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Ashurst insurance newsletter

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Europe

UK – Solvency II: recent developments

Recent publications by the European Insurance and Occupational Pensions Authority (EIOPA) and the Prudential Regulation Authority (PRA) have given new insights into the final Solvency II requirements and the UK implementation timetable.

On 30 April 2014, EIOPA published its "Technical Specification for the Preparatory Phase" for use in the period prior to the implementation of Solvency II (the Technical Specification). These specifications form the basis of the Solvency II balance sheet for interim reporting during 2014 and 2015.

On 2 June 2014, EIOPA also published its first consultation set of Level 3 guidelines (the Level 3 Consultation). Level 3 guidance is issued to the national supervisors on a "comply or explain" basis and is therefore indicative of the way the Solvency II Directive (being the Level 1 legislation) will be interpreted and the detailed technical provisions (being the Level 2 implementing measures) will be developed.

On 23 June 2014, the PRA published a letter (dated 13 June 2014) that it has sent to insurers providing an update on work on Solvency II. The PRA acknowledges that the last few years have been difficult for firms waiting for clarity on Solvency II. However, now that the landscape is clearer, the PRA is keen for firms to concentrate on the work required to put implementation back on track.

Technical Specification
The Technical Specification is not a formal part of the Solvency II legislation but does give an indication of the direction of travel in relation to the valuation of assets, the Standard Capital Requirement, the Minimum Capital Requirement and Own Funds.

Alongside the publication of the Technical Specification, EIOPA also launched a stress-testing exercise. This exercise involves both life and general insurance firms chosen by the national regulators with the aim of covering 50 per cent or more of each of these markets. The results of the stress-test analysis will apparently be published in November 2014.

Level 3 guidelines
The Level 3 Consultation comprises five consultation papers containing proposals for guidelines on:

- Pillar 1 requirements;
- the use of internal models;
- system of governance and own risk and solvency assessment;
- the supervisory review process; and
- the methodology for equivalence assessments by national supervisory authorities.

There is also a sixth consultation paper containing an impact assessment. The consultation period closes on 29 August 2014 and EIOPA intends to publish the final guidelines in February 2015.

The consultation papers relating to the second set of Level 3 guidelines (covering Pillar 2 and Pillar 3 issues) are expected to be published in December 2014.

The Commission's and EIPOA's approach
The Technical Specification and the Level 3 Consultation are helpful to understanding the likely new Solvency II requirements. However, a full understanding of the implications of the two sets of documents is hindered by the continued delay in the publication of the Level 2 implementing measures which has been caused by the delay in agreeing Omnibus II.

The Technical Specification states that it has been drafted to reflect the content of the "working documents of the (Level 2) Delegated Acts" available at the time the document was drafted. This statement is not particularly helpful when these working drafts have not been made publicly available.

The Level 3 Consultation Paper has annexed to it a "non-official reference to the draft Delegated Act articles implementing the Solvency II Directive". This annex appears to be an extract from the latest non-public working drafts of the delayed Level 2 implementing measures. The inclusion of this annex is welcome but it does seem a strange approach to consult on Level 3 guidelines that relate to as yet unpublished Level 2 implementing measures.

The exact timeline for the publication of the Level 2 implementing measures by the Commission is still unclear. The Level 3 Consultation Paper states that it is anticipated the Commission will publish them "later this year", the PRA letter, dated 13 June 2014, states that they will be "soon available for consultation" and Michel Barnier, European Commissioner for internal market and services, has said that publication is "planned for the summer of this year".

Related to this, as the output of Solvency II documentation produced by EIOPA, the Commission and the PRA continues to increase, it would be helpful if greater effort were made clearly to describe how each document fits into the wider framework. This could be achieved by:

- a more consistent use of terminology. As highlighted in this article, there is a lack of consistency in the Technical Specification and the Level 3 Consultation as to how the Level 2 implementing measures are described; and
- documents being much clearer on their face as to how they fit into the framework. For example, the purpose of the Technical Specification could be made clearer on the face of the document.

Small adjustments such as these and a clearer communication of when important documents (such as the Level 2 implementing measures) will be published can only be beneficial to the process.

The PRA letter
The PRA letter, dated 13 June 2014, is a clear indication the PRA believes the hiatus in the Solvency II process is now over and that firms should be planning and resourcing themselves to ensure they will be ready for the implementation of Solvency II on 1 January 2016.

The PRA is particularly concerned about the lack of progress in the development of internal models and the real risk that some firms will not reach the standard expected of a preliminary review by transposition on 1 April 2015. Other points raised by the PRA include:

- in the first quarter of next year, the PRA expects to test the IT infrastructure it is building to enable firms to submit Solvency II data;
- firms are expected to have due regard to EIOPA's preparatory guidelines (published in September 2013) in order to demonstrate to the PRA that they are making appropriate progress with their Solvency II preparations;
- in July 2014, the PRA expects to consult on the final changes it expects to make to transpose Solvency II into the PRA rulebook; and
- the PRA expects to communicate with firms regularly over the course of 2014 to keep them informed of the PRA's Solvency II plans and a timetable of expected activity is attached to the PRA letter.

The PRA's desire to create impetus towards implementation is understandable. However, it is hard to see how the PRA can proceed with matters such as changes to the PRA rulebook, without the Level 2 implementing measures first being published.

Bank of England approach to regulating the insurance industry

On 22 May 2014, *The Times* newspaper published an article by Mark Carney, Governor of the Bank of England, on regulating the insurance industry. The content of part of this article was also mentioned in Mr Carney's speech at the Inclusive Capitalism conference on 27 May 2014.

Mr Carney's key theme was the increased scrutiny the regulator would be applying to insurance firms. He emphasised that the role of the PRA was **not** to prevent insurance firms from failing, but to make sure

that failing insurers did not harm their policyholders, cost the taxpayer money, or make insurance harder to obtain.

He warned insurers that the PRA would not protect them "from the consequences of their own decisions" and that a regime holding senior managers to account in the insurance industry will be created, similar to the regime created for bankers. However, he stressed that the new regime would not apply the banking regime "indiscriminately", because:

- "Solvency II would require the PRA to monitor the fitness and propriety of a much broader range of staff than in banks"; and
- there was no statutory provision for applying a "reverse burden of proof" in insurance. A "reverse burden of proof" will be introduced by the reforms under the Financial Services (Banking Reform) Act 2013, under which senior managers of "relevant authorised persons" will be **presumed** to be guilty of misconduct under section 66 of the Financial Services and Markets Act 2000 if their firm contravenes certain regulatory requirements for which they were responsible at the time, unless they can demonstrate that they took reasonable steps in order to prevent the breach from occurring or continuing. "Relevant authorised persons" in this context does not include insurers.

Other points in Mr Carney's article included the following:

- challenges in the post-crisis landscape could lead insurers "towards new classes of business, less traditional types of investments, or new opportunities in emerging markets". The PRA would be "vigilant" to the risks in any such move and would not hesitate to step in. In practice, though, moving into emerging markets and writing new classes of business would require the consent of the PRA before the move was made;
- the PRA is working towards establishing "global capital requirements" so insurance companies that operate around the world are "consistently strong"; and
- the PRA is working alongside the European Central Bank to ensure that insurance companies and other financial institutions provide funding to SMEs, multinational companies and infrastructure projects to ensure that insurers play a role as a source of long-term finance in the economy.

Overall, it seems that the awareness of the failings of financial firms in recent years, and the limited accountability taken by individuals in those failing firms, is driving the PRA to attempt to impose greater scrutiny on the insurance industry and, in particular, on the individuals running those firms. Consequently, it appears that there will be greater focus on those individuals who conduct regulated functions and their understanding of what this entails for the business.

Transparency International's new guidance on facilitation payments

Transparency International (TI) has produced "Countering Small Bribes: Principles and good practice guidance for dealing with small bribes including facilitation payments". It aims to provide practical advice on addressing the challenge of countering small bribes including "grease payments". TI research shows that, globally, more than one in four people paid a bribe in a recent 12-month period, highlighting the scale of the problem. Demands most often occur in overseas markets, where employees may be vulnerable through travelling alone or the company needs to release critical goods from customs.

The guidance provides a set of principles, discussion and advice designed to help companies operate to high ethical standards, protect their reputations and fulfil their legal obligations. It contains:

- ten principles for countering small bribes;
- a section on assessing risk;
- practical examples and case studies;
- model negotiation steps for resisting demands;
- a self-assessment checklist aligned to the ten principles and good practice set out in the guidance; and
- information on the US FCPA Act.

It can be accessed via this link here.

Insurance mediation directive amendments

Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (Insurance Mediation Directive) has been partially amended by article 91 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (MiFID II). The aim of these amendments is to introduce new customer protection measures in relation to insurance-based investment products.

Customers of financial services, including those buying insurance-based investment products, are thought to suffer from deep asymmetries of information, such that they are often dependent on advice from those selling to them and are not well able to assess any limitations to the advice provided. Such issues are

particularly relevant for packaged products, including insurance-based investment products.

Insurance-based investment products
The new customer protection requirements apply to: (i) insurance mediation activities; and (ii) direct sales carried out by insurance undertakings when they are carried out in relation to the sale of insurance-based investment products. An insurance-based investment product is an insurance product which offers a maturity or surrender value, which is wholly or partially exposed, directly or indirectly, to market fluctuations.

Conflicts of interest
MiFID II also introduces into the Insurance Mediation Directive an obligation for both insurance intermediaries and insurance companies to deal with conflicts of interest which may affect clients. "An insurance intermediary or insurance undertaking must operate effective organisational and administrative arrangements with a view to taking all reasonable steps to prevent conflicts of interest from adversely affecting the interests of its customers."

Where organisational or administrative arrangements to manage conflicts of interest are not sufficient to ensure, with reasonable confidence, that risks of damage to customer interests will be prevented, the insurance intermediary or insurance undertaking must clearly disclose to the customer the general nature and/or sources of conflicts of interest.

The Commission is empowered to adopt delegated acts to:

- define the steps that might reasonably be expected to identify, manage and disclose conflicts of interest; and
- establish appropriate criteria for determining the types of conflict of interest whose existence may damage the interests of customers.

General principles and information to customers
An insurance intermediary or insurance undertaking "should act honestly, fairly and professionally in accordance with the best interests of its customers".

All information, including marketing communications, addressed by the insurance intermediary or insurance undertaking to customers or potential customers must be fair, clear and not misleading. Marketing communications must be clearly identifiable as such.

Possibility of banning third party payments
Member States may, by enacting the necessary rules at the Member State level, prohibit commissions in relation to the distribution of insurance-based investment products.

EIOPA's discussion paper on conflicts of interest in direct and intermediated sales of insurance based investments products
On 21 May 2014, the European Insurance and Occupational Pensions Authority (EIOPA) published a Discussion Paper on Conflicts of Interest in direct and intermediated sales of insurance-based investment products (the Discussion Paper). This followed a mandate for technical advice received from the European Commission in relation to the new article 13d of the Insurance Mediation Directive (introduced by article 91 of MiFID II).

EIOPA aims to provide stakeholders with an early orientation on possible issues to be addressed in the technical advice of EIOPA to the Commission and to seek feedback from all stakeholders. The deadline for sending comments is 22 July 2014.

Conclusion
The amendments to the Insurance Mediation Directive introduced by MiFID II described above seek to minimise the number of cases of misselling of packaged insurance products, such as insurance-based investment products, at EU level.

Member States have 24 months (to July 2016) from the date of entry into force of MiFID II to adopt and publish national regulations necessary to comply with these amendments to the Insurance Mediation Directive.

New rules on conflicts of interest (in the form of delegated acts) will be adopted by the Commission during the following months. Whereas article 87 of MiFID II specifies that the investor protection requirements of MiFID II should be applied equally to investments packaged under insurance contracts, product characteristics make it more appropriate that detailed rules for contracts of insurance used as potential alternatives to financial products are set out in the Insurance Mediation Directive.

EU Savings Directive: recent updates

The European Council has adopted a directive (2014/48/EU) expanding the scope of the existing EU Savings Directive (2003/48/EC) (EUSD). The new directive introduces widely discussed measures to address perceived loopholes in the existing EUSD regime. As a result, from 1 January 2017, insurers are likely to have reporting obligations in relation to cross-border payments under certain life insurance contracts

for the benefit of individuals resident in EU Member States.

Currently the EUSD provides an information exchange between the tax authorities of EU Member States (and, pursuant to various agreements, certain associated territories and non-EU countries). It applies to cross-border payments of "savings income" (broadly, interest on debt) to or for the benefit of individuals (EUSD Payments).

Paying agents making EUSD Payments have responsibility for collecting identity and residence information about the beneficial owner of the payment and are required to report the information and payment to their home tax authority if the beneficial owner is resident in a Member State other than that in which the paying agent is established. A paying agent is, broadly, an economic operator that makes EUSD Payments to the beneficial owner of such payments.

As a transitional alternative to the information exchange regime, participating jurisdictions can apply a withholding regime. Paying agents in withholding jurisdictions must pay EUSD Payments after a deduction of 35 per cent. Of the EU Member States, currently only Austria and Luxembourg apply the withholding regime. From 1 January 2015, it is likely that Luxembourg will switch to the information exchange regime.

There are two principal extensions to the scope of the EUSD as a result of the new directive.

First, "look-through" rules are being introduced to combat the use of conduit paying agents in non-EUSD jurisdictions to take payments of savings income outside the scope of the EUSD.

Second, the definition of "savings income" is being expanded to bring payments in respect of instruments and products which are regarded as being economically equivalent to debt investments within the scope of the EUSD regime.

In particular, benefits from a life insurance contract are to be treated as "interest payments" (and therefore within the scope of the revised EUSD) if:

- the contract contains a guarantee of income; or
- the actual performance of the contract is more than 25 per cent linked to debt or debt-like instruments or products.

The following are excluded from the scope of the revised EUSD regime:

- life insurance contracts entered into before 1 July 2014;
- amounts paid out solely in respect of death, disability or illness; and
- benefits from a life insurance contract which provides solely for a pension or fixed annuity paid for at least five years (unless realised by a disposal of the contract before the end of the five-year period).

It is expected that the revised EUSD will be effective from 1 January 2017. Participating Member States (including the UK) are required to publish and adopt implementing legislation by 1 January 2016.

In parallel, the EU is negotiating amendments to the regimes related to the EUSD operated with certain non-EU third countries (Switzerland, Liechtenstein, Andorra, Monaco and San Marino). Indeed, it was a belief that substantive progress would be made with these agreements which led Austria and Luxembourg to drop their opposition to the adoption of the revised EUSD.

The EU is also considering revisions to the Administrative Cooperation Directive (2011/16/EU) (the revised automatic tax information exchange directive, coming into force from 1 January 2015) to align it with the newly established OECD global standard on automatic exchange of information. These measures all form part of a wider international movement to greater tax information gathering and exchange precipitated by the US introduction of FATCA.

Spanish Regulations on money laundering finally approved

The Third Anti-Money Laundering Directive merely provided a general framework. The Directive was transposed into Spanish law by Law 10/2010. However the rules of Law 10/2010 have now been completed by new Regulations (approved by Royal Decree 304/2014, of 5 May 2014) which took effect on 6 May 2014.

The list of persons subject to the new Regulations includes life insurers, life insurance brokers and pension fund management companies.

The Regulations also apply to non-Spanish life insurers and life insurance brokers carrying on business in Spain under the freedom to provide services or the right of establishment.

Rules applicable to life insurance contracts include the following:

- the identity of the policyholder must be identified by means of attesting documents before the insurance policy is concluded;
- the identity of the beneficiaries of a life insurance contract must be checked before benefits are paid under the policy;
- branch offices of non-Spanish insurance companies benefit from simplified due diligence requirements in relation to policyholders; and
- certain insurance transactions are also subject to simplified due diligence, including, among others:
  - life insurance policies with an annual premium that does not exceed €1,000 or with a single premium not exceeding €2,500; and
  - policies exclusively covering the risk of death, permanent disability or partial disability, serious disease and long-term care (i.e. not covering survivorship and not granting surrender or withdrawal rights).

Hong Kong

Hong Kong insurers rush to meet the FATCA implementation deadline

On 9 May 2014, the Hong Kong Government announced that Hong Kong and the United States have substantially concluded discussions on an inter-governmental agreement (IGA) that will facilitate compliance with the US Foreign Account Tax Compliance Act (FATCA) by financial institutions in Hong Kong. The announcement has resulted in a flurry of activity among insurers, regulators and self-regulatory organisations.

The IGA establishes a legal framework for Hong Kong financial institutions (including insurers) to seek consent from their US customers to disclosures required by FATCA, and to report certain tax information of such customers to the US Internal Revenue Service (the IRS). Insurers are able to register with the IRS before 1 July 2014 on the basis that there is an agreement in "substance" between Hong Kong and the US. Insurers who fail to register risk having a 30 per cent withholding tax imposed on most payments of US sourced income (including interest payments, dividends, rent and profits). The IGA is expected to be executed later this year but the Hong Kong Government has provided useful guidance on implementation and the industry has been able to review an advanced draft IGA.

In response to the announcement and subsequent guidance by Hong Kong regulators and self-regulatory organisations, insurers have taken various steps including:

- registering with the IRS;
- updating policy application and service documentation to ensure that the relevant customer consents and disclosures are in place; and
- updating product documentation for investment-linked insurance policies and making the requisite regulatory filings.

There will also be ongoing FATCA compliance including a requirement under the IGA to seek US policyholder consent to reporting their account balances by 31 March 2015 to the IRS, which will keep insurers busy over the months to come.

Australia

Waiving goodbye to privilege in M&A disputes

A recent first instance decision of the Federal Court of Australia serves as a general reminder of the care that has to be taken when providing information to insurers.

In *Asahi Holdings Pty Ltd -v- Pacific Equity Partners Pty Ltd & Or (No 2)* [2014] FCA 481, the applicant buyer, Asahi, is suing the respondent sellers for allegedly overstating the financial performance of the target business during the due diligence process. Shortly before commencing proceedings against the sellers, the buyer made a claim under its warranty and indemnity insurance policy on the basis of the sellers' alleged breach of warranty in the share sale agreement.

In submitting its claim to the insurers, the buyer voluntarily disclosed a report which provided particulars of the adjustments to the accounts that it asserted would have been required to show the target's true financial position. This report was prepared by the buyer's solicitors and it was accepted that this report was subject to legal professional privilege as it was created for the dominant purpose of use in anticipated litigation.

Justice Bromberg held that the buyer, however, had waived privilege in the report by its solicitors providing a copy to the insurers, and ordered an unredacted copy to be disclosed to the sellers. This was for the following main reasons:

- the buyer's decision voluntarily to disclose the report to the insurers when making its claim for indemnity;
- by the buyer failing to ensure that the insurers agreed to any express obligation to maintain confidentiality over the information contained in

the report, which information was not obviously privileged. References on the face of the report to it being confidential and privileged were inadequate and insufficient; and
- as indemnity had not been granted by the insurers at that initial stage, there was no common interest at that time between the buyer and the insurers that would have allowed privilege to be maintained. Accordingly, the buyer would have been objectively aware that it was providing the report to a potential adversary.

When making claims for indemnity, specialist insurance input should be sought from an early stage to ensure not only that the prospects of a successful claim are maximised but also that the policy obligations are discharged while protecting and maintaining privilege over confidential information.

Opes Prime Stockbroking Ltd (In Liq) (Scheme Administrators Appointed) -v- Stevens: possible statutory charge not grounds for resisting cross-vesting application

The decision in *Opes Prime Stockbroking Ltd (In Liq) (Scheme Administrators Appointed) v Stevens* [2014] NSWSC 659 (discussed below) concerns the application of section 6 of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW) (Law Reform Act).

Section 6 of the Law Reform Act creates a statutory charge over insurance monies potentially payable to insured defendants. The section is intended to ensure that the plaintiff will be able to recover directly from the insurer whose insurance monies (that would otherwise be payable to the defendant) in respect of their claim. Section 6 of the Law Reform Act was originally enacted to ameliorate the potential unfairness to plaintiffs in civil proceedings who were unable to recover judgment against an insolvent defendant insured.

The statutory charge provisions in the Law Reform Act have been the subject of ongoing concern in Australia since the New Zealand decision in *Steigrad & Ors -v- BFSL 2007 Ltd* [2011] NZHC 1037 (*Bridgecorp*). The court in *Bridgecorp* held that a statutory charge (which was substantially on the same terms as section 6 of the Law Reform Act) precluded the insurer of Bridgecorp's D&O policy from advancing defence costs to certain former directors of the collapsed Bridgecorp group of companies. This decision was upheld on appeal by the New Zealand Supreme Court.

The Full Bench of the New South Wales Court of Appeal considered the issue in the decision of *Chubb Insurance Company of Australia Limited -v- Moore* [2013] NSWCA 212. In that case it was held that section 6 of the Law Reform Act only applies to claims brought in a court of New South Wales (and that any statutory charge created by section 6 does not apply to defence costs that are paid by the insurer in accordance with a policy before judgment or settlement of the claim). The decision in *Chubb* was appealed to the High Court but the underlying class action settled before the special leave application was heard.

The decision in *Opes* does not resolve the ongoing issues relating to the Law Reform Act. However, it is a timely reminder that plaintiffs in jurisdictions without an equivalent Law Reform Act will not be able to take the benefit of the provisions in New South Wales.

The case

Opes is a case arising out of the collapse of the Opes Prime group. The plaintiffs instituted proceedings in NSW against the defendants, who were two of the directors of Opes Prime Stockbroking Ltd (OPSL). The plaintiffs allege that the directors breached their duties as directors by failing to ensure that OPSL had adequate risk management policies, practices and procedures and that as a result of those breaches, Opes suffered loss in connection with a securities lending business engaged in by OPSL.

The defendants made an application for an order under section 5(2) of the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) (Cross-Vesting Act) to transfer the proceedings from the Supreme Court of NSW to the Supreme Court of Victoria. The plaintiffs resisted that application, primarily on the grounds that if the proceedings were transferred to Victoria, the plaintiffs would not have the ability to make a statutory charge under section 6 of the Law Reform Act on the defendants' directors' and officers' liability insurance policy. During the course of the hearing, the plaintiffs conceded that the proceedings had been brought in NSW and not Victoria for the purpose of raising a statutory charge under the Law Reform Act. There is no equivalent statutory charge in Victoria.

The question for consideration was whether, in determining an application under the Cross-Vesting Act, the court should have regard to the plaintiffs' possible statutory charge under the Law Reform Act. In a short judgment, Justice Bell held that it was not a valid consideration, noting that the interests of justice are not concerned with the procedural or substantive advantages that one party might enjoy in one jurisdiction rather than another.

Changes to stamp duty on life policies in Victoria

Abolition of Life insurance duty

The Building a Better Victoria (State Tax and Other Legislation Amendment) Act 2014 (the Amending Act) received royal assent on 17 June 2014. The Amendment Act abolishes duty payable on life insurance policies in Victoria from 1 July 2014, and also introduces the concept of "life insurance policy riders" into the insurance duty provisions of the Duties Act 2000 (Vic) to clarify when riders attached to life insurance policies are subject to insurance duty. These changes will also come into effect on 1 July 2014.

Life insurance policy riders are general insurance products often attached to life insurance policies which provide for additional or modified benefits on the occurrence of a contingency or event that does not relate to, or depend on, a life or lives (such as disability). These are effectively additional insurances to the life insurance policy. The Amending Act makes a number of legislative changes which clarify that all life insurance policy riders are to be treated as general insurance and not life insurance, and are therefore subject to duty.

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