

## Insurance & Reinsurance Industry Group: Corporate Insurance & Regulatory Bulletin

### European Commission proposes a new architecture for financial services (including insurance) regulation in the EU

As part of a strategy to ensure that all significant financial market players are subject to appropriate regulation and oversight, the European Commission (“**Commission**”) recently published an important package of draft legislation intended to introduce a new European financial supervisory framework. The proposed framework will have two distinct but interconnected pillars: (1) a European Systemic Risk Board (“**ESRB**”) to monitor and assess risks to the stability of the financial system as a whole (“**macro-prudential supervision**”); and (2) a European System of Financial Supervisors (“**ESFS**”) through the establishment of three new European Supervisory Authorities (“**ESAs**”) for the supervision of individual financial institutions (“**micro-prudential supervision**”).

Under the proposals, the ESRB will issue warnings and recommendations relating to potential threats to financial stability, whilst the ESAs will be given responsibility for supervising their relevant sector and applying existing Community legislation in that area. Currently, the Committee of European Insurance and Occupational Pensions Supervisors (“**CEIOPS**”) (one of three level-3 committees at the EU level in the financial services sector) has advisory powers only. The replacement ESA, to be called the European Insurance and Occupational Pensions Authority (“**EIOPA**”), will have the power to set binding codes and standards, and even discipline national authorities when they move away from the “correct” interpretation of applicable Community law and practice. However, day-to-day supervision of financial institutions will remain with the Member States’ existing regulators.

As an ESA, EIOPA will perform the following functions:

- (a) develop a single set of harmonised rules;
- (b) ensure consistent application of EU rules;
- (c) ensure a common supervisory culture and consistent supervisory practices; and
- (d) ensure coordinated responses in crisis situations (with power in crisis situations to issue binding decisions on national authorities, requiring them to take necessary action in accordance with EU legislation).

The ESFS is intended to function as a network of supervisors, comprised of the three ESAs, the national authorities in the Member States, a Joint Committee of European Supervisory Authorities (comprised of representatives from the three ESAs), the European Commission and a Board of Appeal. Each of these entities will play an important role in the ESFS. The challenge to the insurance sector is that the

Commission's proposals will mark a new era of regulation with the balance between national and EU authorities recalibrated such that the latter will have a greater influence over the form and content of the rules governing the industry.

The Commission's intention is for the new structures to "begin functioning in 2010" and are expected to be discussed within ECOFIN and the Council in December. Provisions can therefore change before final adoption and there is likely to be some delay as the substance of the proposals is worked through.

## VAT on transfers of reinsurance portfolios

The European Court of Justice has ruled in the recent case of *Swiss Re Germany Holding GmbH v Finanzamt München für Körperschaften* that the transfer of a portfolio of reinsurance contracts from one reinsurer to another is subject to VAT at the standard rate. The court held that the transfer of the reinsurance contracts did not fall within the exemption for "insurance and reinsurance transactions", as contended by Swiss Re. Under the existing place of supply rules, the supply of reinsurance contracts is subject to VAT in the seller's jurisdiction.

It should be noted that this judgment does not mean that all reinsurance portfolio transfers will now be subject to VAT. They may fall within the transfer of going concern (TOGC) provisions and thereby not constitute a supply for VAT purposes (subject to the self-supply rules described in the paragraph below). What this decision does emphasise is the importance of falling within the conditions for TOGC treatment and, potentially, obtaining a confirmation from the appropriate tax authority confirming TOGC treatment. If a transfer falls outside the TOGC conditions, it is probable that any VAT accounted for to the relevant tax authorities will be largely irrecoverable, given that the transferor's business is likely to consist of the supply of exempt insurance or reinsurance services.

It should also be borne in mind that the transfer of assets as a TOGC to a company in a partially-exempt VAT group may crystallise a self-supply with the effect that the representative member of the purchaser's VAT group is treated as both supplying and receiving those assets (and is therefore liable to account for VAT on the supply). This rule does not, however, apply where the assets transferred were obtained by the seller more than three years before the transfer.

From 1 January 2010, new place of supply rules for transactions between businesses will come into force shifting the place of supply for such reinsurance portfolio transfers to the jurisdiction of the recipient of the supply. On a transfer between parties located in two different EU member states, the recipient of the supply will have to account for VAT in its own jurisdiction under the reverse charge mechanism (unless, of course, the transfer meets the conditions for TOGC treatment). Even if the transfer is a TOGC for VAT purposes, the self-supply rules described above may still need to be considered.

## ABI publishes Solvency II timeline

On 1 October 2009, the Association of British Insurers published a Solvency II timeline, covering the period from Autumn 2009 to 2015. We set out below the key dates in late 2009 and early 2010:

- In early November to mid December 2009, there will be a third wave of consultation by CEIOPS.
- From November 2009 to February 2010, CEIOPS will draft the QIS5 technical specification including a comprehensive calibration paper.
- In late autumn to the end of 2009, the Solvency II Directive is expected to be adopted formally by the European Council and published in the official EU Journal.
- In the first half of 2010, there will be a public hearing on Solvency II.
- In January 2010, CEIOPS will provide its final advice on the third wave and the impact assessment.
- Between January and March 2010, the European Commission will start to draft the Impact Assessment Main Report and Executive Summary and will finalise the draft Impact Assessment package by the end of June.
- Between January and June 2010, there will be informal discussions on the Level 2 advice and Level 3 guidelines.

## Draft Banking Act 2009 (Exclusion of Insurers) Order 2009

The Banking Act 2009 (the “**Act**”) provides the Bank of England, the Treasury and the Financial Services Authority with the tools to deal with banks that are failing, or are about to fail to meet, their threshold conditions. These tools include a bank administration procedure and a bank insolvency procedure.

Following concern that the Banking Act 2009 and these specific measures would apply to insurers, HM Treasury has proposed this draft Order in order to exclude insurers from the scope of the Act. HM Treasury explained its rationale in an accompanying explanatory memorandum as follows:

“First, the powers under Part 1 of the Act are not designed to be used to resolve a failing insurance company. For example, the first three of the special resolution objectives refer explicitly to ‘banking services’, ‘banking systems’ and ‘protection of depositors’; none of which are applicable to insurance companies.

Second, as implied by its short title, the purpose of the Act is to deal with firms that carry out banking business, not insurance business. The published consultation documents refer to banks and building societies, not insurance companies, and application of the Act to insurance companies was not substantively debated in the passage of the Banking Bill through Parliament.”

To view the draft statutory instrument, please click here.

[http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi\\_9780111487532\\_en.pdf](http://www.opsi.gov.uk/si/si2009/draft/pdf/ukdsi_9780111487532_en.pdf)

To view HM Treasury’s explanatory memorandum, please click here.

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