

# Insurance Quarterly Legal and Regulatory Update

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DILLON  EUSTACE

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## INSURANCE QUARTERLY LEGAL AND REGULATORY UPDATE

### Third Anti-Money Laundering Directive – 2005/60/EC

The draft legislation for the Criminal Justice (Money Laundering & Terrorist Financing) Bill 2009, which will give effect to Directive 2005/60/EC on the "Prevention of the use of the Financial System for the Purpose of Money Laundering and Terrorist Financing" (the "Third Anti-Money Laundering Directive") in Ireland, was presented to the Dail on the 19 November 2009.

It is expected that the Bill will go to Committee Stage in January 2010 and will be enacted shortly thereafter. For now, until the legislation is passed, the Criminal Justice Act, 1994 (as amended) and the Criminal Justice (Terrorist Offences) Act, 2005 continue to apply.

If you would like further information on anti-money laundering requirements Dillon Eustace regularly advises on all aspects thereof and provides training sessions on this topic. Training can be held either at Dillon Eustace's office at 33 Sir John Rogerson's Quay, Dublin 2 or in house training can be provided at a venue of your choosing.

### Solvency II Framework Directive - 2007/44/EC

The Solvency II Framework Directive will introduce a risk based capital regulatory regime for insurers, reinsurers and captive companies with more than €5 million in gross premium volume that operate in the European Union. This Directive is due to be implemented no later than 31 October 2012.

On the 10 November 2009, the Committee of European Insurance and Occupational Supervisors (CEIOPS) delivered its final advice to the European Commission on the vast majority of the Solvency II Level 2 Implementing Measures, following receipt of over 20,000 comments from national and European associations and insurance undertakings. This advice covers a number of critical matters such as the valuation of assets and liabilities, treatment of SPV's, the approval process of internal models, the choice of the risk-free rate for discounting technical provisions, the classification and eligibility of own funds, remuneration and group solvency, to name just a few.

On the 2 December CEIOPS published its consultation paper 78 'Draft Advice for Level 2 Implementing Measures on Solvency II Technical criteria for assessing 3rd country equivalence'. This paper provides draft advice on the Level 2 implementing measures for reinsurance supervision, group solvency calculations and group supervision. CEIOPS has asked for comments on this advice to be received by 5 February 2010.

## Regulations on Accounts and Consolidated Accounts

On the 18 November 2009, the European Communities (Directive 2006/46/EC) Regulations (S.I. 450 of 2009) ("the Regulations"), which implement Directive 2006/46/EC on Company Reporting in Ireland, were signed into law.

Directive 2006/46/EC amends four other Directives; namely Directive 78/660/EEC (the 4<sup>th</sup> Company Law Directive), Directive 83/349/EEC (the 7<sup>th</sup> Company Law Directive), Directive 86/635/EEC (the Credit Institutions Directive) and Directive 91/674/EEC (the Insurance Undertakings Directive).

The key changes arising from the Regulations can be summarised as follows:

- ▣ It is now a requirement for an Irish incorporated company whose securities are admitted to trading on a regulated market to include a Corporate Governance Statement in respect of each financial year end in the Director's Report.
- ▣ All Irish incorporated companies (listed and unlisted) will be subject to disclosures of "off balance sheet arrangements" and "related party transactions" in certain circumstances.
- ▣ Amendments have been made to existing fair value rules contained in Irish legislation.

Both the E.C. (Credit Institutions: Accounts) Regulations 1992 (S.I. 294 of 1992) and the E.C. (Insurance Undertakings: Accounts) Regulations 1996 (S.I. 23 of 1996) have been amended accordingly to reflect the above requirements.

No effective date is contained in the Regulations, however it is understood that they have immediate effect. Given that the Regulations are silent on whether or not they apply to financial years ending after the Regulations were brought into effect, there is concern that the Regulations may apply to financial years which have not yet ended and to financial years which have ended, but where the financial reports in respect of such financial year have not yet been approved by the Board of Directors.

It should be noted that a person who contravenes these Regulations is guilty of an offence and is liable on summary conviction to a fine of €5,000 or three months imprisonment or both and on indictment to a fine of €50,000 or imprisonment for a term not exceeding three years or both.

## The Companies (Miscellaneous Provisions) Bill, 2009

On 18 December, 2009, the Companies (Miscellaneous Provisions) Bill, 2009 (the “Bill”) was returned to first House Seanad Éireann. When this Bill is passed into law (expected January, 2009) it will introduce a number of important changes to Irish company law. The Bill can be broken down into the following parts;

- ▣ Use of US GAAP in Ireland provides, in limited circumstances, for the transitional use by certain parent undertakings of internationally recognised accounting standards other than those generally accepted accounting principles and policies used in the State;
- ▣ Costs of Company Investigations – removes the upper limit on the amount of costs and expenses incurred in such investigations towards which applicants under Sections 7 to 13 of the Irish Companies Act 1990 (and/or the companies under investigation) can be asked to contribute. This provision puts applicants applying to courts under these sections on an equal footing with other parties initiating court proceedings, in that they can be held liable for all costs if the court in its discretion so decides;
- ▣ Recognised Stock Exchange – the definition of “recognised stock exchange” for the purposes of Section 215 of the Companies Act, 1990 is amended to also include exchanges outside the State;
- ▣ Overseas Market Purchase – the Bill introduces a new type of purchase, where a purchase by a company that issues shares is an overseas market purchase if the shares are purchased on a recognised stock exchange outside the State, therefore obliging the company to publish certain information on its website;
- ▣ Continuation of foreign investment companies in Ireland – the Bill will amend the Companies Act 1990 to provide that a body corporate which is a collective investment undertaking established and registered under the laws of a relevant jurisdiction outside the State; and which the Minister may prescribe where he or she is satisfied that the law of the place concerned makes provision for companies to continue under the laws of the state in a substantially similar manner, may apply to the Registrar to be registered as a migrating company in the State by way of continuation;
- ▣ De-registration of companies when continued under the law of jurisdiction outside the

State – in a substantially similar manner to the continuation process, a company can also apply to de-register;

- ▣ Statutory Declaration of Solvency - A director of the migrating company shall make a statutory declaration stating that he or she has made full inquiry into the affairs of the relevant company and has formed the opinion that it is able to pay its debts as they fall due;
- ▣ Amendment of UCITS Regulations – the continuation and de-registration provisions of the Companies Act, 1990 (as introduced by the Bill); shall apply to any investment company authorised pursuant to the UCITS Regulations;
- ▣ Amendment of Companies (Auditing and Accounting) Act, 2003 – provides that persons who are directors of the Supervisory Authority at the time a committee is established for the purposes of the 2003 Act will be entitled to continue on the committee until the inquiry is completed; and
- ▣ Creation of committees for the purposes of investigating any matter from time to time also permitted.

## Corporate Governance (Codes of Practice) Bill, 2009

The purpose of the Corporate Governance (Codes of Practice) Bill, 2009 (“the Bill”) is to enable the Central Bank and Financial Service Authority of Ireland (the “Bank”), as regulator of the Irish Stock Exchange (the “ISE”), to draw up for Ministerial approval a binding code of practice relating to corporate governance which can be enforced as part of the listing rules of the ISE.

Companies whose securities are admitted to trading on the official list of the ISE are currently required to comply with the provisions of the Combined Code on Corporate Governance of the Financial Reporting Council. However, compliance with this code is not enforced by legislation. The recent diminution in confidence in the Irish financial system requires such a code should to be put on a statutory footing.

The Bill was introduced on the 23 April 2009, however it has yet to be scheduled for debate before the Dail.

## Data Protection Act 1988 (Section 5(1)(d)) (Specification) Regulations, 2009

Section 5(1)(d) of the Data Protection Act 1988 allows the Minister for Justice, Equality and Law Reform to specify that data access rights will not apply where the release of the data would be likely to prejudice the proper performance of specified functions of office holders designed to protect members of the public against financial loss occasioned by:

1. dishonesty, incompetence or malpractice on the part of those concerned in banking, insurance, investment or other financial services, or in the management of companies or similar organisations;
2. the conduct of persons who have been at any time adjudicated bankrupt.

On the 20 October 2009, the Minister exercised this power by introducing the Data Protection Act 1988 (Section 5(1)(d)) (Specification) Regulations, 2009 (S.I. 421 of 2009), whereby he has formed the view that the proper performance of functions under the Companies Acts by the Director of Corporate Enforcement, his officers or by any inspector appointed by the High Court or by the Director of Corporate Enforcement is likely to be prejudiced if they are obliged to provide copies of personal data that they hold.

The effect of the above is that going forward data subjects are unlikely to be successful in making data access requests in relation to personal data held by the Director of Corporate Enforcement, his officers or by any inspector appointed by the High Court or by the Director of Corporate Enforcement.

## Data Protection Review Group

In October 2009, the Government's Data Protection Review Group published a consultation document, which will be used to assist the Group reach a balanced conclusion on how Ireland should address the issue of the most appropriate legislative response to data breaches as a result of human error, loss or theft of data or equipment on which data is stored or loss of data due to unforeseen circumstances such as flooding.

Currently there is no specific legal obligation imposed on the Data Controller to inform the Data Subject or the Data Protection Commissioner ("DPC") of an incident involving the loss or improper disclosure of personal data. However, in December 2008 the DPC issued

breach notification guidelines, which recommend that the Data Controller notifies the DPC of any breaches of personal data as soon as the Data Controller becomes aware of such a breach.

The consultation document sets out the regulatory options open to the Government and highlights two areas worthy of particular attention: (1) how a harm threshold would be determined, and (2) the level of penalty imposed by either a court or the Data Protection Commissioner.

Interested parties were asked to provide comments on the Consultation document by the 30 October, 2009.

## Insurance Block Exemption

The insurance block exemption exempts certain agreements between insurers from scrutiny under the European rules on agreements between competitors (Article 81 of the EC Treaty). However, the current block exemption introduced in 2003 expires in March 2010.

On the 5 October 2009, the European Commission invited comments, no later than 30 November 2009, from interested parties on the revised draft block exemption for the insurance sector. The block exemption reflects the European Commission's view that there is no need for the block exemption covering model wordings (standard policy conditions) for direct insurance or standard profit models for life insurance, or security devices.

The revised draft block exemption only provides for a block exemption for agreements on joint compilations, tables and studies, and common coverage of certain types of risk (co-re/insurance pools).

The new block exemption is due to come into force on 1 April 2010. After that date, reinsurers who have until now relied on the Block Exemption Regulation's safe harbour for protection of their pools will need to study their arrangements closely to assess their compatibility with competition law.

## The Financial Regulator

- ▣ **Financial Services Ombudsman** - In September, Joe Meade informed the Financial Ombudsman Services Council that he will retire from the position of Financial Services Ombudsman with effect from January 2<sup>nd</sup>, 2010.
- ▣ **Head of Financial Supervision Appointed** - Matthew Elderfield was appointed as Head of Financial Supervision in the new Central Bank of Ireland in October 2009. Mr. Elderfield, currently the Chief Executive Officer of the Bermuda Monetary Authority, will be responsible for all regulatory activities in the Central Bank. Mr. Elderfield will take up his new position in January 2010.

The new (and yet to be filled) Assistant Director General positions with responsibility for Enforcement, Markets Supervision and Policy & Risk will report directly to the Head of Financial Supervision, Mr. Eldefield.

- ▣ **Minimum Competency Requirement Themed Inspection Results** - The Financial Regulator, in December, published the results of a themed inspection of compliance with the Minimum Competency Requirements (the "Requirements"). The Requirements which came into effect in January 2007, apply to all regulated financial service providers and establish minimum standards for financial service providers.

The themed inspections took place in a number of Credit Institutions and focussed on grandfathering provisions (which expire in January, 2011) and register maintenance provisions. With the exception of two institutions, the results were unsatisfactory. The Financial Regulator has since written to all Credit Institutions, including those not included in the themed inspection programme, to highlight the issues of concern.

- ▣ **Settlement Agreements**- the Financial Regulator has entered into a Settlement Agreement with effect from 29 September 2009 with Mr. Michael Fogarty t/a Tom Fogarty Insurance Brokers of 16 Bank Place, Tipperary Town, Co. Tipperary, in relation to breaches of regulatory requirements discovered during the course of the Financial Regulator's themed inspection into "Charges and Premium Rebates in the Insurance Sector" and relate, inter alia, to a failure by the firm to act in the best interest of its clients. The firm overcharged certain consumers on broker fees which were in excess of the maximum fees advised on the firm's terms of business and failed to refund the difference between the cost of insurance initially quoted to certain consumers and the actual cost of insurance that was subsequently arranged

for those consumers. The Financial Regulator has reprimanded the firm and has required it to pay a fine of €20,000.

Again following the Financial Regulator's themed inspection into "Charges and Premium Rebates in the Insurance Sector", the Financial Regulator has entered into a Settlement Agreement with effect from 5 November 2009 with Pat Treacy Insurance Brokers Limited of 261 Crumlin Road, Dublin 12 in relation to breaches of regulatory requirements. These include overcharging fees in excess of those set out in the firm's terms of business, failure of the firm to transfer premium rebates to consumers in full and within five business days and failure to reconcile and operate the firm's Client Premium Account in accordance with the Consumer Protection Code. The Financial Regulator has reprimanded the firm and has required it to pay a fine of €15,000.

On the 5 November 2009, the Financial Regulator entered into a Settlement Agreement with Quick Quotes Limited, also of 261 Crumlin Road, Dublin 12 for breaches similar to those found at Pat Treacy Insurance Brokers Limited. The Financial Regulator has reprimanded Quick Quotes Limited and has fined it €7,500.

On the 18 December 2009, the Financial Regulator entered into a Settlement Agreement with McHugh O'Leary Insurance Brokers Limited t/a McHugh O'Leary Insurances of 15 Dublin Street, Carlow for breaches of the Consumer Protection Code relating to overcharging fees and administration charges in excess of maximum fees/charges advised in the firm's terms of business. The Financial Regulator has reprimanded the firm and has fined it €18,000.

- ▣ **Non-Life Insurance Companies-** an updated Guidance Note "Operational Guidance Applicable to Captive Insurance Undertakings, November 2009" is now available to download on the Financial Regulator's website [www.ifsra.ie](http://www.ifsra.ie) under the insurance section. The intention of this Guidance Note is to provide greater clarity as regards the position previously outlined in the "Guidance Note "Operational Guidance on Prudential Requirements Applicable to Captive Insurance Undertakings" issued in July 2007.

## Dillon Eustace

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