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Transposition of Solvency II Directive into Greek Law

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In 2016 insurance companies were called to comply with the new rules concerning the taking-up and pursuit of the business of insurance and reinsurance introduced by the Solvency II Directive (2009/138/EC) as transposed in Greece by Law 4364/2016 – the "Insurance Supervision Law "– "ISL". The law has repealed the former main legal instrument on insurance companies (L.D. 400/1970). The new law has changed the existing regime and has significantly affected the legal status of the supervision and the operation of Greek insurance undertakings. For the proper implementation of the law, the supervising authority (the "Bank of Greece" – "BoG") has also issued a number of ancillary acts.

The three Pillars of the Solvency II and the ISL

The particular regulations of the Directive are based on three main pillars.

1. **Securing the adequacy of (re)insurance companies' assets, by setting quantitative requirements consisting of the required Solvency Capital Requirement ("SCR") and Minimum Capital Requirement ("MCR").** Solvency II and ISL have set higher standards concerning the capital requirements for the operation of (re)insurance companies. This is expected to lead a number of insurance companies, especially smaller and medium-sized ones, to mergers, portfolio transfers and strategic co-operation schemes in order to be able to comply with the new requirements.

2. **Requiring appropriate governance, risk management and effective supervision of undertakings by introducing for the first time detailed qualitative requirements.** The companies' governance is thus considered a fundamental supervision mechanism and is charged with full responsibility of compliance with the new regulatory framework. The ISL has introduced the obligation of (re)insurance undertakings to have in place a risk-management system, which should be both effective and well integrated into the organizational structure and the decision-making processes of the relevant companies. As part of the risk-management system every undertaking shall conduct its Own Risk and Solvency Assessment ("ORSA"), shall have an effective internal control system and shall provide effective internal audit and actuarial functions.

3. **Leading to more transparency and adequate disclosure of information to the public and the supervising authorities,** aiming at greater transparency and reliability in the private insurance sector.

The Prudent Person Principle

A significant amendment to the legal framework for the operation of (re)insurance companies is the introduction of the '*prudent person principle*' which converts to qualitative the previously applicable quantitative criteria for investments, as the same were established by L.D. 400/1970. (Re)insurance undertakings may now invest in any assets and instruments the risks of which are identifiable, measurable, manageable and can also be monitored controlled and reported, while at the same time they take into account their overall solvency needs according to the ISL. Under the implementation of the principle, more investments in qualifying infrastructure are expected, given that such investments would possibly meet the requirements of a '*prudent investment*'.

Groups and College of supervisors

An innovative model of supervision is introduced, where a key role is assigned to a group supervisor, whilst recognizing and maintaining an important role for the supervisors of each of the members of the group. Supervisors from all Member States in which undertakings of the group are established shall be involved in group supervision through a *'college of supervisors'*. The college shall be set up to ensure that cooperation, exchange of information and consultation processes among the supervisory authorities of the college are effectively applied in accordance with the Directive and the ISL. Supervisory authorities should use the college to promote convergence of their respective decisions and to cooperate closely to carry out their supervisory activities across the group under harmonised criteria.

Re-organization and Winding-Up Proceedings

Expedited proceedings

It is stipulated that in case the winding-up proceedings exceed 3 years in duration, the liquidator should submit to the supervisory authority a plan to accelerate and complete the proceedings.

Creditors' Preferential Order

A much debatable issue has been the treatment of claims during liquidation. The Directive granted in that issue ample discretion to Member States to differentiate the preferential order of creditors depending on the assets at stake (either assets representing the technical provisions or the whole of the assets).

The relevant provision of the ISL stipulates that insurance claims take precedence over any other claim against the insurance undertaking with the exception of expenses arising from the liquidation procedure, but also introduces a number of exceptions to this rule. Firstly, claims by employees arising from dependent employment contracts or claims arising from the termination of employment contracts, certain claims by lawyers, claims by public bodies on taxes, claims by social security funds and claims against assets subject to rights *in rem* (e.g. mortgages, pledges) are also preferentially treated in comparison to insurance claims.

Outstanding Proceedings

As far as outstanding winding-up procedures are concerned, a special-hybrid regime is provided in the ISL applying provisions of both the former and the new regime. This extraordinary provision in the ISL was deemed necessary in order to avoid delays in outstanding liquidation procedures.

The Functions of the Auxiliary Fund

A much-discussed issue concerns the provisions affecting the operation of the auxiliary fund during a winding-up procedure. By contrast to the previous regulatory regime, the ISL does not include the procedure of insurance placement for compulsory insurance on motor third-party vehicle liability ("MTPL"), which has been a basic function of the auxiliary fund. Under the former regulatory scheme, the assets of an insurance undertaking in a state of winding-up would be transferred to the auxiliary fund so that the latter would cover the necessary funds for satisfying injured third parties in MTPL contracts.

Under the ISL, the scheme is significantly altered. Now, in the event of winding-up procedures all assets are handled by the liquidator. To meet the obligations arising from MTPL contracts, the liquidator discloses a list with the established insurance claims and the auxiliary fund has to indemnify the beneficiary.

Nevertheless, a special regime applies on outstanding winding-up procedures. The auxiliary fund shall be co-administrator with the liquidator as far as the portfolio of MTPL is concerned. Moreover, the fund shall administer the assets already allocated in insurance.

The BoG Acts and the adoption of the EIOPA Guidelines

In accordance with article 46 para. 4 of the ISL, transposing article 71 para. 2 of the Solvency II Directive, the BoG has to comply with the guidelines and recommendations issued by EIOPA as per article 16 of Regulation (EU) 1094/2010. In the event that the BoG does not comply with the EIOPA guidelines, it shall provide the reasons for the relevant deviation.

In order to comply with the EIOPA Guidelines, the Executive Committee of the BoG has issued 23 Executive Acts (the "BoG Acts"), complementing the provisions for the application of the ISL and Regulation (EU) 2015/35 supplementing the Solvency II Directive.

Moreover, the BoG has issued an Act of the Executive Committee, as designated in article 7 para. 8 and article 12 para. 2 of the ISL, defining the annually submitted financial and other data for mutual associations and small-sized insurance undertakings excluded from the Solvency II scope. It also provides for the specifics regarding the operation of excluded insurance undertakings due to their size (e.g. technical provisions, minimum governance requirements, MCR).

More acts are expected to be issued in order to regulate various matters in accordance with the ISL, given the wide authorisation of this law for the BoG to issue secondary regulations for the proper implementation of the ISL. Such examples are those of article 28 para. 12, which provides that the requirements for the transfer of insurance portfolios to branches of insurance companies of third-countries (non-EU) shall be set by a BoG decision as well as article 43 para. 5 according to which the BoG shall publish a list specifying the information required for the assessment of a proposed acquisition of qualifying shareholdings in insurance companies.

On the other hand, in certain provisions of the ISL the BoG is authorised to issue decisions at its discretion and even amend the provisions of the ISL by these decisions. For instance, article 28 para. 11 provides that the BoG may determine alternative or additional requirements for a portfolio transfer and that it may also alter the procedure laid down by the ISL for informing the policyholders about the imminent transfer, the statement of objections by the policyholders, etc. These provisions might prove to be problematic in the future should such a decision be issued, as they could create legal uncertainty both for companies and policyholders: it is questionable, as a matter of principle, whether the BoG, as a regulatory authority, is competent to amend the provisions of a law voted by the Greek Parliament.

Supreme Court on “*claims-made*” clauses

The Greek Supreme Court (Plenary Session) has issued[1] a highly anticipated judgment on “claims-made” clauses in insurance policies covering professional risks (Judgement No 18/2015). The above ruling will definitely serve as a landmark point of reference for all similar cases and matters for some time in the future.

[1] The decision was issued by the end of 2015, but due to its importance, the matter has dominated in legal debates and publications throughout the year 2016. We had first provided an update (http://www.kglawfirm.gr/download.php?url=56f9212a1da24.pdf&name=supreme-court-interprets-claims-made-clauses), already when the matter was judged before the competent chambers of the same Court.

Facts of the case

A bank had insured the risk of any financial loss it might suffer as a result of eventual dishonest or fraudulent acts of its employees. The relevant policy, which included a variation of the claims-made clause, covered only losses that: a) had occurred within the duration of the policy and before the date of retroactive effect stipulated in it; and b) had been discovered and announced by the insured to the insurer within the duration of the policy ('*discovery clause*'). Where these conditions were not met, the insurer was discharged from paying the insurance money.

In this case, the insured was informed about the occurrence of the insured risk one and a half years following the expiration of the policy and the insurer claimed that the policy was avoidable for breach of the abovementioned claims-made clause of the policy.

Relevant provisions

Greek Insurance Law (L. 2496/1997 – the "Insurance Law") does not refer to the issue of claims-made clauses in insurance policies. The Insurance Law consists mainly of 'semi-compulsory' provisions, meaning that any deviation from its provisions which is to the detriment of the policyholder/ insured/beneficiary is not allowed except in cases where such deviation is explicitly permitted.

Article 33(1) of the Insurance Law provides two sets of exceptions where the parties are free to regulate their mutual rights and obligations in cases where the insurance is taken out in order to cover professional risks:

1. exceptions regarding specific risks which are characterized as "large risks" by EU law[2]. These exceptions are: insurance for the carriage of goods, credit insurance, guarantee insurance, marine and air insurance.
2. exceptions imposed by specific provisions of the Insurance Law.

Furthermore, article 7(6) of the Insurance Law provides that: "*the terms of the policy may provide for an increased number of cases in which the insurer's liability shall be excluded, if the policyholder or the insured concludes the policy with a view to covering professional risks*".

Decision

Validity of the clause

The Supreme Court had already ruled in its decision 14/2013 that the claims-made clause is valid in policies covering credit insurance pursuant to Article 33(1) of the Insurance Law since it was explicitly specified in this provision that in case of credit insurance the parties are free to form the terms of their contract.

In its latest decisions 18/2015 and 19/2015 of its plenary session, the Court has ruled that when policies cover professional risks the parties may, according to articles 7(6) and 33(1) of the Insurance Law, provide for additional cases in which the insurer

[2] Article 13 para. 27 of Solvency II Directive.

will not be liable to pay compensation and that article 7(6) concerns all types of escape clauses included in an insurance contract. Therefore, the claims-made clause may be validly agreed in all policies which cover professional risks (without regard to their characterization as one of the five types of "large" risks as provided in article 33(1) of the Insurance Law).

The Court has also rejected the view that article 7(6) only regards to article 7(5) of the Insurance Law which provides that insurer's liability is excluded in case of indemnity insurance occurred due to intentional act or omission or due to gross negligence on the part of the policyholder / insured / beneficiary. According to this view, the extension of liability exclusions only refers to the degree of the insured's fault and that, therefore, the parties may only agree that in policies covering professional risks the insurer will reject his liability if the insured event occurred due to ordinary recklessness on the part of the insured. The Court ruled that article 7(6) is a general provision and therefore it includes claims-made clauses as well as any other escape clause in an insurance policy.

Extended reporting period

In view of the nature of the specific policy in consideration and the real facts of the matter, the Court did not examine whether in case of a claims-made clause it is essential that the insurance contract designates a time period after the policy has expired during which a claim may be made and coverage triggered as if the claim had been made during the policy period (extended reporting period). An extended reporting period protects the insured when claims-made coverage is cancelled or non-renewed or is replaced with an occurrence policy without a retroactive date.

New minimum coverage limits in motor third-party liability with effect from 1-1-2017

The Bank of Greece has changed the minimum limits of coverage for motor third party liability insurance and the contribution to the Greek Motor Insurers' Bureau.

Limits of coverage for MTPL

As of 01.01.2017, the minimum limits of coverage for MTPL insurance are readjusted by virtue of the Act of the BoG with number 100/18.7.2016, in accordance with the Communication from the Commission to the European Parliament and the Council dated 10.05.2016 and the European index of consumer prices (EICP) as per the European Regulation No. 2494/1995 concerning harmonized indices of consumer prices, as follows:

- In case of personal injury: EUR 1,220,000 per victim; and
- In case of property damage EUR 1,220,000 per accident irrespective of the number of victims.

Contribution to the Greek Motor Insurers' Bureau

Also, according to the Act of the Bank of Greece with number 92/25.4.2016, again with effect as of 01.01.2017, the contribution to the Greek Motor Insurers' Bureau by its members is determined in the amount of 4 parts per thousand (4o/oo) on the basis of the gross written premiums for the insurance class of motor vehicle liability without subtracting reinsurance premiums.

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