A Guide to Cross Border Life Assurance from Ireland

DILLON EUSTACE

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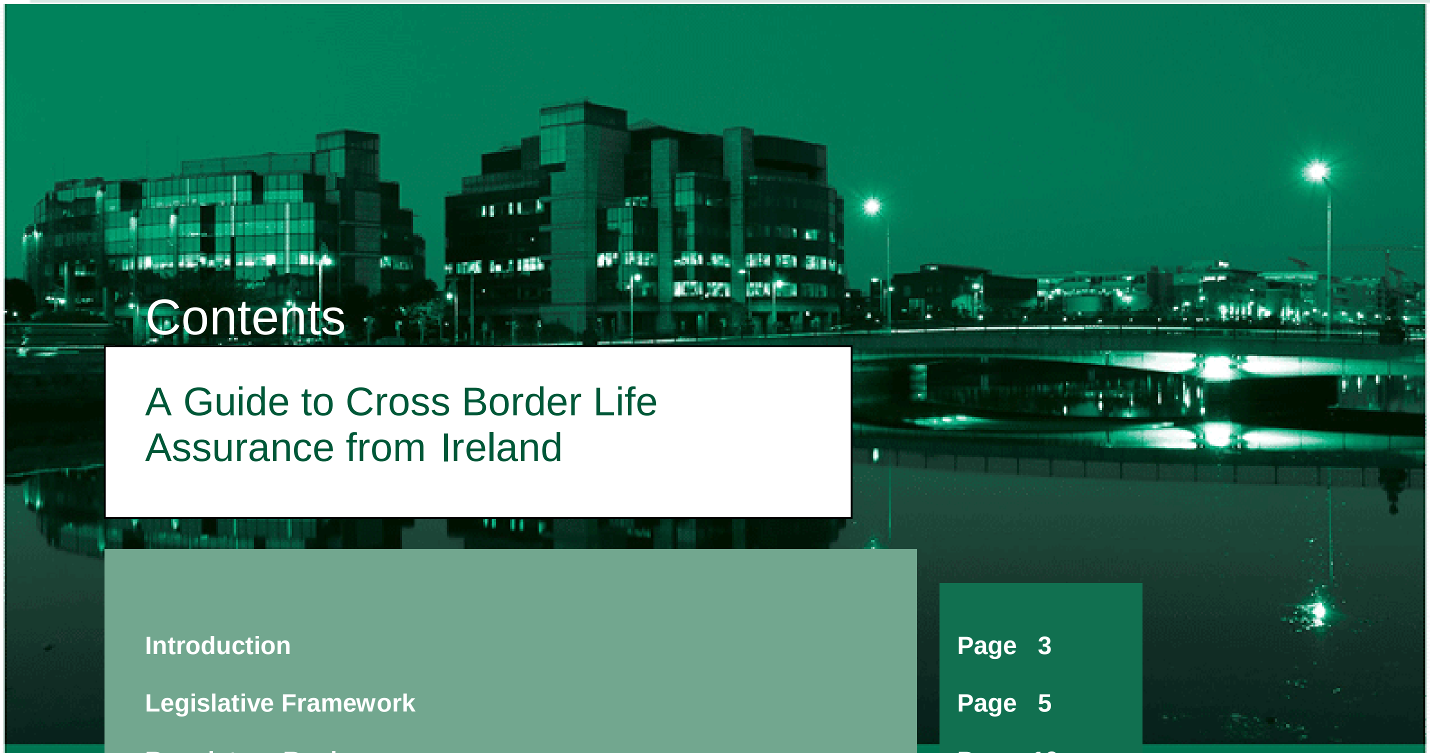

Contents

A Guide to Cross Border Life Assurance from Ireland

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Introduction

Ireland has become one of the leading European jurisdictions for domiciling head office life insurers targeting the wider European market place for a variety of reasons including:

- EU Membership, opening up the EU on a freedom of services and / or branch basis
- long standing legislative and regulatory framework for life business
- 12.5% corporation tax rate
- international financial services hub (asset management, investment funds, cross-border insurance / reinsurance, captive and SPRV domicile)
- availability of experienced TPAs, actuarial consultants and other advisers
- flexible labour laws
- availability of qualified staff, and
- grant aid available in certain cases from government agencies.

International life assurers writing foreign cover from Irish operations include Allianz Global Life, Arca Vita International, Area Life International, Aviva Life International, AXA Life Europe, AXA MPS Financial, AZ Life, Barclays Assurance, Canada Life Assurance Europe, CitiLife Financial, CNP Europe, CUNA Mutual, Darta Saving, Eagle Star European Life, Eurizon Life, Generali Pan Europe, Hansard, Hartford, HSBC Life, Inora Life, Irish Life International, Legal & General Mediolanum, MetLife, Oney Life, Prudential International, Scottish Mutual International, SEB, Sella, Skandia, St. James' Place International, The Lawrence Life, UBS International and Vicenza (*Central Bank Industry Registers, June 30, 2010*).

Latest available aggregate industry statistics for end 2010 show that life business gross premium income amounted to €28.23 billion split between €10.67 billion of Irish risk and €17.56 billion of foreign risk.

Types of business written from Ireland by cross-border operations include:

- traditional unit linked business
- portfolio bonds
- index-linked or tracker products (with or without capital protection)
- group pension products, and
- variable annuity business (including GMXBs)

The purpose of this Guide is to outline the main legal and regulatory requirements for establishing cross-border life operations in Ireland, the taxation implications of same, the passporting regime and the organisational and ongoing operational requirements that need to be addressed by Irish head office operations.

Related Dillon Eustace publications include:

- A Guide to Solvency II
- Transferring an EEA Insurance Undertaking to Ireland
- Cross-Border Insurance Portfolio Transfers
- Increased Corporate Governance Requirements for Insurers

We also publish a quarterly Insurance Legal and Regulatory Update available at www.dilloneustace.ie

Legislative Framework

Although Ireland has regulated life assurance activities for over 100 years, with many provisions of its historic regulatory regime still relevant today, the key driver of insurance regulation and the basis for the development of its cross-border industry, for the last 30 years, has been its membership of the European Union ("EU") and the harmonised insurance regime which has evolved at EU level since the introduction of the First Life Directive in 1979.

The Irish legal framework governing insurance business is set out in pre-existing domestic legislation as amended and supplemented by national laws which implement EU legislative provisions. This framework is further supported by Guidance Notes and policy papers issued by the Central Bank of Ireland (the "Central Bank").

We have summarised the main pieces of European and domestic legislation below. A full list of applicable domestic legislation is provided in Appendix A.

A. European Legislation

The main pieces of European legislation in the life assurance sector are:

Consolidated Life Directive (2002/83/EC)

The Consolidated Life Directive consolidated and amended the First (79/267/EEC), Second (90/619/EEC) and Third (92/96/EEC) Life Directives which had established a common framework for the authorization, solvency and operation of life assurance undertakings within the EU. The common framework enables entities authorised in one EU Member State to write cover in other Member States on the basis of a single authorisation utilising the freedom of services and/or establishment options common to all financial services sectors within the EU.

Solvency II Directive (2009/138/EC)

Solvency II seeks to enhance the supervision and prudential regulation of insurance and reinsurance undertakings, particularly through the imposition of new solvency and governance requirements. It also establishes a new framework for EU regulation through the recasting of 13 insurance directives into a single text. It will apply to all insurance and reinsurance entities with an annual gross premium income exceeding €5 million or gross technical provisions in excess of €25 million. Solvency II was originally due to be implemented by Member States by October 31, 2012, however, this deadline has been delayed until at least January 1, 2013.

Some of the main aspects of Solvency II are as follows:

- insurance undertakings will be required to have in place an effective system of governance to ensure the sound and prudent management of the business proportionate to the nature, scale and complexity of the undertaking's operations and it must be subject to regular review;

- insurance undertakings will be required to perform an annual Own Risk and Solvency Assessment ("ORSA") based on their risk profile, risk appetite and risk strategy. This assessment will provide a view as to the level of capital required to run the undertaking;

- insurance undertakings will be required to calculate their Solvency Capital Requirement ("SCR"), required to reflect all quantifiable risks that the undertaking might face such as underwriting risk, market risk, credit risk and operational risk;

- insurance undertakings will be required to submit written policies and procedures for risk management, internal control and (where relevant) outsourcing to the Central Bank for prior approval;

- every insurance undertaking will have to have an effective and independent internal audit function in place which must evaluate the adequacy and effectiveness of the internal control system and other elements of the system of governance. Any Internal Audit findings shall be reported to the Central Bank who shall determine what actions are to be taken and ensure those actions are carried out; and

- insurance undertakings will be required to provide annual reports in respect of their solvency and financial condition.

The draft Omnibus II Directive proposed by the European Commission, if adopted, will make significant changes to Solvency II:

- Solvency II's implementation by Member States be delayed until at least 1 January 2013;

- more flexible transitional provisions will be introduced for firms affected by Solvency II;

- greater powers will be given to the European Insurance and Occupational Pensions Authority ("EIOPA");

- Solvency II will be modified to reflect changes arising under the Lisbon Treaty; and

- Solvency II will be amended to reflect the new supervisory regime in the EU.

The vote of the European Parliament on the final version of the Omnibus II Directive is due to take place in September 2012.

Insurance Groups Directive (98/78/EC)

In the context of an insurance group having regulated insurance companies established in more than one Member State, the purpose of this Directive was to put in place a framework to ensure that, in addition to home Member State supervision, a supplemental level of supervision could be applied to protect the interests of insured persons through access to information by competent authorities of different Member States and greater co-operation between those competent authorities. This Directive will be replaced by Solvency II.

Reorganisation and winding-up of Insurance Undertakings Directive (2001/17/EC).

This Directive imposes coordinated rules at EU level for winding up proceedings in respect of insurers, both to ensure / restore financial health of insurers and to protect the interests of policyholders and creditors.

Distance Marketing Directive (2002/65/EC)

The Distance Marketing Directive covers remotely negotiated consumer contracts in financial services sector. It seeks to protect consumer interests (to include specifying certain minimum information to be provided, consumer's right of withdrawal, rules applicable to unsolicited services) while facilitating the intra-community cross-border market in financial services.

Financial Conglomerates Directive (2002/87/EC)

This Directive provides for the prudential supervision at group level of financial conglomerates (financial groups providing services and products in different sectors of the financial markets – banking, insurance, investment services).

Third AML Directive (2005/60/EC)

The Third AML Directive seeks to consolidate existing anti-money laundering and counter terrorist financing provisions and introduces new and more extensive anti money laundering and counter terrorist financing measures across the EU.

The aim of the Third AML Directive is to widen the scope of previous legislation based on the revised 40 recommendations of the Financial Action Task Force ("FATF").

The responsibilities of “designated persons” in relation to the prevention and detection of money laundering and terrorist financing has widened significantly with the implementation of the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 in Ireland.

B. Irish Legislation

The main pieces of Irish legislation applicable to the life sector include:

Assurance Companies Act, 1909

Original UK foundation legislation for insurance business. Parts of this Act remain relevant to Irish life assurers.

Insurance Act, 1936

Although many sections repealed by later legislation, the 1936 Act remains relevant in relation to certain authorisation issues and winding up proceedings.

Insurance (No. 2) Act, 1983

The 1983 Act provides powers to petition the court to appoint an administrator to a life insurer as well as granting extensive powers to such an administrator, including the power of sale.

Insurance Act, 1989

A key domestic statute for the regulation of the insurance sector, the 1989 Act provides for the supervision of insurers, the fitness and probity regime, the valuation of assets, minimum share capital, amalgamations and transfers, preparation and submission of annual returns, regulatory powers of intervention and the separation of the assets applicable to the life business and other business of the insurer.

European Communities (Life Assurance) Framework Regulations 1994 (as amended)

The 1994 Regulations are the main regulations transposing the harmonised European regime for life business (the three European Life Directives as now consolidated into Consolidated Life Directive 2002/83/EC) into domestic law. Regarded as a cornerstone of Irish/EU insurance service provision, the 1994 Regulations cover authorisation, internal organisation, solvency, passporting, ownership etc.

Life Assurance (Provision of Information) Regulations 2001

The 2001 Regulations require life assurers to provide certain pre-contractual information to persons before they enter into life assurance contract and to provide certain information to policyholders during the life of the policy. Required information relates to the policy, fees/charges and information as to the insurer or intermediary itself. These Regulations do not apply to policyholders outside Ireland.

Guidance Notes

The Central Bank has issued a set of Guidance Notes which explain and clarify various aspects of the 1994 Regulations.

Care needs to be taken in considering the extent to which any reliance may be placed on the Guidance Notes, in particular as to whether they represent current Central Bank's policy or position on a particular matter.

Regulatory Regime

The Irish regulatory regime for life assurance is an extensive one covering the entire life of an undertaking from initial establishment through to winding-up. In a brochure of this nature, we can only cover the main areas to which the regulatory regime applies but note that most actions taken by a life company during its life are subject to regulation, one of the reasons why a compliance matrix is an important document to be prepared at launch and followed / updated continuously.

Whilst the full list of both EU and domestic legislation set out in Appendix C has to be taken into account, the "bedrock" legislation governing the establishment and authorisation of life assurance undertakings in Ireland is the European Communities (Life Assurance) Framework Regulations, 1994 (as amended) (the "1994 Regulations") to which we refer to extensively below.

We have broken down the key elements of the regulatory regime in subsequent sections covering:

- Authorisation
- Internal organisation
- Financial resources / solvency
- Ownership
- Related party transactions
- Appointed Actuary
- Compliance
- Asset management, and
- Derivatives

Competent Authority

The competent authority responsible for the regulation and supervision of life assurance undertakings in Ireland is the Irish Central Bank which has additional responsibilities in relation to:

- branch establishments of European Economic Area ("EEA") authorised life assurance undertakings;
- EEA authorised life assurance undertakings conducting business by way of services; and
- third country branch establishments.

The Central Bank maintains registers of all life assurance undertakings authorised to write business in Ireland whether through the establishment of a head office, a branch or by way of freedom of services. The registers are available on the Central Bank's website. Additionally, the Central Bank publishes annually an Insurance Statistical Review, also available on its website.

Powers of the Central Bank

The Central Bank is the competent authority for both the authorisation and ongoing supervision of insurers.

Under the Insurance Act, 1989, the Central Bank has extensive powers to request a wide range of information from insurers, to carry out investigations of the business of an insurer and of connected persons, as well as powers of intervention where it considers an insurer is or may be unable to meet its liabilities or unable to provide the required solvency margin. In such cases it can direct the insurer to take such measures as it deems appropriate. Similar powers of intervention arise in other circumstances such as failure to comply with insurance legislation, inadequacy of reinsurance arrangements etc.

The Central Bank can also revoke an authorisation where no business is being carried on for two consecutive years or suspend an authorisation where business has ceased temporarily.

The Central Bank also has significant powers under the Insurance Act (No. 2) Act, 1983 to seek the appointment of an administrator to an insurer who can, upon court appointment, take over the management of the business of the insurer with a view to placing it on a sound commercial footing. Such an administrator is also granted power to dispose of all or any part of the business, undertaking or assets of the insurer concerned.

In addition, the Central Bank may petition for the winding up of a life company on the grounds of it being unable to pay its debts under the Insurance Act, 1936.

The Central Bank and Financial Services Authority of Ireland Act, 2004 also provides power to the Central Bank to impose sanctions for prescribed contraventions of legislation or regulatory rules under its sanctions regime.

If the Central Bank has reasonable cause to suspect that a regulated life assurance undertaking and/or person concerned in the management of the undertaking has committed or is committing a 'prescribed contravention'. There is a particular framework commencing with an investigation or examination, potentially leading to an enquiry and sanctions being applied.

The legislation provides that, at any time up to the conclusion of an inquiry, the Central Bank may enter into a binding settlement agreement with the undertaking and/or a person concerned in its management to resolve the matter.

Relations with Responsible Authorities in Member States

Member States collaborate with one another in supervising authorised life assurance undertakings in the EC. The responsible authority of the Member State in whose territory the head office of a life assurance undertaking is situated is under an obligation to verify the state of solvency of the undertaking with respect to its whole business. The responsible authorities of the other Member

States provide all the information, where necessary, to enable such verification to be carried out. Various powers are given to the Central Bank in this regard under the 1994 Regulations.

Authorisation

An undertaking must hold an authorisation granted either by the Irish Central Bank under the 1994 Regulations or by the competent insurance authority in its home EU Member State to carry on life assurance business.

Authorisations are granted in one or more classes of life business (the full list of classes is set out in Appendix A) and, as provided for in Regulation 6(2) of the 1994 Regulations, an authorisation is valid throughout the EU Member States and allows an undertaking to carry on insurance business in other EU Member States by way of freedom of services or by way of establishment.

Principal Conditions

The principal conditions applicable to an applicant for Irish head office authorisation are as follows:

- it must be a company established under the Irish Companies Act, 1963 to 2009 (see section headed "**Legal Structures for Life Companies**" for certain other options) and have its head office and registered office in Ireland;

- it must submit to the Central Bank a scheme of operations to include particulars or proof concerning:

  (i) the nature of the commitments which it proposes to cover;
  (ii) its guiding principals as to reassurance;
  (iii) the items constituting its Minimum Guarantee Fund;
  (iv) estimates of the cost of setting up the administrative services and the organisation of securing business and financial resources intended to meet those costs;

- in addition, for its first three financial years, it must submit to the Central Bank a plan setting out detailed estimates of income and expenditure in respect of direct business, reassurance acceptances and reassurance cessions;

- it must submit a forecast balance sheet; and estimates relating to the financial resources intended to cover its underwriting liabilities and solvency margin;

- it possess a Minimum Guarantee Fund (equal to one third of the solvency margin, subject to a minimum of Euro 3.5 million. This minimum requirement is due increase to Euro 3.7 million with effect from December 31, 2012);

- it must have a paid-up share capital of at least Euro 635,000;and

- it must demonstrate that it shall be effectively run by persons of good repute with appropriate professional qualifications or experience.

Note that the figures given above are minimum figures only. The actual financial resources requirement for a life company will be determined in association with the Appointed Actuary and the Central Bank in line with its business plan.

Limit on Activities

An Irish head office life undertaking may only carry on the business of life assurance (cannot carry on non-life insurance business) and must limit its operations to the types of business provided for in the 1994 Regulations and to operations directly arising therefrom to the exclusion of all other commercial business.

Application for Authorisation

A pre-application meeting with the Central Bank should be held at which the applicant should outline its plans to the Central Bank in broad terms including:

- nature of the business
- broad projections
- staffing
- outsourcing, and
- target markets.

Once it is clear that the Central Bank is satisfied with the outcome of the initial discussions, a detailed application for authorisation must be submitted to the Central Bank. The information which should be submitted as part of the application is set out in Appendix B, but in summary includes :

- details of the applicant
- overview of parent/group
- regulatory supervision
- ownership structure
- legal structure
- objectives and proposed operations
- organisation of the applicant and governance arrangements
- risk oversight
- capital, solvency and financial projections (5 years projections required)
- proposed appointed actuary
- policy and claims administration
- policy documents
- sales and distribution, and
- IT/ Business Continuity Plan

Particular provisions of the Consolidated Life Directive address the concept of the 'close links' of an assurance undertaking. These provisions may have a bearing on the grant of authorisation from the Irish supervisory authority as Article 6(2) provides that where "close links" exist between the assurance undertaking and other natural or legal persons, the competent authorities shall grant authorisation only if those links do not prevent the effective exercise of their supervisory functions.

Although draft policy documents etc. should be submitted as part of the application, there is no requirement for prior approval or systematic notification of general and special policy conditions, scales of premiums, technical reserves, forms and other printed documents which the insurance undertaking intends to use in its dealings with policyholders.

As a general guide, one should expect the authorisation process to take 4 to 6 months (closer to 6 months in fact).

Grant of Authorisation

Prior to formal authorisation, a successful applicant will normally be provided with confirmation of "authorisation in principle" when the application has been fully examined, reviewed and approved by the Central Bank. The applicant must then address final outstanding matters (often the introduction of capital, formal appointment of directors, finalising the company's name and objects and demonstrating its ability to comply with its conditions of authorisation), before formal authorisation is granted (in the form of a physical certificate of authorisation).

"Authorisation in principle" does not entitle an applicant to write any business before receiving a certificate of authorisation.

Organisation and Supervision

In order to be considered to be established in Ireland, and therefore be eligible for authorisation as an Irish head office life undertaking, the 1994 Regulations provide that a life undertaking must:

- have an office in Ireland to open during business hours for the transaction of life assurance business; and

- must employ at such office persons duly qualified to carry on the business transacted and empowered to issue cover for the authorised classes of life business and to settle claims.

The life company is also required to demonstrate that is run by persons of good repute with appropriate professional qualifications or experience and is required to have administrative and accounting procedures and internal control mechanisms which the Central Bank deem sound and adequate.

Governance

To meet the above requirements, life assurers are required to have:

- a Board of Directors whose members have individually met the Central Bank's fitness and probity tests, with at least 2 independent non-executive members;

- Committees governing Audit, Risk, Compliance and Investment, each with set terms of reference;

- a Managing Director / General Manager dedicated on a full time basis with clear delegated powers and reporting obligations;

- an Appointed Actuary;

- a Compliance Officer;

- an internal audit function;

- a financial control function; and

- to the extent required, an investment management function.

Central Bank's Fitness and Probity Regime

In September 2011 the Central Bank published its Fitness and Probity Standards (Code issued under Section 50 of the Central Bank Reform Act 2010) (the "Standards").

The new regime commenced on December 1, 2011 for all existing staff and new staff holding senior positions, (i.e. those who hold a Pre-Approval Controlled Function ("PCF")) in regulated entities other than Credit Unions. Where a person is proposed to be appointed to a PCF position, the regulated entity is required to submit an electronic Individual Questionnaire to the Central Bank in respect of that person and the appointment will be subject to the Central Bank's approval.

In respect of new appointments to less senior positions (i.e. those who hold a Controlled Function ("CF")), the new regime commenced on 1 March 2012. With effect from December 1, 2012 the Standards will apply to all staff in CF roles (i.e. including staff hired prior to and following the coming into force of the new Standards).

It is important to note that Board composition and responsibilities of boards and individual directors is the subject of the Central Bank's Corporate Governance Requirements for Credit Institutions and Insurance Undertakings. Furthermore, Solvency II will introduce new requirements for governance, internal control and assessment of risk for insurers.

Financial Resources / Solvency

An Irish head office life insurer is required to establish and maintain:

(a) technical reserves, including mathematical reserves in respect of all underwriting liabilities assumed by it; and

(b) an adequate solvency margin and guarantee fund in respect of its entire business. Detailed rules regarding the calculation/determination of the solvency margin and guarantee fund are set out in an Annex to the 1994 Regulations.

A register showing the assets representing the technical reserves and mathematical reserves in respect of each class of insurance business must be kept by the insurance undertaking and it must furnish the Central Bank with a certificate of the value of those assets annually.

The Annual Accounts of the insurance company must be forwarded to the Central Bank annually together with a set of completed regulatory returns and compliance certificates. A Directors Compliance Certificate signed by all the Directors must accompany the Annual Returns of the

Company. The Certificate covers issues such as general compliance with the regulatory regime, internal controls and use of derivatives etc.

In addition, the Appointed Actuary must carry out an investigation into the financial condition of the insurance company's business on an annual basis which must be submitted to the Central Bank.

Particular rules (in addition to normal company law requirements) apply to the process for approving dividend/distributions by life companies including prior actuary approval.

Outsourcing

The term "outsourcing" refers to the entry by a life assurer into contractual relationships with a third party service provider whereby it is agreed that the life assurer may delegate to that service provider the performance of specific functions and/or services.

A life assurer may outsource certain activities to, for example, a third party administrator or asset manager or may appoint an external person as Appointed Actuary or to provide internal audit (often intra-group) or other services. Where outsourcing occurs, control over outsourced activities needs to be maintained and the outsourcing relationship must be governed by a service level agreement meeting certain minimum conditions imposed by the Central Bank.

Related Party Transactions

Details of all proposed transactions of a material nature with a related company must be pre-notified to the Central Bank in accordance with Regulation 10(4) of the 1994 Regulations.

Impact of Solvency II

Once implemented, Solvency II will place additional reporting obligations on insurance undertakings, including:

- insurance undertakings will be required to submit their written policies and procedures of insurance and reinsurance undertakings for risk management, internal control and (where relevant) outsourcing to the Central Bank for prior approval;

- insurance undertakings will be required to submit their ORSA and SCR assessments to the Central Bank; and

- every insurance undertaking will be required to report any Internal Audit findings to the Central Bank who shall determine what actions are to be taken and ensure those actions are carried out.

Ownership and Qualifying Holdings

In addition to the requirement to disclose full details of shareholders and other persons who have qualifying holdings, direct or indirect in the applicant and the amounts of such holdings as part of the application for authorisation.

Prior Central Bank approval is required thereafter for certain acquisitions and disposals, <u>both direct and indirect</u>, in the ownership / voting rights of life companies.

(i) Qualifying Holdings

A "qualifying holding" in an insurance undertaking means a direct or indirect holding:

(a) that represents 10% or more of the capital of, or voting rights in, the undertaking, or

(b) that makes it possible to exercise a significant influence over the management of the undertaking.

For the purpose of determining whether a holding:

(a) is a qualifying holding, or

(b) has reached or exceeded or will reach or exceed a prescribed percentage of the capital of or voting rights in the undertaking,

the rules regarding the calculation of voting rights in Regulations 9 and 10, paragraphs (4) and (5) of Regulation 12 and Regulations 14(5), 15 to 17 and 21(6) of the Transparency (Directive 2004/109/EC) Regulations 2007 and the conditions regarding aggregation of voting rights in Regulation 18 of those Regulations need to be taken into account.

For that purpose, voting rights or shares that an investment firm or credit institution holds as a result of providing the underwriting of financial instruments or placing of financial instruments on a firm commitment basis shall not be taken into account, provided that those rights or shares are not exercised or otherwise used to intervene in the management of the issuer and are disposed of within one year of acquisition.

(ii) Prior approval for Acquisitions

Under Regulation 40A(1) of the 1994 Regulations, a proposed acquirer shall not, directly or indirectly, acquire a qualifying holding in a life assurer without having previously notified the Central Bank of the size of the intended holding, together with sufficient information to enable the Central Bank to consider the proposed acquisition in accordance with pre-set criteria (influence on the life assurer, suitability of the proposed acquirer, financial soundness of the proposed acquisition etc.). A specific Acquiring Transaction Notification Form is required to be completed. Depending on the proposal, a revised business plan, projections and reorganizational framework may be required.

A similar process applies where an entity who already holds a qualifying holding seeks to increase the size of its holding so that its holding would either reach or exceed a prescribed percentage or so that the life undertaking would become its subsidiary.

The prescribed percentages are 20%, 33% or 50%.

There are specific timeframes within which notifications must be assessed, criteria against which they must be assessed when dealing with such notifications and a formal decision must issue by the end of the assessment period, failing which the acquisition is deemed to have been approved.

Completion of an acquisition may only be made where the required notification has been made and acknowledged and either the Central Bank has notified that it does not oppose the proposed acquisition or has not notified that it does oppose by the end of the assessment period.

(iii) Prior notifications of Disposals

Under Regulation 40A(5) of the European Communities (Life Assurance) Framework Regulations 1994 a person shall not, directly or indirectly, dispose of a qualifying holding in an insurance undertaking without having previously notified the Central Bank in writing of the intended size of the holding to be disposed of.

In addition, under Regulation 40(A)(6) a person shall not, directly or indirectly, dispose of part of a qualifying holding in an insurance undertaking without having previously notified the Central Bank in writing of the intended size of the holding, if, as a result of the disposal that :

(a) the percentage of the capital of, or the voting rights in, the undertaking that the person holds would fall to or below a prescribed percentage; or

(b) in the case of a person who is a company or other body corporate, the undertaking would cease to be the person's subsidiary.

(iv) Notification by Target

The life company itself is also required to make a notification in accordance with Regulation 40B(1) and (2) of the above types of proposed changes.

Appointed Actuary

A life insurer must also appoint an actuary of appropriate knowledge and experience as its Appointed Actuary.

The Appointed Actuary's responsibilities - valuing liabilities to policyholders, certifying premium rates etc. – are part of the process in certifying the solvency of a life undertaking and the Central Bank relies on the professional expertise of the Appointed Actuary, one of the reasons why the Central Bank has not laid down detailed requirements in relation to premium rates, policy conditions, and reserving standards. In this way, companies enjoy considerable freedom to innovate but in a manner that does not place solvency at risk.

The Appointed Actuary also has an important role in relation to customer protection - for both cross-border business and domestic business. In that regard, the Professional Guidance Notes from the Society of Actuaries in Ireland require Appointed Actuaries, inter alia, to "*take all reasonable steps to ensure that the company's incoming policyholders should not be misled as to their expectations.*" The 1994 Regulations require the Appointed Actuary to certify compliance with that requirement.

This requirement covers the worldwide business of long-term insurers supervised from Ireland. Its scope means that the Appointed Actuary of a life assurance company supervised from Ireland must try to ensure that purchasers of the company's products in other countries are not misled as to their expectations. This responsibility transcends the normal division of responsibilities between "home country" and "host country" regulators under EU rules.

The Appointed Actuary is required to conduct an annual investigation into the company's financial condition the results of which must be reported to the Board of Directors and to the Central Bank. The form of the report to the Central Bank is specified in the 1994 Regulations but the actual content in terms of assumptions for future mortality, expenses, etc. are at the actuary's discretion. The actuary's annual report and certificate to the Central Bank must also include reference to provisions made in the valuation for mis-matching between assets and liabilities and to the adequacy of premium rates for new business.

Compliance Function

Each life insurance undertaking is required to have a Compliance Officer whose functions generally encompass the following duties:

- obtain the approval of the Board and Managing Director/General Manager for a policy statement on compliance with the Insurance Acts and Regulations, the guidelines issued by the insurance supervisory authority and with other applicable legislation;

- monitor the implementation of compliance and to report periodically to the Managing Director/General Manager and to the Board thereon;

- review products, procedures and systems on a planned basis from the viewpoint of effective compliance and to advise as to steps necessary to ensure compliance;

- review staff training processes so as to ensure appropriate compliance competencies.

The appointment of a Compliance Officer is designed to supplement, not supplant, the responsibility of the Board and of senior management to ensure compliance with legislation and applicable guidelines.

The Directors Compliance Certificate should be signed by all the Directors and accompany the Annual Returns of the Company. The Certificate covers issues such as general compliance with the regulatory regime, internal controls and use of derivatives etc.

Asset Management

Life companies are required to put in place an asset management policy to ensure that they adequately manage the investment-related risks to solvency. The asset management policy should include consideration of regulatory restraints, investment-related risks, technical provisions and solvency which insurers need to monitor, measure, report and control. Main risks would normally be market risk (adverse movements in, for example, stocks, bonds and exchange rates), interest rate risk, credit risk (counterparty failure), liquidity risk (inability to unwind a position at or near market price), operational risk (system/internal control failure), and legal risk.

The Board of Directors should regularly review the adequacy of the insurer's overall investment policy in the light of its activities, product range, its overall risk tolerance, long-term risk-return requirements and solvency position, the results of which should be communicated to senior management in a written investment mandate(s) setting out the operational policies and procedures for implementing the overall investment policy.

Adequate systems of internal control need to be put in place to ensure that investment activities are properly supervised and that transactions have been entered into only in accordance with the insurer's approved policies and procedures. Internal control procedures should be documented and include regular and timely reporting of investment activity.

The life company's investment committee should focus on these matters, regularly (both on policyholder and shareholders funds as well) and report to the Board.

Clearly, the product range and, therefore, the investment related risks, will differ from company to company and procedures and policies need to be tailored appropriately.

Risk Management of Derivatives

Annex V of the 1994 Regulations sets out the conditions under which derivative instruments may be used in connection with assets covering technical reserves. Those conditions are that::

- the derivative is traded on a regulated market or the counterparty is an approved credit institution;

- the underlying assets are admissible assets under the asset valuation rules;

- it contributes to a reduction of investment risks or facilitates efficient portfolio management; and

- having regard to the nature and amount of assets which it holds and to its liabilities, the company will have, at the settlement date assets to fulfil its obligations under that instrument.

Derivatives must be used "in connection with" other admissible assets. This is of primary importance. For example, a purchased put option would not meet the condition unless the underlying stock were held and a purchased call option would do so only if used in connection with liquid assets. If the use of the derivative involved significant gearing or if a significant penalty could arise in some reasonably likely circumstances, then the condition would not be met.

The use of derivatives would be interpreted as:

- contributing to ***efficient portfolio management***, where their use enabled a reasonable investment strategy to be effected more readily or more flexibly or more economically without any corresponding significant increase in investment risk; and,

- contributing to ***a reduction of investment risks***, where their use reduced mismatching with a broadly positive or neutral effect on investment risk or reduced investment risk with a broadly positive or neutral effect on the matching position, due regard being had both to the credit risk and to the market risk components of overall investment risk.

There is a clear obligation on life companies to put in place detailed procedures governing the risk management of their derivatives transactions. Note that the Directors' Certificate which must be submitted with the Annual Returns includes statements concerning compliance in relation to the management of derivatives.

General Good and Other Irish Legal Requirements

In addition to insurance regulation, an Irish head office life undertaking is required to comply with the following general good requirements:

- the provisions of the Consumer Information Act, 1978 (applicable to insurance contracts in the marketing and selling of insurance products);

- the provisions of the Sale of Goods and Supply of Services Act, 1980 (applicable to insurance contracts in the marketing and selling of insurance products);

- provision relating to the supervision and regulation of insurance intermediaries under the Investment Intermediaries Act, 1995 (as amended); and

- the Consumer Credit Act and the Unfair Contract Terms legislation.

In addition, such companies are subject to general Irish and EU legislative provisions applicable to Irish companies include the Companies Acts, data protection and anti-money laundering legislation, insurance mediation legislation, employment law, auditing and taxation legislation etc.

Legal Structures for Life Companies

Under the 1994 Regulations an entity applying for authorisation in Ireland to carry on life assurance business must either be:

- a company limited by shares, a company limited by guarantee or an unlimited company within the meaning (in each case) of the Companies Acts, 1963 to 2009;
- a society registered under the Industrial and Provident Societies Acts, 1893 to 1978;
- a society registered under the Friendly Societies Acts, 1896 to 1977; or
- it may adopt the form of a European Company (SE).

In this section we have summarised some of the issues relevant to establishing a company in Ireland as the vehicle for a life assurance undertaking as well as examining the capacity to use the European Company or "SE" structure as the chosen vehicle and the opportunity to re-domicile to Ireland using a cross-border merger.

Private Limited Liability Companies

The normal Irish legal vehicle for a life operation is a private limited liability company established under the Companies Acts, 1963 – 2009.

This brochure does not attempt to cover in any detail Irish company law requirements as they apply to Irish companies. At a high level, however, the following points are of note:

(a) *Board of Directors*: The day to day management of the company is entrusted to the Board of Directors. Under company law a company is required to have at least two directors and a secretary (who may also be a director). The Central Bank will normally expect that a life company have at least 5 board members, two of which are independent non-executives.

(b) *Company Secretary*: Every company must have a Company Secretary under Section 175 of the Companies Act 1963 whose Company Secretary's duties revolve around seeing that the company complies with the Companies Acts, its own regulations and the law in general.

(c) *Shareholders and Capital*: There is no residency or other requirements for shareholders in an Irish company nor any limit to the number of shares which a foreign shareholder may own.

A company may have several classes of share with different rights attached. Shares are issued with a par or nominal value. The share capital may be denominated in a foreign currency. Under the Companies Acts, no minimum capital requirements are imposed but a private company must have a minimum of 1 and a maximum of 99 shareholders.

A life company must have a minimum paid up share capital of Euro 635,000. Additional capital can take a variety of forms including share capital, capital contributions, certain types of subordinated loan etc.

(d) *Registered Office*: Every company must have a registered office within Ireland. This is to ensure that every company formed and registered in Ireland has an address to which all communications and other notices may be sent. The Companies Acts also require that certain documents be kept and retained at the company's registered office e.g. the register of members, register of directors' interests etc.

(e) *Reporting Requirements*: Every Irish company is required to file an annual return in a prescribed form within 28 days after its Annual Return Date. The annual return includes information regarding the registered office of the company, shareholders and the directors and secretary. Each company must file an annual return and the annual return date will be the anniversary of the effective date of the most recent annual return.

A company must file its first annual return 6 months after the date of incorporation, thereby establishing its annual return date, and thereafter, the anniversary of that date.

Every company is also required to maintain proper accounts which must be audited each year and a copy of the audited accounts must be filed in the Companies Registration Office together with the annual return. There are provisions for the filing of group accounts and for the filing of abridged accounts in the case of small or medium sized private companies. The financial statements accompanying the Company Annual Return must not be more than nine months old and the annual return date must be amended accordingly. The annual return date can only be amended once in every 5 years.

Bear in mind the additional specific reporting requirements for life companies mentioned earlier including annual regulatory returns, compliance certificates and appointed actuary investigation.

(f) *Limited Liability*: The liability of a member with respect to a limited liability company is limited to any unpaid amount of the nominal value of its shares. It is only in exceptional circumstances that a shareholder will be liable for any amount beyond the nominal value of his shares, for example, if the number of shareholders falls below the required minimum number.

Incorporation Process

The process for incorporating a private limited liability a company is quite straightforward involving the submission of the by-laws or constitutive documentation (the Memorandum and Articles of Association) and accompanying forms to the Companies Registration Office.

A company can normally be incorporated in a five business day timeframe, normally effected using a pro-forma set of constitutive documentation and without using the words "insurance" in the name or objects of the company. This is because the Companies Registration Office will normally not allow incorporation of a company with life assurance objects/name until the Central Bank has indicated it has approved in principle the application for authorisation. Once the approval in principle is advised, one can simply convert the company into an insurance company by amending its Memorandum and Articles of Association by shareholder resolution.

A copy of the proposed final version Memorandum and Articles of Association of the Irish company will need to be submitted to the Central Bank with the application for authorisation.

The European Company ("SE")

Within the framework of the 1994 Regulations, one option available to house the legal structure of a life assurance undertaking is the Societas Europaea ("SE") or European Company.

The SE is a European <u>public</u> limited company subject to Council Regulation (EC) Number 2157/2001 of 8 October, 2001 (the "EC Regulation") and to the laws applicable to a public limited company in the EU Member State in which it has its registered office.

The EC Regulations were transposed into Irish law by the European Communities (European Public Limited-Liability Company) Regulations, 2007 (the "SE Regulations").

The objective of the SE Regulations is to enable the creation of a single legal and corporate framework for companies to operate in more than one country within the EEA, eliminating the need for companies to comply with several different Member States regulatory systems. As the EC Regulation states, it is essential that companies should be able to plan and carry out the reorganisation of their business on a European level and that companies from different Member States should have the option of combining their potential by means of mergers.

Cross-border provision of insurance services activities into multiple EU Member States could be an area where use of a SE could be of benefit by eliminating multiple corporate structures, multiple solvency requirements etc.

The SE may be registered in any of the Member States of the European Economic Area ("EEA") and may be formed in any one of the five following ways:

- an SE formed by Merger (through acquisition)
- an SE formed by Merger (through formation of a new company)
- by forming a Holding SE
- by forming a Subsidiary SE, or
- by transforming an existing entity into an SE.

A company which has its registered office in a Member State, but its head office outside the EEA, may also participate in the formation of an SE provided it can show “a real and continuous link” with the economy of the relevant Member State.

Cross Border Mergers

A further mechanism to consider in the context of re-domiciling to Ireland is a cross-border merger. Directive 2005/56/EC (the “CBM Directive”) (implemented in Ireland on 27 May, 2008 by the European Communities (Cross-Border Mergers) Regulations, 2008 (the “CBM Regulations”)) permits any limited liability company (other than a company that is limited by guarantee) to be party to a cross-border merger with another such entity registered in another EEA Member State.

The CBM Regulations permit an Irish limited-liability company to be party to a cross-border merger.

According to the CBM Directive, a merger is an operation whereby:

(i) one or more companies (from at least two different Member States), on being dissolved without going into liquidation may transfer all their assets and liabilities to another existing company (or to a company that they form), in exchange for the issue to their members of shares representing the capital of that company (or of the newly formed company) and, if applicable, a cash payment, or

(ii) a company, on being dissolved without going into liquidation, transfers all its assets and liabilities to the company holding all the shares representing its capital.

The principal benefits of the CBM Regulations are as follows:

- they provide a harmonised platform for mergers within the EEA;

- liquidation is avoided as the transferor company is dissolved automatically once the merger is effected;

- there is legal certainty, as once the merger is approved by the competent authority (which in Ireland is the High Court) in a Member State the merger cannot subsequently be deemed null and void; and

-	the assets and liabilities of the transferor companies transfer automatically by operation of law, eliminating the need for any additional documentation.

It is important to note, however, that unlike the provisions regarding the SE as laid out in the SE Regulations (described above), the registered office of the company post cross-border merger must be in the Member State in which the successor company is registered and does not have the potential to move from one Member State to another.

A cross-border merger may be effected in one of the following three ways:

(i) *Merger by absorption*: This is an operation in which, on being dissolved and without going into liquidation, a company transfers all of its assets and liabilities to a company which is the holder of all the shares or other securities representing the capital of the first-mentioned company.

This would occur where an existing company acquires all the assets and liabilities of its wholly owned subsidiary.

(ii) *Merger by acquisition*: This is an operation in which a company (*other than a company formed for the purpose of the operation*) acquires all the assets and liabilities of another company that is, or other companies that are, dissolved without going into liquidation in exchange for the issue to the members of that company, or the members of those companies, of securities or shares in the first mentioned company, with or without any cash payment.

The members of the transferor company are given securities or shares in the successor company when the successor company acquires the transferor company, either with or without a cash payment.

(iii) *Merger by formation of a new company*: This is an operation in which two or more companies, on being dissolved without going into liquidation, transfer all their assets and liabilities to a company that they form in exchange for the issue to their members of securities or shares representing the capital of that new company, with or without any cash payment.

Those holding securities or shares in the original companies will be given securities or shares in the newly formed company, with or without a cash payment.

Free Movement of Services within the EU/EEA

One of the core features of the EU's harmonised regime for life assurance business is that once a life assurance undertaking has been authorised in one Member State it can then write business throughout the EU/EEA, (referred in colloquially as "passporting") either by:

- establishing a branch, thus operating on a 'freedom of establishment' basis, or
- writing business directly on a 'freedom of services' basis

subject to a straightforward prior notification regime.

The procedures for passporting are set out in the Consolidated Life Directive (in Ireland, the 1994 Regulations) and the related Siena Protocol which was agreed between the various EU insurance supervisory bodies in October 1997 and was revised in 2008.

The Central Bank is responsible for notifying other Member States of an Irish life undertaking's intention to operate in their countries. Upon notification by the Central Bank, the foreign competent authority must, within a specific timeframe, reply to the Central Bank advising of any general good requirements to be observed in its jurisdiction.

The Consolidated Life Directive

The original three EU Life Directives which together created the EU's harmonised regime for life business have now been consolidated into Directive 2002/83/EC of 5 November 2002 concerning life assurance (the "Consolidated Life Directive"). That Directive is now the bedrock EU legislation setting out the harmonised regime for the authorisation and supervision of life insurance undertakings throughout the European Union and which provides for the capacity of a life insurer authorised in one EU Member State to carry on business in another EU Member State under either the "freedom of establishment" or the "freedom to provide services".

As Recital (3) of the Directive explains "It is necessary to complete the internal market in direct life assurance, from the point of view both of the right of establishment and of the freedom to provide services in the Members States, to make it easier for assurance undertakings with head offices in the Community to cover commitments situated within the Community and to make it possible for policy holders to have recourse not only to assurers established in their own country, but also assurers which have their head office in the Community and are established in other Member States".

Additionally, Recital (8) provides that "... the taking up and pursuit of the business of assurance are subject to the grant of a single official authorisation issued by the competent authorities of the Member State in which an assurance undertaking has its head office. Such authorisation enables an undertaking to carry on business throughout the Community, under the right of establishment or the freedom to provide services. The Member State of the branch or of the provision services may not require assurance undertakings which wish to carry on assurance business there and which have already been authorised in their home Member State to seek fresh authorisation."

The following definitions within the Directive (see Article 1) are relevant :

- "*assurance undertaking*" means an undertaking which has received official authorisation in accordance with Article 4;

- *"branch*" means an agency or branch of an assurance undertaking [any permanent presence of an undertaking in the territory of a Member State shall be treated in the same way as an agency or branch, even if that presence does not take the form of a branch or agency, but consists merely of an office managed by the undertaking's own staff or by a person who is independent but has permanent authority to act for the undertaking as an agency would];

- "*establishment*" means the head office, an agency or a branch of an undertaking;

- "*home Member State*" means the Member State in which the head office of the assurance undertaking covering the commitment is situated;

- "*Member State of the branch*" means the Member State in which the branch covering the commitment is situated;

- "*Member State of the commitment*" means the Member State where the policyholder has his/her habitual residence or, if the policy is a legal person, that Member State where the latter's establishment, to which the contract relates, is situated;

- "*Member State of the provision of the services*" means the Member State of the commitment, if the commitment is covered by an assurance undertaking or branch situated in another Member State.

As noted above, Article 4 of the Directive provides that the taking up of the activities covered by the Directive are subject to prior official authorisation and that such authorisation shall be sought from the authorities of the home Member State by any undertaking which establishes its head office in the territory of that State.

Article 5 which is headed "Scope of Authorisation" provides in Article 5(1) that authorisation shall be valid for the entire Community and it shall permit an assurance undertaking to carry on business there (ie. throughout the entire Community), under either the right of establishment or freedom to provide services. In other words, it would permit an insurer which is authorised in, for example, Ireland, by virtue of having an Irish head office authorisation, to carry on business in other jurisdictions in the European Union under either the right of establishment or under the freedom to provide services.

Right of Establishment or Freedom to Provide Services

As noted above, there are two ways in which a life company authorised in one Member State can sell into another Member State - either by setting up a branch in that other Member State under the freedom of establishment or by selling from its home Member State under the freedom to provide services.

Title IV of the Consolidated Directive sets out the provisions relating to the right of establishment and the freedom to provide services.

(i) Right of Establishment

Article 40 deals with establishment of branches and provides that an assurance undertaking (i.e. one that has a head office in another Member State) which proposes to establish a branch within the territory of another Member State shall notify the competent authorities of its home Member State.

In other words, an insurance company from Ireland which proposes to establish a branch in Spain must first notify the competent authorities in Ireland. There is a requirement then for the Irish competent authority to require a variety of information including scheme of operations, etc. and it is the competent authority which then sends that file to the Spanish competent authority. Importantly, before the Spanish branch can commence business in Spain, the competent authority in Spain must inform the Irish competent authority "of the conditions under which, in the interest of the general good, that business must be carried on in the Member State of the branch" (i.e. in Spain).

(ii) Freedom of Services

Article 41 deals with the freedom to provide services cross border. It provides that an assurance undertaking (i.e. a head office, not a branch) which intends to carry on business for the first time in one or more Member States under the freedom to provide services shall first inform its home competent authority indicating the nature of the commitments it proposes to cover.

Under Article 42, the home competent authority then communicates to the competent authority of the jurisdiction into which it is intended to sell on a freedom to provide services basis.

European Communities (Life Assurance Framework) Regulations, 1994

In Irish law the right of establishment and the freedom to provide services are found in Part 6 of the 1994 Regulations. Regulation 46 provides that an Irish head office undertaking which proposes to establish a branch in another EU Member State shall notify the Irish regulator, going through the same process as outlined in the Directive. Similarly, Regulation 48 provides that where an insurance undertaking not established in Ireland (i.e. in another EU Member State) intends to carry on insurance business by way of a branch in Ireland, it must go through the process as outlined in the Directive.

Under Regulation 50, an Irish head office undertaking which intends to carry on business by way of services into another EU Member State must go through the notification process as outlined in Articles 41 and 42 of the Directive.

European Commission Interpretive Communication

Over several years, the interpretation of what is meant by freedom of services and what is meant by branch/establishment has been the subject of rulings of the European Court of Justice ("ECJ"). That seems to have been a catalyst for the European Commission to issue an Interpretive Communication issued in 2000 dealing specifically with the sale of life assurance cross-border within the EU.

In its Interpretive Communication, the Commission considers in some detail whether the appointment by a life company established in one Member State of an "independent person" in another Member State to carry out certain operations on its behalf in that other Member State could result in the life company being regarded as carrying on insurance activities on a permanent basis in the other Member State and therefore on an establishment basis as opposed to on a freedom of services basis.

The Commission adopted a broad definition of "independent person" - structures (natural or legal persons) that are "legally separate" from the insurance undertaking, irrespective of their form or designation. The "legally separate" criterion appears to be interpreted by the Commission as meaning that, for example, bank branches of the life company's parent or of its sister undertakings are "independent" because they are legally separate entities from the life company, then the communication may provide useful clarification for prospective cross-border bancassurance operations.

Although not made expressly clear in the Communication, the Commission does appear to contrast the concept of an "independent person" with the branch or agency concept, the essential character of which is the fact that such branch or agency is subject to the direction and control of the parent body.

Having set out the principles arising from EC case law, the Commission's interpretation is that for the rules governing the right of establishment to apply(rather than those applicable to the freedom to provide services), the independent person must meet the following three cumulative conditions:

(a) it must be subject to the direction and control of the insurance undertaking it represents;

To negate this condition, the independent person should have sufficient freedom to organise its own activities, to decide how much time it will devote to the insurance undertaking and to represent competitors at the same time.

(b) it must be able to commit the insurance undertaking;

This condition focuses on whether the acts or decisions of the independent person can commit the insurance undertaking (i.e. conclude policies) vis-à-vis third parties. Importantly, the Commission has stated that even if the independent person can, for example, make on behalf of the life company an offer containing all the essential elements of the proposed policy, if the life company can still refuse the proposal submitted by the independent person and signed by the client, then the ability to commit condition will not be met.

(c) it must have received a permanent brief.

In order to qualify on the establishment basis the capacity of the independent person to commit an insurance undertaking must be based on a long-term continuous brief and not a brief that is limited in time or a one-off instruction.

Accordingly, it is only where all three conditions referred to above exist that an insurance undertaking, using an independent person permanently established in the target Member State would be treated as if it had a permanent establishment in that Member State.

Policyholder Communication and PRE

For business written in Ireland, specific pre-contractual information must be provided to prospective policyholders in advance of concluding a policy and, during the term of the policy, certain information must be provided to policyholders. These obligations arise under the Life Assurance (Provision of Information) Regulations, 2001.

Those Regulations, considered further below, do not apply to business written by an Irish life company in other EU Member States under freedom of establishment or freedom of services. In those cases, the general good requirements of the other Member State will apply.

In this section, we also consider the concept of "policyholders' reasonable expectations" or PRE which is relevant in all cases.

The Life Assurance (Provision of Information) Regulations 2001

As noted above, the 2001 Regulations do not apply to policyholders resident outside Ireland, nor to contracts of creditor insurance, other than contracts in connection with a housing loan.

Pre-contractual information

Before a prospective policyholder signs a proposal or an application form for life assurance it must be provided with information as to the policy details, its appropriateness to the needs of the client, early encashment consequences, projected benefits and charges, intermediary or sales remuneration, review of premium, cancellation rights, as well as with other general and additional information.

Information regarding the policy requires that the Client be given information as follows:

(a) '*Make sure the policy meets your needs*'. There is a warning for policyholders who propose to effect the policy in replacement of an existing one.

(b) '*What happens if you want to cash in the policy early to stop paying premiums?*'

(c) '*What are the projected benefits under the policy?*' Again an illustrative table of benefits and charges must be provided in a particular format.

(d) '*What intermediary remuneration or sales remuneration is payable?*' Again a table is required.

(e) '*Are returns guaranteed and can the premium be reviewed?*'.

(f) ‘*Can the policy be cancelled or amended by the insurer?*’

(g) ‘*Information on taxation issues*’.

Where a service fee is charged by an insurer or insurance intermediary, the amount of the fee must be disclosed in writing to the client.

Information about the insurer or insurance intermediary or sales employee must be provided to the client, including:

- names of the insurer and insurance intermediary in full including their legal form and, where applicable, the name of the sales employee;

- contact telephone number, fax number, e-mail address and relevant address for correspondence;

- the Member State in which the head office of the insurer is situated and, where appropriate, the Member State of the branch of the insurer that will enter into the insurance contract; and

- where the client deals directly with insurance intermediary, any delegated authority or binding authority granted by the insurer, in relation to underwriting, claims handling and claims settlement, to that insurance intermediary.

Particular formats are required for the provision of such information.

Post contractual information

Life companies must provide policyholders with an annual written statement containing:

- the current premium payable;

- the current surrender or maturity value; and

- such further information as the assurer considers appropriate.

Policyholders' Reasonable Expectations

In February 2010, the Central Bank wrote to the compliance officers of all domestic life assurance companies reflecting its view that *'there are obligations on insurance companies to ensure that they reserve adequately for policyholders' reasonable expectations'*

The expression 'policyholders' reasonable expectations is not defined in Irish insurance legislation and no statutory or regulatory obligation currently exists under Irish law which obliges insurance companies to ensure that they reserve adequately for policyholders' reasonable expectations. Furthermore, the Irish courts have never, to our knowledge, determined upon the concept of policyholders' reasonable expectations.

The first reference to 'policyholders' reasonable expectations' appears in the Guidance Notes issued by the Department of Enterprise, Trade and Employment ("DETE") in June 2009 in the context of 'with profits' business. Although the Central Bank itself has not defined the term, it is one in common usage in Irish insurance law and practice.

It appears, therefore, that the Central Bank's expectation that all life assurance companies should ensure adequate capital reservation to meet policyholders' reasonable expectations originates not in statute but in guidelines issued by DETE. Government Department Guidance Notes including DETE's Guidance Notes, do not (as a matter of Irish constitutional law) impose legal obligations which may be positively enforced by State authorities unless statutorily underpinned.

Nevertheless, it is clear for the purposes of superior European Community law and, in particular, Article 10 of the Consolidated Life Directive that there exists in Ireland a clear practice which is followed in the prudential supervision of life assurance undertakings in relation to policyholders' reasonable expectations that the Appointed Actuary must address, when advising the Board of Directors, policyholders' reasonable expectations having regard to all relevant Guidance Notes issued by the Society of Actuaries, including ASP LA-4 which specifically addresses policyholders' reasonable expectations.

In turn, the Board of Directors of the life company, when addressing matters of financial soundness and ensuring compliance with Irish solvency obligations, must have regard to the advices provided by the Appointed Actuary.

As the concept of 'policyholders' reasonable expectations' is not defined in Irish statute, any interpretation thereof is inevitably a matter for the Irish courts.

Anti-Money Laundering

Life insurers are subject to the anti-money laundering regime set out in the Criminal Justice (Money Laundering and Terrorist Financing) Act, 2010 ("the Act") which transposed the Third-Anti Money Laundering Directive (2005/60/EC) (the "Third AML Directive") into domestic Irish law. The aim of the Third AML Directive is to widen the scope of previous anti-money laundering legislation based on the revised 40 recommendations of the Financial Action Task Force ("FATF").

Key Changes

The responsibilities of designated persons in relation to the prevention and detection of money laundering and terrorist financing has widened significantly with the implementation of the Act.

The Act introduces the following important changes for "designated persons":

- the definition of money laundering has widened to include the proceeds of any criminal conduct, however minor;

- the terminology of "Know Your Customer" has been replaced by "Customer Due Diligence" (CDD);

- the level of CDD required will be determined using a risk based approach. This can range from "simplified" where there is a low risk of money laundering or terrorist financing to "enhanced" where there is high risk of money laundering or terrorist financing;

- there are enhanced obligations to identify the "beneficial owner" whereby the designated person must ensure that they take reasonable measures to understand the ownership and control structure of the client;

- there is a new requirement to identify non domestic politically exposed persons ("PEPs") i.e. those persons in a prominent public position and their families or close associates;

- those persons who meet the definition of "trust and company services provider" will need to be authorised;

- a guard at superintendant level or higher and/or a District Court judge has the power to direct a designated person not to carry out a specified service for a specific timeframe where a customer is subject to investigation;

- the number of offences that can arise under the Act are significantly greater than under the old legislation;

- the Minister for Justice and Law Reform, in conjunction with the Minister for Finance, can approve the Guidance Notes to be used by designated persons. A Court can have regard to these Notes when determining if a designated person took all the appropriate measures.

A Risk Based approach to Customer Due Diligence

To be in a position to determine what is the appropriate level of customer due diligence, designated persons will be required to assess the risk of money laundering or terrorist financing by conducting an internal risk assessment which considers factors such as the:

- nature of the customer base;
- nature of the products or services to be provided;
- methods of distribution; and
- geographic areas of operation.

The risk assessment will need to take into consideration the matters outlined in the Act as being deemed low risk and high risk.

If on completion of the risk assessment the designated person determines that the risk of money laundering or terrorist financing is "low" then "Simplified Due Diligence" can be applied to the customer. At the other end of the scale where the designated person determines that the risk of money laundering or terrorist financing is "high" then "Enhanced Due Diligence" is required. All other customers will have normal Customer Due Diligence applied to them.

Customer Due Diligence

Customer due diligence is required to be made prior to the occurrence of any of the following circumstances:

- establishing a business relationship with a customer;
- carrying out a transaction or series of transactions for a customer greater than €15,000 (previously €13,000);
- carrying out a service for a customer if there is a suspicion of money laundering or terrorist financing;
- carrying out a service for a customer where there is doubt about the veracity or adequacy of previously obtained identification documentation.

There are a number of exceptions where a designated person is not required to operate CDD on a prior to basis as outlined above. In relation to life assurance business the verification of the beneficiary of a life assurance policy can be deferred at the time a policy is taken out, however such verification must be carried out:

- prior to the policy being paid out, or
- prior to the beneficiary exercising any other right vested in the policy.

Other exceptions to the prior to rule are as follows:

- where a designated person has reasonable grounds to believe that prior identification would interrupt the normal conduct of business and there is no real risk that the service or customer is involved in money laundering/terrorist financing;
- a credit institution may allow a bank account to be opened before verifying identity, however no transactions can be carried out through the account until verification is completed.

In order to complete CDD, a designated person must complete the following:

- verify the customer's identity;
- identify any beneficial owner connected with the customer or service concerned;
- obtain information in relation to the purpose and nature of the business relationship;
- carry out ongoing monitoring.

It should be noted that it is permitted to verify a customer's identity using an electronic format, however due to the higher risk of exposure to impersonation when using electronic verification, one or more additional checks should be used. Typically, if electronic verification is relied upon then the first payment should be through an Irish/EU bank account in the customer's name.

Simplified Customer Due Diligence

The full CDD procedure outlined earlier is not required where a designated person is deemed to be dealing with a "specified customer" or a "specified product" so long as a number of conditions are satisfied. In such cases a Simplified CDD can be applied as the risk of money laundering or terrorist financing is deemed to be low.

Under Simplified CDD a designated person is <u>not required</u> to:

- verify the customer's identity;
- establish the beneficial ownership;
- establish the purpose of the business relationship.

However, ongoing monitoring of the business relationship is required.

A specified customer is defined as:

- a credit institution or a financial institution that carries on business in Ireland or is situated in another EU Member State that has adopted the Third AML Directive or is in a prescribed third country which has requirements equivalent to the Third AML Directive;
- any listed company admitted to trading on a regulated market;
- a public body;
- certain other EU public bodies.

A specified product is defined as:

- a life assurance policy where the annual premium is no more than €1,000 or the single premium is no more than €2,500;
- an insurance policy in respect of a pension scheme, which does not have a surrender clause and cannot be used as collateral;
- a retirement pension scheme for employees where the contributions are made by way of deduction from payroll and the rules of the scheme do not permit a member's interest to be assigned;
- electronic money up to certain limits.

There are certain circumstances where a designated person may be dealing with a "specified customer" or a "specified product", but cannot avail of Simplified CDD because:

- the customer is an individual and has not been physically present for identification purposes;
- the customer is from a country not deemed to have adequate procedures for the detection of money laundering or terrorist financing;
- there are reasonable grounds to believe there is a real risk that the customer is involved in money laundering or terrorist financing; or
- there are doubts about the adequacy of documentation previously received.

Enhanced Customer Due Diligence

The Act sets out that Enhanced CDD will apply:

- in any situation where there is a high risk of money laundering or terrorist financing;
- where the customer (who is an individual) has not been physically present for identification purposes;
- in the case of a non-domestic politically exposed person (PEP); and
- in the case of a correspondent banking relationship with a non EU institution.

Enhanced CDD involves seeking additional identification documentation and requiring the first payment to be made through an Irish/EU bank account in the customer's name.

Politically Exposed Persons (PEPs)

A PEP is defined as an individual who is, or has been entrusted with a prominent public function, or an immediate family member, or a known close associate of that person. It is important to note in this context that an individual ceases to be a PEP one year after he or she has left office. Prominent public functions include among others - heads of state, heads of government, members of parliament, ambassadors and members of the courts of auditors or of the boards of central banks.

In relation to PEPs a designated person is required to:

- have appropriate risk-based procedures to determine whether the customer is a PEP;
- have senior management approval for establishing business relationships with such customers;
- take adequate measures to establish the source of wealth and source of funds that are involved in the business relationship or transaction; and
- conduct enhanced ongoing monitoring of the business relationship.

While the domestic insurance sector has a very low exposure to PEPs, those companies that are established to provide services to parties outside of Ireland have a higher exposure to PEPs and will need to implement measures to check PEP status such as a PEP database developed either in-house or sourced from an external provider.

Reliance on Third Parties

Where a customer is introduced to a designated person by certain third parties, then the designated person can rely on the due diligence measures already taken by that third party. However, it is important to remember that ultimate responsibility remains with the designated person. To manage this risk, the designated person should obtain a confirmation from the third party setting out that the appropriate due diligence measures have been carried out on the customer and that records will be retained and made available on request to the designated person.

In terms of the ongoing monitoring requirements applicable to a business relationship and transaction with the customer, this activity cannot be outsourced to a third party.

Reporting Suspicious Transactions

In terms of reporting suspicious transactions, designated persons and their directors and employees remain responsible for reporting any know or suspected suspicious transaction relating to money laundering or terrorist financing. Where a designated person has appointed a Money Laundering Reporting Officer (MLRO), employees should be instructed to file the suspicious transaction report (STR) with the MLRO who should investigate the matter and if necessary, report it without delay to the appropriate authorities, i.e. the Garda Siochana and the Revenue Commissioners.

Record Keeping

Under the Act, a designated person is obliged to keep the following documents and information for use in any investigation by the Garda Siochana or the Revenue Commissioners or other competent authorities into any suspected cases of money laundering or terrorist financing :

- in the case of customer due diligence, the designated person must keep records of the procedures applied and the information obtained about the customer. An original or copy of all documents used to verify the identity of the customer / beneficial owner must be retained for a period of at least five years after the relationship ceases with the customer or the date of the last transaction, whichever is the later;

- in the case of the ongoing monitoring, the designated person must keep records evidencing the history of services and transactions carried out in relation to that customer for a period of at least 5 years from the date on which the transaction was completed;

- copies of STRs made to the Garda Siochana and the Revenue Commissioners should be retained for at least five years;

- records relating to staff training including material used and attendance records should also be retained for a period of at least five years.

The records referred to above may be retained electronically so long as they are capable of being reproduced in electronic form.

Staff Training

To ensure compliance with the relevant provisions of the Act, designated persons will need to review and update their internal procedures to reflect the new requirements. Staff training in relation to customer due diligence and how transactions are classed as low and high risk will be required. To meet the ongoing monitoring obligation designated persons will need to have a thorough understanding of the nature and type of business activities that their customers are engaged in to determine what might constitute suspicious activity related to money laundering or terrorist financing. To this end, employees, directors and officers of the designated person will be required to participate in ongoing education and training programmes to assist them in recognising practices that may be related to money laundering or the financing of terrorism and the appropriate action to take in such circumstances. Training should be conducted at least on an annual basis.

Data Protection

Data protection obligations are set out in the Data Protection Act, 1988 (the “1988 Act”) which was amended by the Data Protection (Amendment) Act, 2003 (the “2003 Act”) (collectively known as the “Acts”).

“Personal data” is defined under the Acts as data relating to a living individual who is or can be identified either from data or from data in conjunction with other information that is in, or is likely to come into, the possession of the data controller. Therefore, personal data does not include business names and addresses but it would include a business email address which relates to a living individual. If you process, hold, store, transfer or do anything involving the personal data of a living individual, then you will need to comply with the provisions of the Acts.

It is worth noting that the Acts only apply to information which allows an individual to be identified. There are no prohibitions on the disclosure of information from which all identifiers have been removed i.e. anonymised data.

Under the Acts, entities that control the content and use of personal data, either alone or with others are defined as “data controllers”. Entities that process personal data on behalf of data controllers are defined as “data processors”. Some data controllers and data processors are also required, under Section 16 of the Acts, to register as such with the Data Protection Commissioner (the “DPC”). Registration must be renewed on an annual basis and the cost varies according to the number of employees an entity has working for it. It is worth noting that all data controllers and data processors are required to comply with the provisions of the Acts and only those within the ambit of Section 16 are required to register with the DPC and renew this licence on an annual basis.

Also of note is that personal data does not include data consisting of information that is required by law to be made available to the public.

Appointment of a Data Processor

The identification of the data controller and data processor status is important as the application of the legislation differs in each case. Data controllers are obliged to comply with all eight of the data protection principles (set out in detail below). A data controller that appoints another party to process personal data must ensure that the data processor: acts solely on its instructions; complies with security arrangements equivalent to those to which the data controller is subject; and provides sufficient safeguards in respect of security and organisational measures governing the processing. The data controller is obliged to enter into a written agreement with the appointed data processor setting out parameters and that certain security measures are in place and adhered to by the data processor.

Under Section 21 of the Acts a data processor may not disclose information without the prior authority of the data controller on behalf of whom the data is processed and contravention of this provision is an offence.

Security Measures (onus on the data controller)

Under Section 2 of the Acts, data controllers are required to ensure that any processing carried out by a data processor on its behalf is governed by a contract in writing. This contract must provide that;

- the data processor carries on the processing only on and subject to the instructions of the data controller; and

- the data processor takes appropriate security measures to guard against unauthorised access, alteration, disclosure or destruction of the data, particularly where the processing involves transmission over a network and against all other unlawful forms of processing.

The data controller must also;

- ensure that the processor provides sufficient guarantees in respect of the technical security measures and organisational measures, governing the processing; and

- take reasonable steps to ensure compliance with those measures i.e. monitor/audit this outsourcing arrangement.

8 Principles

Section 2 and Section 4 of the Acts impose certain key responsibilities on data controllers in relation to the information that is kept about living individuals. These obligations are summarised by the DPC using eight principles which must be followed, and are listed below.

Principle 1: Fair obtaining

Personal data must be obtained and processed fairly.

Principle 2: Purpose specification

Personal data must only be kept for specified, explicit and legitimate purpose(s).

Principle 3: Use and disclosure of information

Personal data must not be used and disclosed in a manner incompatible with the purpose(s) for which it was initially obtained. Companies must take care to ensure that personal data is not disclosed to third parties in a manner, which is inconsistent with the purpose for which the data was originally collected.

Principle 4: Security

Appropriate security measures must be taken against unauthorised or unlawful access, alteration, disclosure or destruction of data, particularly where the processing involves transmission over a network.

Principle 5: Accurate and up-to-date

Personal data must be accurate, complete and, where necessary, kept up-to-date.

Principle 6: Adequate, relevant and not excessive

Personal data must be adequate, relevant and not excessive in relation to the purpose(s) for which it was collected or processed.

Principle 7: Retention time

Personal data must not be retained for any longer than is necessary for the specified purpose. Companies should be mindful of this requirement when drafting record retention policies and should ensure that staff are aware of the statutory retention periods applicable to the company (e.g. 6 years for accounting records under the Companies Act, 1990). Electronic and manual records held in respect of individuals should be disposed of following the expiry of the statutory retention period in the absence of a legitimate reason for retention.

Principle 8: Right of access

Individuals are entitled to a copy of their personal data on written request. There are detailed requirements for handling access requests from individuals prescribed by Section 4 of the Acts. These cover the format of the response and timescales imposed. A reasonable fee may be charged by data controllers for dealing with access requests. Individuals may also rectify incorrect information maintained.

Fair Processing

Under Section 2A of the Acts in order to process personal data at least one of a number of conditions must be met by data controllers. These conditions include:

- obtaining consent from the data subject for the processing;
- the processing being necessary for the performance of a contract with the individual;
- the processing being necessary in order to take steps to enter into a contract with the individual at his/her request;
- the processing being necessary for compliance with a legal obligation (other than one imposed by contract); and/or
- the processing being necessary for the legitimate business interests of the data controller or a third party to whom the data are disclosed.

Sensitive Personal Data

Sensitive personal data is defined in the Acts as data relating to:

- racial/ethnic origin;
- political opinions;
- religions or philosophical beliefs;
- trade union membership;
- physical or mental health;
- sexual life; and/or
- the commission or alleged commission or an offence and/or criminal proceedings.

In addition to the general conditions imposed under Section 2 of the Acts, sensitive personal data shall not be processed unless one of a number of further conditions is met. The <u>additional</u> conditions include:

- obtaining "explicit" consent for the processing (i.e. clear and unambiguous consent);
- processing being necessary for the purposes of obtaining legal advice;
- processing carried out through legitimate activites of non-profit organisations that exist for political, philosophical, religious or trade union purposes;
- information already in the public domain;
- processing necessary for medical purposes;
- processing necessary to prevent injury to the health of the data subject or another person or otherwise to protect their vital interests (including property);
- processing necessary for the purpose of exercising a right imposed by law in connection with employment; or
- processing being carried out by political parties, candidates for election for the purpose of compiling data on peoples' political opinions.

Transfers Abroad

Because data protection laws within the EEA are broadly harmonised and personal data is similarly protected, transfers to the UK and other EU/EEA countries are permitted. Section 11 of the Acts specifies conditions that must be met before personal data may be transferred to third countries. If a company transfers personal data from Ireland to third countries (i.e. jurisdictions outside of the EEA), it will need to ensure that the country in question provides an adequate level of data protection. Some third countries have been approved for this purpose by the EU Commission. The US Safe Harbor arrangement has also been approved, for US companies which agree to be bound by its data protection rules. In the case of countries that have not been approved in this way, there are a number of measures that a data controller can including: obtaining the consent of the individuals in question; entering into an EU approved model contract; or entering into a set of Binding Corporate Rules.

The rules regarding transfers to third countries can be summarised below.

- The general rule is that personal data cannot be transferred to third countries unless the country ensures an adequate level of data protection. The EU Commission has prepared a list of countries that are deemed to provide an adequate standard of data protection - Hungary, Switzerland and Argentina have been approved in full, Canada has been approved for some types of personal data, and the US Safe Harbor arrangement has been approved for US companies which agree to be bound by it.

- If the country does not provide an adequate standard of data protection, then the Irish data controller must rely on one of the alternative measures (see below), including the consent of the data subjects, and the use of approved contractual provisions.

The Irish DPC retains the power to prohibit transfers of personal data to places outside of Ireland if he considers that data protection rules are likely to be contravened and that individuals are likely to suffer damage or distress as a result.

Exemptions to Restrictions on Transferring Data

Under Section 11 of the Acts, there are a number of exemptions to the restrictions on transferring data outside the EEA which include:

- the destination country has been approved by the EU;
- the transfer is allowed by an exemption under the Acts (see below);
- the data subject has consented to the transfer;
- the company importing the personal data enters into a contract in a form prescribed by the EU;

- the specific transfer is approved by the Irish DPC; or
- the transfer is a type already approved by the Irish DPC.

Furthermore, the transfer is exempt from statutory restrictions if:

- it is made to comply with international law;
- it is made in connection with a legal claim;
- it is made to protect the vital interests on the data subject;
- the transfer is of information held on public registers;
- the transfer is necessary for the performance/conclusion of a contract; or
- the transfer is necessary for reasons of substantial public interest.

Breach Notification

Section 2 of the Acts obliges that appropriate security measures be taken to prevent unauthorised access to or unlawful processing of personal data. The DPC advises that any loss of control of personal data by a data controller leading to or that may lead to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data constitutes a breach of this requirement.

In July, 2010 the DPC authorised the Personal Data Security Breach Code of Practice (the "Code"). The Code states that all incidents of loss of control of personal data must be reported to the DPC as soon as the data controller becomes aware of the incident, except:

*"(i) where the personal data was inaccessible in practice due to being stored on encrypted equipment secured to a high standard with a strong password **and** the password was not accessible to unauthorised individuals;*

*(ii) where the personal data was stored on equipment with a strong password and a remote memory wipe feature that was activated immediately after the incident **and** there is no reason to believe that the personal data was likely to have been accessed before such deletion took place;*

*(iii) where the full extent and consequences of the incident has been reported without delay directly to the affected data subject(s) **and** it affects no more than 100 data subjects **and** it does not include sensitive personal data or personal financial data that could be used to carry out identity theft."*

The Code further states that a data controller must keep a record of each incident and the remedial steps taken to rectify the incident, even where there is no requirement to notify the DPC.

The DPC has confirmed that it will investigate the issues surrounding any data breach and may conduct onsite examinations of systems and procedures which could lead to legal enforcement.

Taxation

Life insurance companies establishing operations in Ireland can avail of an attractive tax regime for both shareholder and policyholder profits. Shareholder profits are generally taxable at Ireland's low rate of corporation tax of 12.5% and policyholder profits can be rolled up free of tax (i.e. gross roll-up).

Calculating Shareholder Profits

The statutory accounts together with certain supporting data extracted from the company's regulatory return forms the basis for determining the shareholder profits of the company. The basis of the computation will be the transfer to the non-technical account. Profits which are allocated to or expended on behalf of policyholders are excluded but profits reserved for policyholders are included in shareholder profits. A proportion of the transfer to the fund for future appropriations (FFA) will be regarded as taxable shareholder profits with the balance treated as belonging to policyholders. The annual transfer to the shareholder non-distributable reserve will be taxable (as it is allocated fully to shareholders). Normal add-backs and deductions for tax purposes are made with a deduction permitted in respect of Irish dividend income included in shareholder profits.

Policyholder Profits

Policyholder profits benefit from Ireland's gross roll-up regime and as a result can be rolled-up free of Irish tax. How policyholder profits are treated for Irish taxation on distributions, encashment etc depends on whether the policyholder is Irish tax resident or not.

Non-Irish Resident Policyholders

A life assurance company is not required to deduct tax ("exit tax") in respect of a distribution of payments on the maturity, surrender, assignment, etc of policies made by the company to:-

1. Policyholders who are neither Irish resident nor ordinarily resident in Ireland and who have either:

   i) provided the company with the appropriate relevant declaration of non-Irish residence;
   ii) the company has availed of the Branch Business exemption (see below); or
   iii) the company has availed of the Freedom of Services exemption (see below).

Branch Business exemption

With effect from 1 January 2002, where an Irish life assurance company offers its policies through a branch established in an offshore state (i.e. an EU or EEA member state), the requirement to obtain a declaration of non-residence from the policyholders may be waived where the life assurance company has obtained written approval from the Irish Tax Authorities ("***ITA***") absolving them of the obligation to obtain a declaration of non-residence before making a payment to a policyholder without deduction of exit tax. However, such approval is subject to certain conditions as follows:

a) the branch has a full legal and tax presence in the local jurisdiction in which it is established;
b) the branch will not sell any products to Irish residents and will not offer any products in Ireland;
c) the branch will not knowingly distribute any material in connection with any products in Ireland;
d) the branch should take all reasonable steps to satisfy itself that all policyholders of the branch are neither resident nor ordinarily resident in Ireland.

Freedom of Services Business (FoS) exemption

With effect from the passing of Finance Act 2008 the exemption from the requirement to obtain the declarations is extended to life companies writing on a freedom of services basis where the policyholder is resident in an EU or EEA member state. This exemption must be approved by the ITA prior to making a payment to a policyholder without deduction of exit tax. The ITA has not issued any written guidance on the process for FoS business. However, based on prior experience, the conditions for approval include the following:

a) The life company writes the business from Ireland on a FoS basis under Regulation 50 of the European Communities (Life Assurance) Framework Regulations 1994 (S.I. No. 360 of 1994) or other equivalent arrangement in an EEA State and has complied with the conditions in Regulation 50 or other equivalent regulation in an EEA State;

b) The life company should take all reasonable steps to satisfy itself that all policyholders are neither resident nor ordinarily resident in Ireland. To satisfy this last point, the ITA typically requires the company to give an undertaking that:

    (i) the company will verify the proposed policyholders identity by complying with local anti-money laundering procedures;
    (ii) the company will only accept direct debit mandates from the country where the proposal originates;
    (iii) the company will not accept any policyholder who provides an Irish address; and
    (iv) the proposal form will require the proposed policyholder to declare in writing that they are resident in the country where the proposal originates.

However, it should be noted that there is no written guidance from the ITA on this and as such they may impose further conditions/require additional undertakings having reviewed the facts of each specific case.

2. Policyholders which although Irish resident fall within a category known as exempt Irish investors (e.g. approved pension schemes, charities, other life companies, etc) who have made an appropriate relevant declaration to the company.

Irish Resident Policyholders

When a life assurance company makes a distribution on the maturity, surrender, assignment, etc of policies, to Irish residents the company has to deduct tax (currently at a rate of 33%) from the investment gain included in the payment.

8 Year Rule for Irish Resident Policyholders

Ireland introduced in 2005 legislation to counteract Irish investors being able to roll-up (indefinitely) their share of the underlying income and gains of a life policy for more than 8 years. As such a life company must deduct tax on any deemed gain on their policy on the ending of an 8 year period beginning with the inception of the life policy and each subsequent 8-year period beginning when the previous one ends. This 8 year rule does not apply to non-Irish resident investors.

Stamp Duty on policies of insurance for Irish Policyholders

A 1% stamp duty is payable on premiums for policies of insurance falling under certain of the “Classes of assurance” listed in Annex I to Directive 2002/83/EC concerning life assurance to the extent that the risks to which those policies of insurance relate are located in Ireland.

VAT

Generally speaking insurance and related services are VAT exempt services, therefore insurers do not charge VAT on their products but consequently may have limited recovery of VAT on their input costs.

Reporting

Tax regulations (the “Regulations”) have been recently introduced which require assurance companies to file annual returns with the ITA in relation to certain payments made to policyholders.

Reporting Requirement - The reporting requirement applies to life assurance companies who make payments to Irish policyholders in relation to certain types of business. Certain types of life assurance contracts are outside the scope of the rules (e.g. permanent health insurance contracts, many pension contracts (including annuities) and pure protection policies which do not acquire a surrender value are exempt.

Reportable Payments - The Regulations apply to any payments made by assurance companies other than excluded payments. Excluded payments include payments to non-residents who have provided an appropriate declaration, protection payments made by reason of death or disability, payments relating to certificates of deposit, commercial paper and medium term notes, and payments to certain resident entities such as pension schemes, banks and building societies.

Information required by Revenue - The details required include the payee’s name, address and payment amount. A separate report must be made for each separate policy on which a payment is made. Where an investment is made by two or more persons, a report must be made for each person. If no payment is made to a policyholder then there is no requirement to make a report. Revenue has also issued guidance in relation to the format the reports should take.

Reporting Deadlines – In respect of payments made in the calendar year 2011, 30 September 2012. For future years, by 31 March of the following year

Payments to non-Irish residents are not required to be returned so international insurers based in Ireland are likely to be affected by the Regulations only if they have customers living in Ireland.

Appendix A

Classes of Life Assurance Business

Class I - Life assurance and contracts to pay annuities on human life but excluding those in Classes II and III below

Class II - Contracts of insurance to provide a sum on marriage or on the birth of a child, being contracts expressed to be in effect for a period of more than one year

Class III - Contracts linked to investment funds

Class IV - Permanent health insurance contracts

Class V - Tontines

Class VI - Capital redemption operations

Class VII - Management of group pension schemes

Appendix B

Application for Authorisation

The information which will be sought by the Central Bank as part of an application for authorisation of a new Irish Head Office life company is summarised below.

Details of the Applicant

(i) Full name and address of applicant.

(ii) Contact details of a principal who will accept receipt of any correspondence from the Central Bank in respect of the application proposal (i.e. name, address, telephone, fax and e-mail details).

(iii) Contact details of professional advisors in relation to the application proposal (if applicable), (i.e. name, address, telephone, fax and e-mail details).

(iv) Confirmation that the Central Bank can liaise with the named professional advisors in respect of the licence proposal.

(v) Details of the applicant's Actuary, Company Secretary, Legal Advisor and External Auditor.

Overview of Parent/Group

Full name and address of Parent/Group. Confirmation that the Board of the Parent has approved the submission of the application for the establishment of a life assurance company to the Central Bank (a certified copy of the board minute confirming that the Parent has consented to the establishment of the applicant should be submitted).

(i) Brief history/background of Parent/Group. This should include overview on the ownership and structure of parent/group (ideally the Central Bank prefers ownership to be vested in one or more financial institutions of standing e.g. subsidiary of an international insurance company/ group, etc).

(ii) Confirmation that the parent/group has obtained the prior consent of its home country supervisory authority.

(iii) Copy of organisation chart of the group outlining:

- the legal structure of each of the entities concerned (i.e. whether the entities are incorporated, limited liability companies, unlimited, etc.);

- the percentage holding of each shareholder; and

- details as to where the applicant will be positioned in the group.

(iv) Provide audited annual accounts in respect of the parent/group.

(v) Information on industry ranking, size of parent on local and global scale.

(vi) Main group activities/lines of business. Details of main areas of global activity of parent/group and details of main areas of EU activity of parent/group should be given.

(vii) Details of all existing group operations in Ireland including:

- a description of the activities being carried out by each of the existing Irish operations;

- details as to whether the operations are supervised by the Central Bank or any other regulatory authority; and

- provide internal audit reports on the Irish operation(s) in the previous 12 months. A summary of the internal audit reports will suffice where more than five internal audit reports have been carried out.

(viii) Details of any proposed association of the applicant with:

- existing Irish operations; and

- other group operations
- providing details of any proposed links between existing operations (including Irish operations) and the applicant.

(ix) Financial standing detail for parent/group i.e. summary for the last five years of:

- income and profitability;
- balance sheet;
- solvency position /capital adequacy.

(x) Debt ratings for parent/group/institutional shareholders (this should include details of any upgrades/downgrades in the last 3 years and reasons why).

(xi) Confirmation whether the Parent/Group has any other regulated entities in other jurisdictions.

Regulatory Supervision

(i) Contact details for Parent/Group's Home State regulator/supervisor.

(ii) Confirmation that Parent/Group's Home Regulator/Supervisor applies consolidated supervision to the Group.

(iii) Confirmation (and details where relevant) whether the Parent/Group, within the last 5 years has:

- received regulatory approval for new entities in any other jurisdiction;
- applied to establish a regulated entity in any other jurisdiction, which was either withdrawn or refused;
- been subject to an investigation into allegations of fraud, misconduct or malpractice by any regulatory authority in any other jurisdiction;
- the parent/group or any its director/senior manager/executive, been censured or disciplined by any regulatory body further to its professional activities.

Ownership Structure

(I) Details of all direct and indirect holders of shares or other interests in the applicant.

(II) Submit the most recent audited accounts for all direct and indirect qualifying shareholders, if applicable (i.e. those who hold 10% or more of the capital or of the voting rights).

(III) Arrange for Individual Questionnaires (standard applicable from Central Bank website) to be completed by all individual qualifying shareholders.

(IV) Demonstrate that the applicant is independent of dominant interest if the applicant is owned or ultimately owned or controlled by one or a small number of individuals.

(V) Demonstrate that there will be cohesion, continuity and consistency in the manner in which the business of the life assurance undertaking is directed by its owners.

(VI) Briefly summarise the rationale of using a plc (if applicable) as opposed to a private company.

Legal Structure

(i) Confirmation that the applicant will be registered in Ireland and subject to Irish law.

(ii) Outline the full legal structure of the applicant, i.e. limited company, unlimited company, etc.

(iii) The following should be included with the application:

- certificate of incorporation
- draft copy of the Memorandum and Articles of Association of the Applicant.
- latest audited accounts where the applicant has already been incorporated for more than 18 months.

Objectives and Proposed Operations

(i) Outline the classes of life assurance business being applied for.

(ii) Provide full details of the applicant's proposed insurance business and products

(iii) Confirm that the operations of the company will be limited to life assurance.

(iv) The application should be specific as to the activities, which the applicant proposes to carry out if granted a licence. The proposal should also set out the countries in which business will be written and whether this will be on a freedom of services or establishment basis.

(v) The application should provide the rationale for the proposed Freedom of Establishment (i.e. setting up a head office in Ireland) or Freedom of Services structure (i.e. selling into Ireland from outside Ireland).

(vi) Where other Member States are involved, applicants should note that there may be further legal requirements to be fulfilled in each Member State. These are usually communicated by the relevant authorities in the countries by means of their 'General Good Requirements'.

(vii) The following should also be included:

- Rationale for seeking an insurance licence and establishing in Ireland.

- Detailed information on the sources of funding for the applicant.

- Overview of market research which has been undertaken regarding the establishment of a life assurance undertaking and its proposed activities, or any information supporting the applicants expectations in relation to its target market and the level of expected sales.

- Overview of the applicant's distribution network for its products.

- Likely sources of new business/future business activities for the applicant.

- The applicant's new product approval process.

Organisation of the Applicant and Governance Arrangements

(i) Demonstrate how 'heart and mind' will be present in Ireland (The day-to-day operations must be conducted within the State.)

(ii) Provide details of the proposed board of directors and their activities, specifically identifying:

- Executive directors
- Non executive directors
- Independent directors
- Proposed frequency of board meetings and location; and
- Potential conflicts of interest (if any, including details of how they will be addressed).
- Provide Organisation chart of the applicant's corporate governance structure;
- Details of all management committees and members [e.g., Audit Committee, Risk and Compliance Committee, Remuneration Committee, Investment committee, other relevant committees.]

(iii) Details should include composition thereof, frequency of meetings, general responsibilities/terms of reference, reporting lines; and details of sub-committees (if applicable).

(iv) Provide details of organisation structure/management team (to include the Compliance Officer and Money Laundering Reporting Officer), i.e. biographies, job titles, responsibilities, reporting lines, etc.

(v) Provide operational process map for the entire company including functions outsourced to service providers.

(vi) <u>Note</u>: 'Individual Questionnaire' in respect of <u>each</u> of the applicant's board of

directors/senior management must be submitted as part of the application.

(vii) Provide outline of projected staffing requirements over the first 3 years of the applicant's operations (broken down on a yearly basis).

Risk Oversight

Details must be provided in respect of the following key functions:

- Audit.
- Compliance
- Risk Management
- Underwriting
- Reinsurance
- Financial Control
- Investment Management
- Internal Controls/ Policies
- Anti Money Laundering Procedures
- Conflicts of Interest
- Outsourcing

Capital, Solvency and Financial Projections (5 years projections required)

Capital: The applicant must possess a Minimum Guarantee Fund, which is currently Euro 3.5 million (note that this minimum requirement is due increase to Euro 3.7 million with effect from December 31, 2012).

Share Capital: The minimum paid up share capital must be not less than Euro 635,000.

Financial Projections: The financial estimates should be submitted in the format outlined in the schedule to the European Communities (Life Assurance) Framework Regulations, 1994 and the currency used should be Euro.

Proposed Appointed Actuary

Submit Individual Questionnaire and Certification of Financial Projections for proposed appointed actuary.

Policy and Claims Administration

Provide details of the remit and staffing of the policy admin function including the reporting lines of the function, the key reports utilised and the frequency of reporting.

Policy Documents

Provide details of Policy Documents and Marketing Literature and other information provided to policyholders e.g. Key Features Information

Sales and Distribution

Provide details of all distribution channels and projected sales for each product and regulatory status of distributors (need for qualifications/authorisation e.g. Minimum Competency Code or equivalent in other Member States)

Confirm process whereby applications are accepted and recorded and cash handling procedures and controls over same.

Outline procedures to ensure adherence to the Central Bank's Consumer Protection Code or equivalent consumer related rules in other Member States

Personnel and procedures to ensure adherence to the Central Bank's Minimum Competency Code

IT/ Business Continuity Plan

Provide details of:

- all IT systems to be used in relation to front and back office operations;
- the main IT service providers and back up IT service providers;
- the business continuity plan.

Appendix C

List of Legislation

Assurance Companies Act 1909	Original UK foundation legislation for insurance business. Parts of this Act remain relevant to Irish life assurers.
Insurance Act 1936	Although many sections repealed by later legislation, still relevant in relation to certain authorisation issues and winding up proceedings.
Insurance (No. 2) Act 1983	Provides powers to Central Bank to petition court to appoint administrator to a life insurer as well as granting extensive powers to such an administrator, including the power of sale.
Insurance Act 1989	Main piece of domestic insurance legislation in insurance sector covering supervision of insurers, fitness and probity regime, valuation of assets, minimum share capital, amalgamations and transfers, preparation and submission of annual returns, regulatory powers of intervention and the separation of the assets applicable to the life business and other business of the insurer.
Insurance Act 2000	Relates primarily to Part IV of the Insurance Act the regulation of insurance intermediaries.
Unclaimed Life Assurance Policies Act 2003	Introduces requirements for unclaimed life policies.
Central Bank and Financial Services Authority of Ireland Act 2004	Main relevance is creation of sanctions regime.
European Communities (Life Assurance) Regulations 1984	Implemented the First Life Directive. Substantially replaced by 1994 Life Framework Regulations but not repealed.
European Communities (Life	Introduced new format for regulatory returns and

Assurance Accounts, Statements and Valuation) Regulations 1986	provided for an annual actuarial valuation.
European Communities (Life Assurance) (Amendment) Regulations 1988	Provides freedom from liability to an authorised agent.
European Communities (Companies: Group Accounts) Regulations 1992	Implements EU Directive on the form and content of group accounts.
European Communities (Life Assurance) Framework Regulations 1994 (as amended)	Implementing Irish legislation for the harmonised European regime for life business (the three European Life Directives as now consolidated into Consolidated Life Directive 2002/83/EC). Covers authorisation, internal organisation, solvency, passporting, ownership etc. One of the bedrock pieces of insurance legislation in Ireland and has been amended several times.
European Communities (Insurance Undertakings: Accounts) Regulations 1996	Implements the Insurance Accounts Directive which modifies general companies legislation in relation to the accounting requirements for insurers.
European Communities (Non-Life Insurance and Life Assurance) Framework (Amendment) Regulations 1997	Introduced requirement for insurers to declare details of shareholders with "close links" to other firms.
Life Assurance (Provision of Information) Regulations 2001 (as amended)	Requires insurers to provide specified pre and post contractual information to clients.
European Communities (Reorganisation and Winding-Up of Insurance Undertakings) Regulations 2003	Implements EU Directive on winding-up rules for insurers.
European Communities (Life Assurance) Framework (Amendment) Regulations 2004	Amends 1994 Framework Regulation to take account of the Distance Marketing Directive (extending the 30 days cooling-off period).
European Communities (Distance	Extends the regulation of distance marketing to

Marketing of Consumer Financial Services) Regulations 2004	include the marketing of retail financial services.
European Communities (Insurance Mediation) Regulations 2005	Requires insurers to ensure that all intermediaries placing business with them comply with certain requirements such as knowledge and ability, client money and professional indemnity Insurance, the provision of pre-contractual information).
European Communities (Reinsurance) Regulations 2006	Implements the EU Reinsurance Directive to regulate reinsurance activity. Includes capacity to establish Special Purpose Reinsurance Vehicles (SPRVs).
European Communities (Insurance and Reinsurance Groups Supplementary Supervision) Regulations, 2007	Consolidated implementation (replacing earlier statutory instructions) of the Insurance Groups Directive as amended by the Financial Conglomerates Directive and the Reinsurance Directive.

CONTACT US

Our Offices

Dublin
33 Sir John Rogerson's Quay,
Dublin 2,
Ireland.
Tel: +353 1 667 0022
Fax: +353 1 667 0042

Hong Kong
62/F, The Center
99 Queens Road, Central
Hong Kong
Tel: + 852 3965-3126
Fax: + 852 3965-3222

New York
245 Park Avenue
39th Floor
New York, NY 10167
United States
Tel: +1 212 792 4166
Fax: +1 212 792 4167

Tokyo
12th Floor,
Yurakucho Itocia Building
2-7-1 Yurakucho, Chiyoda-ku
Tokyo 100-0006, Japan
Tel: +813 6860 4885
Fax: +813 6860 4501

Cayman Islands
Landmark Square
West Bay Road
PO Box 775
Grand Cayman KY1-9006
Tel: +345 949 0022
Fax: +345 945 0042

e-mail: enquiries@dilloneustace.ie
website: www.dilloneustace.ie

Contact Points

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For more details on how we can help you, to request copies of most recent newsletters, briefings or articles, or simply to be included on our mailing list going forward, please contact any of the team members below.

Andrew Bates
e-mail: andrew.bates@dilloneustace.ie
Tel : +353 1 6670022
Fax: + 353 1 6670042

Tom Carney
e-mail: tom.carney@dilloneustace.ie
Tel : +353 1 6670022
Fax: + 353 1 6670042

Breeda Cunningham
e-mail: breeda.cunningham@dilloneustace.ie
Tel : +353 1 6670022
Fax: + 353 1 6670042

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DUBLIN CAYMAN ISLANDS HONG KONG NEW YORK TOKYO