

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

CONSULTATION DOCUMENT

CONSULTATION ON REGULATIONS TO BE ISSUED UNDER THE INSURANCE BUSINESS ACT

[MFSA REF: 07 - 2015]

18 September 2015

Closing Date: 19 October 2015

Note: The documents circulated by the MFSA for the purpose of consultation are in draft form and consist of proposals. Accordingly, these proposals are not binding and are subject to changes and revisions following representations received from Licence Holders and other involved parties. It is important that persons involved in the consultation bear these considerations in mind.

Note for Consultation

1. Purpose

1.1 Further to the consultation document issued by the MFSA on the 22nd December 2014 highlighting the main changes to be carried out to the Insurance Business Act (Cap.403) (“the Act”) in order to transpose Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), (the “Solvency II Directive”), the MFSA is issuing for consultation a number of proposed regulations to be issued under the proposed amended Act (“proposed Act”). As part of the transposition exercise of the Solvency II Directive, the MFSA is currently amending the subsidiary legislation issued under the Insurance Business Act (Cap.403) to align it with the requirements, as well as the terminology of the Solvency II Directive. It is also being proposed to issue a number of new regulations transposing specific provisions of the Solvency II Directive.

1.2 Any comments and feedback are to be addressed to the Insurance and Pensions Supervision Unit by email on ipsu@mfsa.com.mt. Interested parties are kindly asked to submit any comments in writing by not later than the **Monday 19th October 2015**.

2. Proposed Regulations to be issued under the Insurance Business Act

2.1 It is proposed to **amend** the following Legal Notices:

2.1.1 Insurance Business (Companies Carrying on Business of Affiliated Insurance) (Amendment) Regulations, 2015

In terms of the Solvency II Directive, insurance and reinsurance undertakings also include captive insurance undertakings and captive reinsurance undertakings, as defined in Articles 13(2) and 13(5) of the said Directive. In order to align the insurance legislation with the Solvency II Directive, the Insurance Business Act has been amended to incorporate two new definitions of ‘captive insurance undertaking’ and ‘captive reinsurance undertaking’. Under the current insurance legislation, insurance companies carrying on this type of insurance business are defined in the Insurance Business (Companies Carrying on Business of Affiliated Insurance), 2003. As a consequence, to bring the regulations in line with the terminology used in the proposed Act, it is proposed to substitute the terms “affiliated insurance company” and “affiliated reinsurance company” used in these regulations with the terms “captive insurance undertaking” and “captive reinsurance undertaking”. Therefore, it is proposed that the title of these regulations be amended to read Insurance Business (Captive Insurance Undertakings and Captive Reinsurance Undertakings) Regulations. A new definition of “financial undertaking” has also been introduced, since reference to this term is

made in the definitions of a “captive insurance undertaking” and a “captive reinsurance undertaking”.

These regulations provide that the proposed Act, regulations and Insurance Rules issued thereunder shall apply to captive insurance undertakings and captive reinsurance undertakings subject to the modifications contained in these regulations.

In terms of the new regulation 4(5)(a)(iii), it is being proposed that the requirements of article 33(2)(c) of the Act do not apply to captive insurance undertakings and captive reinsurance undertakings. Furthermore, in so far as regulation 4(5)(b)(ii) is concerned, the requirements found in article 35(3)(d)(i) of the Act, which require that copies of the application and the actuarial report are to be made available for inspection at each of the branches, agencies and offices in Malta of the undertakings concerned, will not apply to captive insurance undertakings and captive reinsurance undertakings, unless otherwise determined by the Financial Services Tribunal. A new regulation 4(9) will also be included to clarify that the provisions of article 48A of the Act relating to Lloyd’s, will not apply to captive insurance undertakings and captive reinsurance undertakings.

2.1.2 Companies Act (Incorporated Cell Companies Carrying on Business of Insurance) (Amendment) Regulations, 2015

The amendments to these regulations were carried out to bring them in line with the terminology used in the proposed Act when transposing the Solvency II Directive. In so far as regulation 13 is concerned, this was redrafted and divided into two sub-regulations due to the amendment of the term “company” which was replaced with the term “undertaking” in the said Act. In terms of the proposed regulation 13(1), the provisions of the Companies Act (Cap.386) shall apply to an incorporated cell company and to an incorporated cell as if a reference to “company” in the Companies Act is a reference to an “incorporated cell company” or “incorporated cell”. Regulation 13(2) will apply the provisions of the Insurance Business Act to an incorporated cell company and to an incorporated cell as if a reference to “an undertaking” in the Insurance Business Act is a reference to an “incorporated cell company” or “incorporated cell”.

2.1.3 Insurance Business (Linked Long Term Contracts) (Amendment) Regulations, 2015

In these regulations, the definition of “authorised company” has been substituted with the definition of “authorised undertaking”. An interpretation of “Directive 2009/65/EC” (the UCITS Directive), has been included in the definitions, since reference to the said Directive is made in the proposed amended Schedule to these regulations. It is proposed to include new definitions of “index linked benefits”, “property linked benefits” and “linked fund” in the amended regulations.

It is also proposed to include a new regulation 2(2) in order to clarify that the provisions of these regulations apply where the investment risk is borne by a policyholder who is a natural

person, as stated in Article 133(3) of the Solvency II Directive. Moreover, the said Article 133(3) requires that the types of assets or reference values to which policy benefits may be linked are not to be more restrictive than the UCITS Directive. As a consequence, it is proposed to replace the current Schedule to the regulations to bring it in line with Article 50 of the UCITS Directive.

2.1.4 Insurance Business (Approved Auditor) (Amendment) Regulations, 2015

In these regulations, it is proposed to replace the term “partnership of auditors” and “partnership” with the term “audit firm” to align these regulations with the terminology used in the Accountancy Profession Act (Cap. 281). It is also proposed to amend the fines (*multa*) in regulation 4(3) to align them with the amounts of fines specified in article 3(4) of the Accountancy Profession Act (Cap. 281). Article 9 of the Insurance Rule 17 of 2009 which lists the circumstances leading to suspension or revocation of an authorisation is being transposed in regulation 6 of these regulations. A new regulation 6(3) is being included which gives the MFSA the power to revoke an authorisation issued or held and strike off the name of the approved auditor, should such auditor not pay his annual supervisory fee in terms of the Insurance Business (Fees) Regulations, 2014 (LN 53 of 2014). A new regulation transposing article 10 of the Insurance Rule 17 of 2009 relating to the manner leading to suspension or revocation of an authorisation is being inserted in these regulations. Regulation 6A refers.

2.1.5 Insurance Business (Continuance of Companies Carrying on Business of Insurance) (Amendment) Regulations, 2015

It is proposed to amend these regulations to reflect the amendments proposed in article 62 of the Act, since in terms of the said article these regulations apply to continuance of undertakings carrying on business of insurance as well as companies enrolled as insurance managers or insurance brokers under the Insurance Intermediaries Act (Cap. 487).

2.1.6 Companies Act (Cell Companies Carrying on Business of Insurance) (Amendment) Regulations, 2015

Primarily, it is proposed to amend these regulations to bring them in line with the terminology used in the proposed Act when transposing the Solvency II Directive. The MFSA is also proposing to introduce a new regulation 3(3) to clarify that save as provided in these regulations the provisions of the Companies Act (Cap. 386), the Insurance Business Act (Cap. 403) and the Insurance Intermediaries Act (Cap. 487), as the case may be, apply to undertakings set up as protected cell companies carrying on business of insurance.

2.1.7 Protection and Compensation Fund (Amendment) Regulations, 2015

The amendments to these regulations were mainly carried out to bring them in line with the terminology being used in the proposed Act.

2.1.8 Insurance Business (Penalties for Offences and Infringements) (Amendment) Regulations, 2015

As stated in the consultation document issued on the 22nd December 2014 relating to the proposed amendments to the Act, the articles relating to penalties in the Act have been amended to bring them in line with the penalties found in the Investment Services Act (Cap.370).

Therefore, the First and Second Schedule to these regulations will be amended to reflect the amounts found in the proposed amendments to article 67 of the Act. It is therefore being proposed that the Third Column of the First Schedule relating to penalties which are enforceable by prosecution in the Courts of Malta will be amended so that the maximum years of imprisonment are being extended from two years to four years, whilst the maximum fine (*multa*) which may be imposed shall be increased to €466,000 in order to bring it in line with the proposed Act. In the Second Column of the Second Schedule relating to administrative penalties which may be imposed by the MFSA without recourse to a court hearing, the maximum administrative penalty will be increased to €150,000 in order to bring it in line with the proposed Act. The Third and Fourth Schedule have been amended primarily to cater for court penalties and administrative penalties for the new or amended provisions introduced in the proposed Act. Furthermore, the terminology used in the same column will be amended to bring it in line with the terminology used in the proposed Act.

2.1.9 Insurance Business (Long term Business Contract Statutory Notice) (Amendment) Regulations, 2015.

Primarily, amendments have been carried out to bring these regulations in line with the terminology used in the Act when transposing the Solvency II Directive. Moreover, it is proposed to amend regulation 3(3) to clarify that in the case of a long term contract where Malta is not the country of commitment, the statutory notice shall be made out in the language of the country of the commitment. Regulation 3(6) will also be amended to increase the minimum and maximum penalty for any insurer who fails to serve a statutory notice at the time when the contract is entered into. Regulation 4(4) has been substituted in order to fully reflect the requirements contained in Article 186 of the Solvency II Directive.

2.1.10 Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) (Amendment) Regulations, 2015

The provisions relating to reorganisation and winding up of insurance undertakings are found in Title IV of the Solvency II Directive, which were previously found in Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings, and which are transposed in these regulations. These regulations have been amended to align them as much as possible to the provisions of the Solvency II Directive, and in particular to take into account the different modes of winding up which are envisaged by the Companies Act (Cap.386), which do not necessarily involve the intervention of the Court in the adoption of reorganisation measures and commencement of winding up proceedings. For this purpose, the MFSA is proposing to introduce a new definition of “relevant authorities” which transposes the definition of “competent authorities” found in Article 268(1) of the Solvency II Directive. The definition of “administrator” has been amended to identify the administrator in Malta and in other Member States or EEA States. In the proposed regulations, the roles of the administrator and liquidator have been further clarified.

Regulations 5 and 14 relating to publication have been amended to remove the requirement of publication in the Malta Government Gazette. In so far as regulations 7 and 16 are concerned, these were amended to make it possible for creditors who have their residence, domicile or head office in a third country, to have a right to lodge claims or submit observations in relation to claims in the case of reorganisation measures or winding up proceedings in the case of a Maltese insurance undertaking. The requirement contained in regulation 11 for Maltese insurance undertakings to maintain a register showing the assets representing the technical provisions in accordance with the Act, was removed as a result of the representations made from the market following the consultation process of the 22nd December 2014. Furthermore, a new regulation 18A has been added to these regulations in order to transpose Article 160 of the Solvency II Directive relating to the treatment of branches in winding up proceedings. For ease of reference, the MFSA is attaching a consolidated draft of the proposed amendments to the Insurance Business (Reorganisation and Winding Up of Insurance Undertakings) Regulations, 2004.

2.2 It is proposed to issue the following **new** Legal Notices:

2.2.1 European Passport Rights for Insurance and Reinsurance Undertakings Regulations, 2015.

It is proposed to revoke the current European Passport Rights for Insurance and Reinsurance Undertakings Regulations, 2004 (“revoked regulations”) which transpose Directive 2005/68/EC, Directive 73/239/EEC, Directive 88/357/EEC, Directive 92/49/EEC and Directive 2002/83/EC and replace them with new regulations. The aim is to align the

proposed regulations with the provisions of the Solvency II Directive and the Omnibus II Directive relating to passporting.

Regulations 3(2)(c)(iv) and 4(2)(b)(i) of the revoked regulations are being amended to bring them in line with the new financial requirements applicable to insurance undertakings introduced by the provisions of the Solvency II Directive relating to the Solvency Capital Requirement and the Minimum Capital Requirement. Regulation 5 of the revoked regulations has been amended to transpose Article 150 of the Solvency II Directive applicable to European insurance undertaking covering risks relating to class 10, requiring such undertakings to contribute to the financing of the Motor Insurance Bureau in Malta and the Protection and Compensation Fund for the purposes of Part IV of the Protection and Compensation Regulations, 2003, and also provides the manner in which such financial contribution is to be calculated. Regulation 8 of the revoked regulations has been also amended to include a new provision introduced by the Omnibus II Directive relating to on-site verifications.

New regulations 12(4) and 14(3) have been added to require a European insurance undertaking and a European reinsurance undertaking which is seeking to provide services in Malta to identify a person to whom the legal documents are to be served, as required in Article 155(3) of the Solvency II Directive. Finally, three new regulations have been added. Regulation 15 relates to sanctions. Regulation 16 transposes the proviso to Article 164(6) of the Solvency II in order to allow the MFSA to require publicity of transfers of portfolio by European insurance undertakings, which may include risks situated in Malta or commitments where Malta is the country of commitment. Regulation 17 transposes Article 155(9) of the Solvency II Directive requiring the MFSA to inform the Commission and EIOPA of the number and type of cases which led to refusals under regulation 9(5)(b) and 10(4) as well as measures taken in regulations 12(3) and 12(5).

2.2.2 Insurance Business (Commission Delegated Regulation on Solvency II) Regulations, 2015

The aim of these regulations is to apply the provisions of the Commission Delegated Regulation to authorised insurance and reinsurance undertakings, reinsurance special purpose vehicles authorised under the Reinsurance Special Purpose Vehicles Regulations, 2013, and authorised insurance and reinsurance undertakings which are included within the scope of group supervision. Within the same regulations, the MFSA will be designated as the supervisory authority indicated in the Commission Delegated Regulation.

2.2.3 Insurance Business (Exemptions) Regulations, 2015

The aim of these regulations is to transpose Articles 3, 5, 7, 9(1) and (2), 10(1) and 11 of the Solvency II Directive. In terms of recital (4) of the Solvency II Directive, certain operations carried out by organisations which provide insurance services should not be covered by the Solvency II Directive, due to their size, legal status, their nature, as being closely linked to

public insurance systems or specific services they offer. Therefore, this new regulation lists those operations which shall not be considered as business of insurance for the purposes of the proposed Act and, accordingly, a person carrying out operations, as specified in these regulations, shall be exempted from the requirement to obtain an authorisation in terms of article 7 of the proposed Act.

2.2.4 Insurance Business (Maintenance of Assets) Regulations, 2015

The purpose of these regulations is to transpose the provisions relating to the maintenance of assets currently found in the Insurance Business (Assets and Liabilities) Regulations, 2007 which will be revoked by these new regulations. These regulations will apply to third country insurance undertakings and third country reinsurance undertakings carrying on business of insurance in Malta and those insurance undertakings which at the time of coming into force of the regulations had ceased to carry on business they were licensed to carry on under the 1981 Act or under the Insurance Business Act, 1998 and are currently servicing or running-off that business.

Regulation 3 of the regulations, which is applicable to third country insurance and reinsurance undertakings carrying on business of insurance in Malta, requires such undertakings to deposit in Malta an amount of assets as prescribed in Article 129(1)(d) of the Solvency II Directive. This regulation also lays down a procedure relating to the maintenance of such deposits where a third country insurance or reinsurance undertaking carries on business of insurance in more than one Member State or EEA State.

Regulation 4 lays down the amount of assets to be maintained in Malta in the case of an insurer which is only servicing or running off of the business of insurance it was authorised to carry on. The amount of deposit which such insurer is required to maintain is that established in the First Schedule to these regulations.

Parts III, IV and V of these proposed regulations relating to the custodian of assets, deposit of assets and miscellaneous provisions respectively, transpose provisions contained in the current Insurance Business (Assets and Liabilities) Regulations, 2007.

2.2.5 Insurance Business (General Provisions of Supervision) Regulations, 2015

This set of new regulations transposes a number of obligations to be complied with by the competent authority for the purposes of the Solvency II Directive and is modelled on the Investment Services Act (Supervisory Review) Regulations, 2013 (L.N.130 of 2014). The purpose of these regulations is therefore to transpose and implement Articles 28, 29, 30, 31, 33, 34(6), 36(3), 38(1), 41(5), 52(1), 71(1), 77f(1), 176 and 177(1) of the Solvency II Directive.

These regulations lay down the main objective and scope of supervision, as well as the general principles of supervision found in the Solvency II Directive. These regulations also

provide for the transparency and accountability of the competent authority when carrying out its functions and exercising its duties under the Act and the publication of information by the competent authority in accordance with regulation 6. Moreover, these regulations specify the powers of the competent authority in the case of supervision of branches of an authorised insurance or reinsurance undertaking established in a Member State or EEA State, other than Malta, and the carrying out of on-site verifications by the competent authority. Under these regulations, the competent authority is also required to ensure that an authorised insurance or reinsurance undertaking which outsources functions or activities satisfies certain conditions listed in regulation 9. These regulations also provide for the verification of the system of governance of authorised insurance and reinsurance undertakings by the competent authority. In addition, these regulations contain provisions relating to information to be provided by the competent authority to EIOPA and the Commission.

2.2.6 Insurance Business (Solvency II Transitional Provisions) Regulations, 2015

These regulations transpose Articles 51(2) third subparagraph, 129(3) second subparagraph, 131, 256(1), 308b, 308c, 308d and 308e of the Solvency II Directive. The aim of these regulations is to allow for a smooth transition from the current regime to the Solvency II regime. These regulations will apply to authorised insurance and reinsurance undertakings, as well as insurance and reinsurance undertakings which form part of an insurance group. These regulations provide for transitional measures on information which has to be provided in the report on the solvency and financial conditions, the calculation of the Solvency Capital Requirement and compliance with the Minimum Capital Requirement. These regulations also include transitional measures for authorised insurance or reinsurance undertakings which would have ceased to carry out business of insurance by 1 January 2016. Moreover, these regulations also contain transitional measures in relation to basic own fund items classified under tier 1, the equity risk sub-module, the approval of an internal group model, the relevant risk free interest rate term structure, the transitional deduction, and the phasing-in plan on the transitional measures on risk-free interest rates and on technical provisions.

2.3 It is proposed to **revoke** the following Legal Notices:

2.3.1 Insurance Business (Criteria of Sound and Prudent Management) (Revocation) Regulations, 2015

The Insurance Business (Criteria of Sound and Prudent Management) Regulations, 1999, will be revoked since it is being proposed that the provisions in these regulations will be transposed in Insurance Rules.

2.3.2 Insurance Business (Companies Accounts) (Revocation) Regulations, 2015

The Insurance Business (Companies Accounts) Regulations, 2001, will be revoked due to the fact that in Malta all companies are required by the Companies Act (Cap.386) to prepare their financial statements in line with IASs and IFRSs as adopted by the EU by means of the Commission Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards and the Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council.

3. Other Regulations

New regulations transposing Title III of the Solvency II Directive - Supervision of Insurance and Reinsurance Undertakings in a Group and Article 4 of the Solvency II Directive - Exclusion from scope due to size, will be issued for consultation in due course.

**Communications Unit
Malta Financial Services Authority
MFSA Ref: 07-2015
18 September 2015**