of the insurer and to perform his/her other functions in relation to the insurer (not just in respect of his/her duties under the 1964 Act as was previously the case). If the 70 per cent threshold is not met, the administrator may only be granted such funding from the ICF that would defray the expenses of the administrator in the performance of his/her functions in relation to the insurer. This funding will only be granted where the expenses are unlikely to be defrayed otherwise than from the ICF.

Sanctions for failure to make appropriate levy contribution

Under the previous regime, failure to make appropriate levy contributions had the potential to lead to the revocation of the relevant insurer's authorisation. The Act has amended the sanctions that may apply in such circumstances. Now a non-paying insurer may instead see their authorisation suspended until such time as their levy payments are up to date. Where the insurer is authorised in another Member State, the Central Bank may prevent the insurer from issuing new policies in the State until such time as all appropriate levy contributions have been paid.

The Act also makes it an offence to fail to make an appropriate contribution. An insurer that is found guilty of such an offence is liable on conviction on indictment to an unspecified fine and/or imprisonment for a term not exceeding 5 years. Again, the Act imposes personal liability on directors, managers, secretaries or other officers of an insurer (or a person

purporting to act in such a capacity) where the offence was committed with that person's consent, connivance or wilful neglect. In such circumstances the same penalties will apply.

Conclusion

The Act, upon commencement, will bring about a modernisation of the ICF regime (reflecting the cross-border market in non-life insurance policies) and will give the Central Bank more effective powers of enforcement.

The Act addresses some of the concerns held by some industry participants concerning the application of the levy to premiums in respect of policies issued by an Irish-domiciled insurer who is operating on a freedom of establishment or free movement of services basis in another Member State. Now only those policies that are linked to a "risk in the State" (as set out above) will be subjected to the levy.

Insurers should be aware of their obligations under the new regime and should note the penalties for failure to comply.

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