

MFSA

MALTA FINANCIAL SERVICES AUTHORITY

**FEEDBACK STATEMENT ISSUED
FURTHER TO INDUSTRY RESPONSES
TO MFSA CONSULTATION DOCUMENT
ON INSURANCE RULES**

MFSA REF: [09 - 2015]

AND

MFSA REF: [011 - 2015]

14TH JANUARY 2016

1.0 Introduction

On the 30th October and the 16th November 2015, the MFSA issued two consultation documents relating to the Insurance Rules issued under the Insurance Business Act (Cap. 403), as part of the transposition exercise of the Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast), (the “Solvency II Directive”).

The new Insurance Rules issued under the Insurance Business Act have been published on the 22nd December 2015 and came into force on the 1st January 2016. In this regard, reference is to be made to the [Circular on the Publication of New Insurance Rules addressed to Authorised Insurance and Reinsurance Undertakings](#), issued by the MFSA on the 22nd December 2015.

Further to the consultation documents, the MFSA is issuing a feedback statement on the comments received in relation to these Insurance Rules. An outline of the main comments received and the MFSA’s position in relation thereto is provided below.

2.0 Main Comments received on the Insurance Rules issued under the IBA and the MFSA’s position

2.1 Chapter 6 - System of Governance

2.1.1 Industry comment: In terms of paragraph 6.8.3 (b) of Chapter 6 of the Insurance Rules, an authorised undertaking is to provide the MFSA with a copy of the draft outsourcing agreement which is to be entered into between the authorised undertaking and the service provider. It was queried whether this requirement applies to all outsourcing agreements, to only key outsourcing agreements or to key and critical outsourcing agreements.

MFSA’s Position: As has been the practice, the MFSA will approve the outsourcing of key or critical functions, that is, the key functions identified by the Solvency II Directive and those critical functions identified by the undertaking. Outsourcing agreements relating to issues of an administrative nature, as has been the case to date, will not require the prior approval of the MFSA.

Annex to Chapter 6 - Guidelines on System of Governance and on Own Risk and Solvency Assessment

2.1.2 Industry comment: The definition of “persons who effectively run the undertaking” found in the Annex to Chapter 6 of the Insurance Rules covers members of the Board of Directors, as well as members of the senior management. The definition makes reference to Board members and senior management, omitting any reference to members of board-appointed committees. It is therefore not clear how members of board-appointed committees should be treated.

MFSA's Position: It is the Board of Directors which effectively runs the undertaking. If an individual is appointed to perform a key function, this person has to be notified to the MFSA and a fit and proper assessment has to be undertaken on the individual. If a group of persons or a committee or the Board of Directors are appointed to perform a key function, the person who holds the ultimate responsibility i.e leading this team of people, must be notified to the MFSA to allow for a fit and proper assessment to be undertaken.

2.1.3 Industry comment: The market requested clarity on the definitions of “*persons having other key functions*” and “*key function holders*” found in the Annex to Chapter 6 of the Insurance Rules in view that this will have direct implications on the process adopted by undertakings for the assessment of fitness and properness. A key function is normally run by the head of the function who will be the key function holder and has responsibility for the function. It is thus being queried whether the above definitions imply that any members of the team within that key function, and who therefore carry out related tasks, are to be considered as ‘persons having other key functions’ and thus be subject to all fit and proper requirements as would be the key function holder; and if this was the case, it would be overly onerous. It was also maintained that this issue would also have implications on the interpretation of paragraph 16 (fit and proper policies and procedures) of the Annex to Chapter 6 of the Insurance Rules, since notification to the MFSA is to be done only in respect of key function holders and board members, however, the fit and proper checks would apply to persons assisting to some extent in the carrying out of the key functions.

Confirmation was also requested as to whether “key function holders”, refers to persons responsible for the running of the function and not necessarily performing the function.

MFSA's Position: The Annex to Chapter 6 of the Insurance Rules reproduces the requirements found in the EIOPA Guidelines on System of Governance. In so far as paragraph 16 is concerned, this refers to the fit and proper requirements as set out in the fit and proper policy of the undertaking concerned which, as a minimum, is to take into account the procedures and situations listed in the said paragraph. It is then up to the undertaking concerned to identify which positions require notifications to the MFSA.

Chapter 2 of the Insurance Rules (Fit and Proper Criteria, Notification and Assessment) lists the persons who are required to submit a Personal Questionnaire (“PQ”), the persons who are subject to a pre-approval process by the MFSA and also the persons who are subject to notification requirements to the MFSA.

In so far as the definition of “*key function holders*” is concerned, reference is to be made to the definitions found in the Annex to Chapter 6, whereby the term “*key function holders*” is defined as the persons responsible for a key function as opposed to persons carrying out or performing a key function.

2.1.4 Industry comment: Paragraph 17 of the Annex to Chapter 6 of the Insurance Rules (Outsourcing of key functions) states that an undertaking is to have fit and proper procedures in assessing persons employed by its service provider in performing a key function. Clarification was sought as to whether this would trigger a notification requirement, by the authorised undertaking to the MFSA, of the person employed by the service provider.

Clarification was also sought on paragraph 67 of the Annex to Chapter 6 of the Insurance Rules, in particular as to whether reporting by the person in charge of the outsourced function includes both the person responsible for the oversight of the outsourced key function (together with notification via a Personal Questionnaire “PQ”) and also the employee of the service provider performing the service for the insurance undertaking. Clarification was also sought as to whether the employee of the service provider performing a key outsourced function should also be fit and proper (that is, whether notification is required to be submitted via a PQ).

MFSA’s Position: Where a key function is outsourced, the MFSA expects the undertaking to be able to demonstrate, at its request, how it has conducted its assessment and reached its conclusions that the persons working within that function of the service provider are fit and proper. It is the undertaking’s responsibility to check the fitness and properness of the service provider. The undertaking must notify the MFSA prior to designating a person within the undertaking with overall responsibility for the outsourced key function.

As previously stated, Chapter 2 of the Insurance Rules (Fit and Proper Criteria, Notification and Assessment) lists the persons who are required to submit a Personal Questionnaire (“PQ”). Where a key function is outsourced, the submission of a PQ applies to the persons appointed to oversee the outsourced key function from within the undertaking. Where the compliance function is outsourced, the submission of a PQ to the MFSA is also required by the person who is responsible to carry out the function at the service provider.

For further information, reference is to be made to the [Circular addressed to authorised \(re\) insurance undertakings in relation to the Fitness and Properness Assessment of persons performing or overseeing Key Functions under the Solvency II Regime](#), issued by the MFSA on the 4th January 2016.

2.1.5 Industry comment: Paragraph 49(2) of Section 9 of the Annex to Chapter 6 of the Insurance Rules relating to the actuarial function states that the actuarial function should give an opinion on the reinsurance policy for the “group as a whole.” The market expressed concerns that it would be difficult at entity level to provide an opinion on the group, unless the intention is that the actuarial function provides an opinion on reinsurance for all entities in the sub-group for which the actuarial function is responsible.

MFSA’s Position: The MFSA noted the concerns of the market and has amended the said paragraph 49(2) to clarify that the obligation is on the group actuarial function to give an opinion on the reinsurance policy and the reinsurance program for the group as a whole.

2.1.6 Industry Comment: It was stated that the Annex to Chapter 6 of the Insurance Rules draws a clear distinction between ‘key’ functions and ‘critical/important’ functions in view of the fact that the key functions are being subject to more detailed notification requirements. However, a licence holder stated that this distinction is not being drawn throughout the outsourcing section in Section 11 - Outsourcing, of the said Annex.

MFSA’s Position: Reference is to be made to paragraph 67 of the Annex to Chapter 6 of the Insurance Rules which states that in its written notification to the MFSA, of any outsourcing of critical or important functions or activities, the authorised undertaking should include a description of the scope and the rationale for the outsourcing and the service provider’s name. The written notification of any outsourcing of a critical or important function which is also a key function should also include the name of the person in charge of the outsourced function or activities at the service provider.

Please note that the Annex to Chapter 6 of the Insurance Rules transposes the EIOPA Guidelines on Systems of Governance and Own Risk and Solvency Assessment. Reference is also to be made to [the Final Reports on Guidelines on System of Governance issued by EIOPA](#), which contains explanatory text on the requirements of each Guideline.

2.1.7 Industry Comment: A licence holder pointed out that the text found in the Annex to Chapter 6 of the Insurance Rules transposing the Guidelines on Systems of Governance and the ORSA is not identical to the EIOPA Guidelines. It was noted that the MFSA referred to ‘the Board of Directors’, whilst the EIOPA Guidelines refer to the ‘AMSB’ (Administrative, management or supervisory body). It was queried whether the AMSB includes only the Board of Directors.

MFSA’s Position: When reproducing the EIOPA Guidelines on Systems of Governance and the ORSA, the MFSA, where it was deemed necessary, carried out a transposition exercise to clarify the application of certain provisions. The term “AMSB” as used in these EIOPA Guidelines covers at least the single board in a one-tier system (the term “Board of Directors”, in Malta’s case) and either the management or the supervisory board of a two-tier board system depending on their responsibilities and duties.

2.2 Chapter 5: Valuation of assets and liabilities, technical provisions, own funds, Solvency Capital Requirement, Minimum Capital Requirement and investment rules

2.2.1 Industry Comment: Article 84 of the Solvency II Directive provides that an authorised undertaking shall, upon a request by the MFSA, demonstrate the appropriateness of the level of the undertaking’s technical provisions, the applicability and relevance of the methods applied and the adequacy of the underlying statistical data used. Licence holders require further information as to how this can be demonstrated.

MFSA’s Position: For further information, licence holders are to be guided by the [Guidelines on valuation of technical provisions](#) issued by EIOPA.

2.2.2 Industry Comment: A licence holder pointed out that there is a contradiction between Article 98 of the Solvency II Directive and Article 82 of the EU Commission Delegated Regulation (EU) 2015/35 of 10 October 2014 on the eligibility and limits applicable to Tiers 1, 2 and 3 of own funds.

MFSA's Position: In our view, Article 98 of the Solvency II Directive and Article 82 of the EU Commission Delegated Regulation do not contradict each other but require two different tests to be carried out by undertakings. Article 98 applies eligibility limits to Tiers 1, 2 and 3. These limits are such that they would ensure that the conditions listed in Article 98 are met. On the other hand, Article 82 of the EU Commission Delegated Regulation (EU) 2015/35 applies quantitative limits to the proportion of own fund items in the different Tiers that can underpin the Solvency Capital Requirement and the Minimum Capital Requirement.

2.3 Chapter 8: Financial Statements and Supervisory Reporting Requirements

2.3.1 Industry Comment: Section 8.5 of Chapter 8 of the Insurance Rules, requires an approved actuary to draw up a report affecting those classes of with-profits business of the authorised insurance undertaking carrying on long term with-profits business in terms of classes I and III as specified in the Second Schedule of the Insurance Business Act. A licence holder requested more detail on the content and format of the report to be submitted by an approved actuary.

MFSA's Position: The MFSA will be shortly issuing a consultation paper as to the contents of the report to be produced by the approved actuary of an authorised insurance undertaking concerned.

2.3.2 Industry Comment: Section 8.4 of Chapter 8 of the Insurance Rules, lays down the different means of disclosure of how an authorised undertaking is to publish and make available to the public a copy of its audited financial statements. One of the means of disclosure provided in this section is that where an authorised undertaking owns and maintains a website related to its business, such information is to be disclosed on that website. However, Chapter 8 does not specify as from when should such audited financial statements be available on the website of an undertaking. Clarification was sought as to whether the date of publication of audited financial statements on a website is the 20/05/2017 or the 20/05/2016 in line with the Day 1 reporting.

MFSA's Position: Publication of audited financial statements is to take place no later than the time frames established in paragraph 8.2.2 of Chapter 8. In so far as reporting deadlines are concerned, authorised undertakings are to be guided by the [Solvency II Circular for Insurance and Reinsurance Undertakings: Solvency I Final Submission and Solvency II Day I Reporting](#) published by the MFSA on the 30th November, 2015. Publication of audited financial statements on a website is to take place as from the 20/05/2017.

2.3.3 Industry Comment: Paragraph 8.1.1(c) of Chapter 8 makes reference to the report on the solvency and financial condition which an authorised undertaking is to disclose publicly, on an annual basis. However, this Chapter does not provide rules on where this needs to be disclosed.

MFSA's Position: This disclosure requirement is provided for in the EU Commission Delegated Regulation (EU) 2015/35 of 10 October 2014, specifically in Article 301 (Means of Disclosure) of the said Regulation.

2.3.4 Industry Comment: Paragraph 8.6.6 of Chapter 8 requires an authorised undertaking to have in place appropriate systems and structures to fulfil the requirements set out in paragraphs 8.6.1 to 8.6.5 as well as a written policy, approved by its Board of Directors, ensuring the ongoing appropriateness of the information submitted to the MFSA. A respondent enquired whether this implies that an authorised undertaking needs to have an SFCR Policy and if the MFSA will be issuing any guidelines on this policy.

MFSA's Position: The written policy referred to in paragraph 8.6.6, which an authorised undertaking is to have in place, refers to the information to be provided for supervisory purposes in terms of Section 8.6 of Chapter 8 of the Insurance Rules. The MFSA will not be issuing guidelines in this respect.

2.4 Chapter 9: Freedom of Establishment and Freedom to provide Services by a European Insurance Undertaking and a European Reinsurance Undertaking

2.4.1 Industry Comment: Clarification was sought as to whether Chapter 9 on Freedom of Establishment and Freedom to provide Services by a European Insurance Undertaking and a European Reinsurance Undertaking contains provisions common for all Member States. Moreover, it was pointed out that it would be desirable if there would be a EU framework for general good provisions, especially for undertakings having policyholders with different and changing countries of commitment.

MFSA's Position: Chapter 9 transposes provisions found in Chapter VIII of Title 1 of the Solvency II Directive relating to the freedom of establishment and freedom to provide services. This Chapter also includes some detail found in the General Protocol relating to the collaboration of the insurance supervisory authorities of the Member States of the European Union, 2008, applicable to all Member States. It is up to the Member State concerned to transpose the provisions of the Solvency II Directive in the manner it deems appropriate. To date, there is no common framework of general good provisions applicable to all the Member States.

2.5 Chapter 12: Conduct of Business Rules (Information to policyholders)

2.5.1 Industry Comment: Paragraph 12.2.5 (d) of Chapter 12 requires a policyholder to be provided with a concrete reference to the report as required in article 18F of the Act on the solvency and financial condition, allowing the policy holder easy access to this information. A concrete reference to the report on the solvency and financial condition would not be possible before May 2017. Clarification was sought in this respect.

MFSAs Position: Following the concerns of the market, the MFSAs has included a footnote in Chapter 12 of the Insurance Rules to clarify that the obligation to provide a concrete reference to the report is triggered off from the date when the undertaking is obliged to disclose publicly, on an annual basis, a report on its solvency and financial condition.

Contacts

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