



Transfers of
Insurance
Portfolios

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TRANSFER OF INSURANCE PORTFOLIOS

Introduction

The last two years have seen an increasing number of insurance portfolio transfers in the domestic and cross-border sectors of the Irish insurance industry with the drivers for this activity principally being domestic or international M&A activity, group re-organisations and a number of closures.

Evidence of this trend can be found in the notices relating to portfolio transfers regularly appearing in the newspapers, in Iris Oifigiúil and by examining the High Court list with recent examples including those involving Quinn Insurance (to Liberty), Canada Life (inter group), Quinn-Life Direct (to Irish Life), Combined Insurance Company of Europe (to ACE) and Old Mutual (to Skandia – inter group).

Having been involved in a number of portfolio transfers recently both between domestic Irish insurers and between Irish insurers and insurers in other EU Member States, we have set out below an overview of the legal and regulatory regime applicable to portfolio transfers as well of the processes involved, the type of documentation required to be prepared and an idea of the timescales involved.

General Legal Framework

The transfer of the whole or part of a portfolio of insurance (including reinsurance) contracts from one insurance undertaking to another within the European Union ('EU') or European Economic Area ('EEA') must be done in accordance with the requirements of applicable EU insurance directives and the legal requirements of the relevant EU/EEA Member States concerned.

EU legislation clearly sets out the legal and regulatory frameworks which apply to the transfer of portfolios of insurance contracts from one insurer to another within the EU/EEA.

At EU/EEA level, Directive 2002/83/EC (the '**Consolidated Life Directive**') provides for the transfer of all or part of the part of the portfolio of life assurance business from one life assurer to another while Directive 92/49/EC (the '**Third Non-Life Directive**') establishes the framework for the transfer of all or part of the portfolio of non-life insurance business from one non-life insurer to another.

Reinsurance portfolios may be transferred in accordance with the requirements of Directive 2005/68/EC (the '**Reinsurance Directive**').

Where the portfolio transfer involves an Irish insurance undertaking additional domestic Irish insurance legal and regulatory requirements must be considered. These requirements are largely reflective of the frameworks established by the Consolidated Life Directive, the Third Non-Life Directive and the Reinsurance Directive but it is important to note that the domestic

Irish frameworks for the transfer of portfolios of insurance (and reinsurance) contracts may require compliance with specific legal and regulatory provisions and procedures (including High Court procedures) upon which specialist legal advice should be sought. In summary, the transfer of a portfolio of insurance contracts generally requires:

- the sanction of the Irish High Court pursuant to the 1909 and 1989 Acts [*not required for reinsurance portfolio transfers and certain non-life insurance transfers*]; and
- the consent of the Central Bank of Ireland (the '**Central Bank**'), the Irish supervisory authority, pursuant to the Life or Non-Life Regulations.

Portfolio Transfers - Life and Non-Life Insurance

Where at least one of the undertakings is carrying on business in Ireland, the transfer between insurance undertakings of the whole or part of an insurer's portfolio of insurance contracts may involve compliance with at least the following:

- (a) the legislative provisions which transpose the requirements of the Consolidated Life Directive into Irish law, namely the European Communities (Life Assurance)(Framework) Regulations 1994 as amended (the '**Life Regulations**'); or
- (b) the legislative provisions which transpose the requirements of the Third Non-Life Directive into Irish law, namely the European Communities (Non-Life Insurance)(Framework) Regulations 1994 as amended (the '**Non-Life Regulations**'); and
- (c) the domestic legislative requirements of Irish insurance law, including the Assurance Companies Act 1909 (the '**1909 Act**') and the Insurance Act 1989 (the '**1989 Act**').

Portfolio Transfers - Reinsurance

A transfer between reinsurance undertakings of the whole or part of a reinsurance portfolio may be effected in Ireland in compliance with Regulation 22 of the European Communities (Reinsurance) Regulations 2006 which transpose into Irish law the provisions of the Reinsurance Directive.

The procedure for the transfer of portfolios of reinsurance contracts is procedurally less complex than that in respect of life and non-life portfolios. Firstly, High Court approval is not required in order to effect the transfer from a legal perspective. Secondly, there is no legal procedural restriction on an Irish reinsurance undertaking transferring its portfolio of reinsurance contracts to another person. However, compliance with certain regulatory requirements is required.

In Ireland, Central Bank approval is required by an Irish transferee where it seeks to acquire a portfolio of reinsurance contracts held by another reinsurance undertaking (wherever situate). In such circumstances the transferee must obtain a certificate from the Central Bank to the

effect that, after taking the acquisition into account, the undertaking will have the requisite solvency margin under the Reinsurance Directive.

High Court Approval

Section 13 of the 1909 Act sets out the following requirements, at a minimum, that must be met before an application for sanction of a life/non-life insurance portfolio transfer can be made to the High Court:

- (a) notice of the proposed transfer must be made in the Irish Official Journal;
- (b) a Statement summarising the transfer, including abstracts from the Scheme of Transfer and a copy of the Independent Actuary's Report must be provided to policyholders; and
- (c) the Scheme documents including the relevant Transfer Agreement must be open for inspection by the policyholders of each insurance undertaking for a period of 21 days after publication in the Irish Official Journal;

Accordingly, as a first step, an initial procedural application is made to the Court seeking directions. Subsequently, having complied with these directions and having obtained Central Bank consent, the applicants must then go back into the High Court and seek formal Court approval by way of Court Order.

Central Bank Approval

As noted above consent of the Central Bank pursuant to the Life or Non-Life Regulations (as applicable) is also required before the High Court will sanction the transfer.

Prior to giving its consent, the Central Bank requires the following:

- (a) consultation with, and the consent of, the supervisory authorities of the relevant EU/EEA Member States within the framework of the Consolidated Life Directive or the Third Non-Life Directive;
- (b) a copy of the Independent Actuary's Report; and
- (c) confirmation of compliance with the advertising requirements and the document inspection requirements in each relevant EU/EEA Member State. In this regard, the Central Bank expects that in the Republic of Ireland notice of the transfer will be published in two daily newspapers with nationwide circulation and in the Irish Official Journal.

In deciding whether or not to give its consent to a proposed portfolio transfer, the Central Bank will generally have specific regard to the findings of the Independent Actuary's Report to

satisfy itself whether or not the transfer, if permitted, would prejudice the rights of the policyholders of both the transferor and the transferee.

Where the Central Bank objects to a proposed transfer, it is unlikely that the Irish High Court would sanction that transfer.

Policyholders Rights

When considering the transfer of an insurance portfolio transfer, It is important to appreciate that both the policyholders of the transferring and transferee insurance undertakings have the right to make written submission to the Central Bank in relation to the proposed transfer.

In addition, policyholders of both the transferring and transferee insurance undertakings have a statutory right under Irish law to receive information relevant to the proposed transfer and to inspect the scheme of transfer documentation, unless directed otherwise by the Irish High Court. Policyholders also have the right to be heard at any application before the Irish High Court for the transfer of a portfolio of insurance contracts and to raise objections to the application.

It is, therefore important for insurers engaged in a portfolio transfer to ensure compliance with all legal and legislative requirements in order to eliminate/minimise the risk of a regulatory or policyholder objection to the proposed transfer.

Where the proposed transfer of an insurance portfolio receives all necessary sanctions/consents under Irish law, the transfer can be put into effect in accordance with the Order of the High Court sanctioning the transfer.

Procedural Steps

The principal procedural steps to be taken in an insurance portfolio transfer include:

(i) Initial Application to High Court

The parties to the portfolio transfer, as petitioners, must make an initial application to the High Court in order to obtain the following orders/directions, as appropriate:

- (a) an order fixing a date, time and place for the hearing of the application (known as the Petition) seeking High Court approval for the transfer;
- (b) directions as to any persons who ought to be served with the petition and accompanying papers;
- (c) directions as to the form and manner in which, and the publication in which, notice of the petition ought to be published and/or notified;

- (d) directions as to the form and manner in which and the policyholders to which notice ought to be sent; and
- (e) an order fixing the time and place at which the petition, the transfer agreement and accompanying papers are to be made available for inspection by policyholders for a period of fifteen days after the date of the advertisement of the petition in Irish Oifigiúil.

(ii) Notification to the Central Bank

As Central Bank approval is also required, the Central Bank should also be notified of the proposed transfer transaction as soon as practicable and should be given the names of the transferor and the transferee together with details of the policyholder residency/commitment profiles..

In due course, and as may be more specifically required by the Central Bank, it should be provided with copies of the Transfer Agreement, Scheme of Transfer, Independent Actuary's Report and the relevant High Court papers.

With the established EU statutory frameworks for the transfer of insurance portfolios, the national regulators have been assigned certain statutory functions. The notification to the Central Bank enables such statutory functions to be discharged.

(iii) Foreign Regulators

Insurers should bear in mind that upon notification of the proposed transfer to the home state regulator, consultation with, and the consent of, the supervisory authorities of other relevant EU/EEA Member States may be required depending on the policyholder residency/commitment profiles.

As a matter of Irish law, in order for sanction to be granted by the Irish Court for an insurance portfolio transfer, evidence may be required to be submitted displaying compliance with the advertising and other consumer protection requirements in any relevant EU/EEA Member State other than Ireland.

(iv) High Court Petition

The High Court Petition refers to the formal application for approval of the High Court to the transfer that petition must set setting out details of transferor, transferee, proposed scheme of transfer, report of independent actuary, details of notice and communication to policyholders and of the consultation with Central Bank.

Documentation Required

The principal documents that need to be prepared in relation to an insurance portfolio transfer are:

(i) *The Scheme of Transfer*

A Scheme of Transfer needs to be prepared in accordance with the requirements of Section 13 of the Assurance Companies Act, 1909, the Insurance Act, 1989 and the 1994 Regulations (Life or Non-Life).

The Scheme will normally deal with matters such as:

- (a) the process by which the portfolio will transfer (assets and liabilities);
- (b) any limitations on transfer imposed;
- (c) any excluded policies (i.e. those not transferring);
- (d) the rights of transferred policyholders;
- (e) the treatment of premiums received post transfer date;
- (f) continuation of any legal proceedings;
- (g) effective date of transfer and related matters.

(ii) *The Transfer Agreement*

The Transfer Agreement is the formal contractual agreement under which the portfolio is transferred from the transferor to the transferee in accordance with the Scheme of Transfer and the High Court Order.

The Transfer Agreement will deal with similar matters as the Scheme but will also address the consideration for the transfer and the transaction completion process.

(iii) *The Report of the Independent Actuary*

An Independent Actuary must be engaged by the transferor to consider and report to the High Court on the proposed transfer, primarily from the perspective of the policyholders of both the transferor and transferee and to opine as to whether any policyholders interest could in any way (either directly or indirectly) be adversely affected by the proposed transfer.

The Independent Actuary's report should be addressed to the High Court and in addition to standard information regarding the parties and the scope of the report, it will normally include a commentary on the economic/business rationale behind the transfer and then address in detail issues such as unit pricing, financial position of the parties both before and after the transfer (including capital position, future capital position, valuation assumptions and future business plans), the effect on policyholders and other risk considerations.

In preparing the report, the Independent Actuary carries out a review of the relevant company documentation to include:

- review of the Scheme documentation (and if necessary suggesting amendments in order to eliminate any concerns);
- review of the proposed Transfer;
- consideration of the effect on policyholders including their contractual rights, benefit security and benefit expectations and in particular any potential changes in unit-pricing practices and the issue of non-guaranteed policy charges;
- review of any changes to re-assurance arrangements in connection with the transfer and review comparative solvency levels before and after the proposed transfers; and
- review of the effects of the transfer on the risks within the two companies and the resources of those companies and to meet those risks.

The Independent Actuary will also liaise and raise issues as necessary with the transferor and transferee and if necessary with the relevant legal and tax advisors.

(iv) Confirmation from Foreign Transferee

To the extent that the transferee company is a foreign (i.e. non-Irish company), the transferee company may be required, via affidavit from the relevant officer, to provide additional information to the High Court as to the legal and regulatory regime applicable to the transferee company in its home Member State which may include translations of its bye-laws, authorisation, legal structure, authorisation by its governing body in relation to the transfer and related documentation.

(v) Legal Capacity: Memorandum and Articles of Association/Approval by the Board of Directors and/or Shareholders

It is important to check the powers which the transferor and transferee have under their respective constitutive documents to implement a portfolio transfer. To the extent that either does not have the requisite powers, it will be necessary to take appropriate steps to include such powers in advance.

It is also important to ensure full compliance by the transferor and the transferee with all relevant decision making obligations to ensure that the parties to the transfer have full and proper legal capacity to effect the transfer. Proof of such compliance will, as a general rule, be sought by the Irish High Court, as appropriate.

(vi) Certificate of Solvency

As a matter of EU and Irish law, the competent authority with responsibility for supervision of the transferee must issue a certificate as to the solvency of the transferee. This regulatory certificate is an essential proof to which the Irish High Court will have regard before deciding whether or not to sanction the transfer. Where the certificate is absent, the Irish High Court will not sanction the transfer.

(vii) Publication in Iris Oifigiúil/Newspapers

The High Court, in accordance with national legislative requirements, has the power to issue various directions requiring publication of information notice regarding where information may be inspected regarding the transfer, the date of the hearing and the right to raise objections.

As a general rule, the Irish High Court requires that notices regarding the court hearing and the transfer be published in two daily newspapers in Ireland with nationwide circulation and in the Irish Official Journal. In certain circumstances, the publication of notices/advertisements in non-Irish newspapers/journals may also be required by non-Irish competent authorities and when sanctioning the proposed transfer, the Irish High Court as a matter of practice requires compliance with such non-Irish publication requirements as a condition of sanction.

(vii) Supporting Affidavits

Various supporting affidavits of officers of the companies involved will be required for the High Court applications.

Completion Process

The principal completion stages for a portfolio transfer are set out below.

(i) General Agreement

The parties reach broad consensus on the assets/liabilities (including life assurance business) to comprise the portfolio transfer and a broad outline draft Scheme of Transfer.

(ii) Preliminary Notification

The transferor and transferee agree to notify the competent regulatory authority and provide the necessary information to the competent authority to enable the inter-regulator consultation to commence in accordance with the applicable EU/EEA rules. It is generally advised that the name of the Independent Actuary (as appropriate) is notified to the regulator at this time.

(iii) Preparation of draft Scheme and Court documents

The parties prepare drafts of all necessary Scheme and Court documents. The parties assist the Independent Actuary through the provision of requested information to enable the preparation by the Independent Actuary of his/her report.

(iv) Application to the Irish High Court for Directions

In advance of applying to the Irish High Court for sanction to effect the High Court, it is first necessary to seek judicial direction on the various steps which the court considers ought to be complied with before the court may be engaged formally for its sanction. At the hearing of the Motion for Directions, the Irish High Court will fix the date on which the hearing for the petition for sanction will be heard and will clearly specify the various legislative, regulatory and procedural requirements which must be adhered to by the parties on or before the petition hearing date. Typically, the High Court's directions will focus on the rights of the policyholders to receive information and inspect documents, the security of the policyholders as applicable and the necessity for inter-regulatory consultation amongst others.

(v) Compliance with the Directions of the Irish High Court

The parties must then proceed to comply with the directions of the High Court in the intervening time between the date of the Motions for Directions and the date of the hearing of the Application for Sanction of the Transfer by the High Court.

(vi) The Petition Hearing Date

On the date of the Petition Hearing, the Irish High Court hears the application by the parties to allow the transfer. Where policyholders raise objections to the transfer the Court will deal with those objections as a matter of priority.

Where it is satisfied that the parties have complied with its directions, that all necessary regulatory consents have been obtained and that policyholders are not (materially) negatively impacted by the transfer, the High Court will generally sanction the transfer with effect from a future specified date, referred to as the Scheme Date. The transfer may be sanctioned by the Court either with or without further conditions.

(vii) The Scheme Date

The Scheme Date is the date on which (pursuant to the Order of the Irish High Court where appropriate) on which the parties actually effect the transfer of the portfolio of insurance business from the transferor to the transferee.

Timing

The length of time within which the transfer of a portfolio of insurance business may be effected will vary from insurer to insurer depending on all relevant factual and legal circumstances.

As a general rule of thumb, a period of nine months could be taken as a reasonable period within which parties may seek to effect a portfolio transfer. This time period allows for adequate preparations, the statutory three month inter-regulator consultation at EU/EEA level, the Court's workload and holiday calendar. The timing issues for individual portfolio transfers will, of course, vary from one transfer to another and depend on the individual circumstances of each case.

Other Considerations Concerning Portfolio Transfers

Portfolio transfers can have a variety of other implications which need to be taken into account.

(i) Competition Law

As the transfer of portfolios of (re)insurance contracts involves the disposal/acquisition of assets of (re)insurance undertakings, consideration must also be given to the possible application of EU/EEA and domestic competition law requirements.

(ii) Tax

The transfer of (re)insurance portfolios may give rise to tax considerations for the transferors and transferees under applicable national fiscal rules upon which specialised advice should be sought.

(iii) Employee rights and TUPE

Depending on the nature and extent of the portfolio being transferred, the transfer may trigger various employee related considerations as a transfer of undertaking.

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DILLON EUSTACE INSURANCE REGULATORY TEAM

Dillon Eustace is one of Ireland's leading law firms focusing on financial services, banking and capital markets, insurance regulation, corporate and M&A, litigation and dispute resolution, real estate and taxation.

Headquartered in Dublin, Ireland, the firm's international practice has seen it establish offices in Tokyo (2000), New York (2009) and Hong Kong (2011) and most recently Cayman Islands (2012).

We have developed a dynamic cross-disciplinary Insurance team comprising specialists operating in the legal, regulatory, compliance and tax areas which advises a large number of domestic and international operators in the life, non-life, health insurance and reinsurance sectors.

Our Insurance team has particular expertise in providing advice to its clients on the transfer of insurance portfolios including both domestic and cross-border portfolio transfers, for example for Sella Life. Most recently, in July 2012, our Insurance team advised and represented both Quinn-Life Direct Limited and Irish Life Assurance plc as petitioners before the Irish High Court (Commercial Court) in the successful transfer from Quinn-Life Direct Limited of part of its portfolio of life assurance business to Irish Life Assurance plc with the sanction of the Irish High Court and the approval of the Central Bank of Ireland, in accordance with all applicable Irish and European Community legal requirements.

Legal, Regulatory and Tax

Legal, regulatory and tax matters which we advise upon include:

- ▣ Establishment and Authorisation
- ▣ Cross-border Passporting and Home State v. Host State Issues
- ▣ Capitalisation Issues
- ▣ Effective Structuring of Distribution Channels
- ▣ Strategies for Restructuring and Portfolio Transfers
- ▣ Ongoing Supervisory Matters, including Solvency II and Corporate Governance
- ▣ Frameworks for Effective Compliance (Compliance Plans, Procedures, Reports, Data Protection, Anti-Money Laundering)
- ▣ Client Representation before EU and Irish Regulatory Bodies
- ▣ Regulatory Inspections and Investigations
- ▣ Insurance Mergers, Acquisitions and Joint Ventures
- ▣ Redomiciliation and Cross-Border Merger Transactions
- ▣ Tax Benefits and Incentives

- ▣ Product Structuring and Documentation
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- ▣ Contractual Negotiations with TPAs, Asset Managers and other Counterparties
- ▣ ISDA Documentation/Derivatives Generally
- ▣ General Corporate Advice

Compliance

We provide a comprehensive compliance related service for insurers, including (depending on the level of support required):

- ▣ *Compliance matrices*: which provide an overview of the legislation affecting your business including company law, employment law, health and safety, money laundering, data protection as well as primary/secondary law, regulations and guidance notes relevant to your business.
- ▣ *Compliance manuals*: which set out roles and responsibilities as well as summarizing what steps need to be put in place in your business to meet the various legislative and regulatory obligations that affect your business.
- ▣ *Compliance monitoring programmes*: which outline the checking and frequency of same which needs to be conducted to address the various compliance and regulatory obligations relevant to your business.
- ▣ *Compliance training*: we run specific training programmes for client management, staff and boards of directors on a wide range of compliance topics.

We also deliver compliance programmes for insurers (life, non-life and reinsurance) as well as to life and non life insurance intermediaries.

A significant element of our service involves advising on day to day issues relating to anti-money laundering, data protection, corporate governance, consumer protection, codes of conduct, passporting and other similar issues.

The Team also liaises on behalf of clients with regulatory bodies in relation to matters such as minimum competency requirements, acquisitions/disposals of qualifying holdings, board and senior management changes, advertising and promotional material and product documentation.

Quarterly Newsletter and Other Publications

The Insurance Regulatory team maintains a series of brochures and frequently publishes articles on matters relating to the functioning of the insurance industry in Ireland, including:

- Brochures and Regulatory Updates
 - Guide to Life Assurance Regulation in Ireland
 - Guide to Non-Life Insurance Regulation in Ireland
 - Solvency II
 - Insurance Quarterly Legal and Regulatory Update (Q3, 2012)
 - Insurance Quarterly Legal and Regulatory Update (Q4, 2012)

- Recent Articles
 - Proposed Reform of the Insurance Mediation Directive
 - KIDs for Life: The PRIPS Initiative
 - Central Bank Enforcement Administrative Sanctions Regime
 - Fit & Proper Update
 - Minimum Competency Code
 - Case C-82/10 : ECJ rules that Irish Governments exception of VHI from EU insurance rules is unlawful
 - Amendments to Insurance Compensation Fund Regime
 - Central Bank (Supervision and Enforcement) Bill, 2011
 - ECJ Ruling on Unisex Insurance Premiums
 - Corporate Governance Code for Insurance Undertakings

These and other publications (including our quarterly insurance legal and regulatory updates) may be accessed on our website www.dilloneustace.ie

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This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.

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