The Consorcio de Compensación de Seguros in the new law on the regulation, supervision and solvency of insurance and reinsurance undertakings

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The full application of the new European solvency framework to insurance undertakings starting as from 1 January 2016 has been the determining factor for the approval of Act 20/2015, of 14 July, on the regulation, supervision and solvency of insurance and reinsurance undertakings (LOSSEAR), which has become the central point of domestic regulation in this scope. In terms of the aspects requiring legal rank, the LOSSEAR partially transposes the European Parliament and Council Directive 2009/138/EC, of 25 November 2009 (Solvency Directive II) and has to fit the provisions of this Directive in with those derived from the Community rules for direct application, namely the Commission Delegated Regulation (EU) 2015/35, of 10 October 2014, supplementing the aforementioned Directive.

However, the LOSSEAR does not merely transpose the provisions of the Community Directive but also includes other contents, specific to the general framework of the Spanish insurance market and industry. In this way, the LOSSEAR integrates the new insurance supervision legislation, as a continuation of the Acts of 1908, 1954, 1984 and 1995.

Consequently, the incidence of the LOSSEAR on the activity of the Consorcio de Compensación de Seguros (CCS) must be analysed both from the perspective of the transposition of the new European solvency programme as well as with respect to the contents specific to the Spanish insurance sector.

The LOSSEAR introduces new developments in the regulation of a number of issues directly affecting the activity of the CCS. In addition to taking in the overall framework of Solvency II, to which the CCS will adapt in all that is compatible with its nature, specific aspects are regulated, either by attributing new functions to the CCS or by reconsidering some aspects of the current regulation.

In any case, this underlines the role of the CCS in the Spanish insurance market as an institution which contributes to its stability and, in general, to the reinforcement of the insurance institution.

1. The Consorcio de Compensación de Seguros and Solvency II

On analysing the LOSSEAR from the perspective of the CCS, the first question raised is whether the Solvency II programme is applicable to it.

The starting point of this analysis is none other than the express exclusion which the Solvency Directive II makes with respect to CCS on defining its scope of application (articles 8 and 10); an exclusion already present in the Community regulations prior to Solvency II[1].

This exclusion from the scope of application of Solvency Directive II would force Spanish legislators to design a regulating framework specific to the insurance activity of the CCS. However, for reasons of transparency and discipline in the management of an undertaking of such relevance in the domestic insurance market, the final decision was to apply to the CCS the same programme as that applicable to private insurance undertakings in the performance of the CCS's insurance activity, and solely for this activity, unless its Articles of Association contain special rules[2].

Finally, CCS's insurance activity will be governed by the provisions contained in the LOSSEAR and the regulation pursuant to it in all aspects which are not incompatible with its legal status. And it must be mentioned here that the uniqueness of the legal status of the CCS is derived from its nature as an undertaking belonging to the public sector, specifically as a public business undertaking dependent on the Ministry of Economy and Competitiveness. This corporate nature renders the CCS subject to the public regulations on budget information and to the control of public oversight bodies (State Public Accounts Department and the Court of Auditors), which determine the control over the management of its risks. Moreover, the mixed nature of its activities must be taken into account -both the strictly insurance as well as the non-insurance activities, even though the latter are connected with the insurance market.

Consequently, with this legal approach, the CCS has taken the steps necessary in order to adapt to compliance with the requirements of the three pillars of Solvency II (capital requirements in relation to the risk, governance system and information and transparency with respect to the market) to the extent that these requirements are compatible with its nature as a public undertaking.

2. Specific contents of the LOSSEAR affecting the CCS

The provisions of the LOSSEAR referring specifically to the CCS essentially encompass four areas of activity: extraordinary risk insurance, collaboration with the supervisory authority, the winding-up of insurance companies[3] and the performance of public functions of an informative nature.

These new developments are contained primarily in the eighth final provision of the LOSSEAR, which amends a number of articles of the current Articles of Association of the CCS, as well as in other articles (162, 163 and 183 to 189) and additional provisions two and fourteen.

A brief summary of the principal new developments is set out below.

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[1] The exclusion was also included in article 4.g) of Council Directive 73/239/EEC, of 24 July 1973 (First Directive on Insurance other than life insurance), amended in this aspect by the Act of Accession of Spain to the European Economic Community.

[2] Article 2.2 of the Articles of Association of the CCS, approved by Royal Legislative Decree 7/2004, of 29 October. The same provision appeared in the original wording of the Articles of Association of the CCS, approved by Act 21/1990, of 19 December.

[3] The references made throughout these comments to insurance undertakings must be understood as made also to reinsurance undertakings.

3. Extraordinary risk insurance

An outstanding novelty in this scope is the extension of the extraordinary risk insurance to include damages as a consequence of extraordinary events[4] affecting motor vehicles which have only contracted third-party insurance (new wording of article 7.b of the Articles of Association).

This is a significant novelty from the point of view of the material scope of extraordinary risk insurance, which has always been tied to the signature of a personal injury or property damage insurance contract. For the first time, the coverage of extraordinary risk insurance is connected with a good –a motor vehicle- that only has the civil liability of its owner insured. In this way, the third-party automobile insurance will also include the obligation to take out extraordinary risk insurance, even though the vehicle does not have own-damage insurance[5].

The reason for this extension must be sought in the key role that vehicles have in the personal and working lives of people in our society and in the interpretation that legislators appear to have made of the limited capacity for perceiving extraordinary risks. Although in the scope of ordinary risks the owner of a vehicle has sufficient elements of judgement in order to decide whether an own-damage insurance policy is advisable or not –a decision which should always remain within the sphere of a person's own criteria- legislators appear to have considered that such capacity of risk assessment is limited in the case of catastrophic risks, therefore making extraordinary risk insurance compulsory.[6]

According to the data contained in the Insured Vehicle Database (FIVA), the total number of insured vehicles was 28.8 million at the end of 2014. Given that, in accordance with the Extraordinary Risk Statistics, series 1971-2014, the number of motor vehicles that had some kind of own-damage coverage in 2014 totalled 22.9 million, the extension of the cover to vehicles with thirty-party coverage alone will mean the inclusion of around 5.9 million additional vehicles, that is, an increase of 26 % over the current number of vehicles with extraordinary risk cover.

In any case, this extension of the scope of extraordinary risk coverage will also involve the application of the relevant surcharge for the CCS in third-party automobile insurance policies. The quantification

[4] The legal definition includes the damages caused by earthquakes and seaquakes, extraordinary floods, volcanic eruption, atypical cyclonic storms and falling celestial objects and meteorites, as well as those occasioned violently as the consequence of terrorism, rebellion, sedition, mutiny or popular uprising, and those derived from events or actions by the Armed Forces or law enforcement agencies.

[5] In practice, motor vehicle owners have been accessing extraordinary risk coverage through partial ordinary damage insurance contracts (for example, glass insurance). In this regard, the Extraordinary Risk Insurance Regulation provides that "*in the polices covering a motor vehicle's own damage, the extraordinary risk coverage provided by the Consorcio de Compensación de Seguros shall guarantee the total of the insurable interest even though the ordinary policy only does so partially*" (article 5.4 the Extraordinary Risk Insurance Regulation, approved by Royal Decree 300/2004, of 20 February).

[6] This decision by legislators can be interpreted in light of the measures put into place by the public authorities, which are analysed in Behavioural Economics in order to favour decisions, in this case for the protection of a person's own assets in the face of risks that are difficult to assess by ordinary citizens and range from a "nudge" through to "compulsion". From the extensive academic and informative literature on this issue, we can quote H. Kunreuther *et al.*, "*Insurance and Behavioural Economics*", where chapter 7 is concerned with an analysis of the anomalies and limitations in the demand for insurance.

of the compensation in these cases will be determined through a regulation to be published pursuant to the LOSSEAR.

4. Collaboration with the General Directorate for Insurance and Pension Funds (DGSFP)

The LOSSEAR enables the DGSFP, as a supervisory authority, to seek the collaboration of the CCS in relation to the special control measures adopted with respect to undertakings in a difficult financial situation (article 162). Likewise, it will be able to obtain the support of the CCS in the performance of functions of the liquidators appointed by the DGSFP, whenever the latter has also decided to proceed with the intervention of the insurance undertaking for the purpose of ensuring the proper fulfilment of the special control measures (article 163.4).

The specific delimitation of these functions of collaboration or support must be made in the provisions pursuant to the LOSSEAR. In any case, these will consist of material actions for the implementation of the decisions of the supervisory authority, without involving administrative powers of any kind whatsoever for the CCS.

This collaboration is clearly connected with the winding-up activity of the CCS, since all of the preventive measures by the supervisor aimed at remedying difficult financial situations or the governance system of insurance undertakings will prevent, in the end, scenarios of serious decline that would lead irreversibly to winding-up.

Also in the framework of the relationship of the CCS with the supervisory authority, mention should be made of the new wording of article 19.2 of the CCS Articles of Association with reference to the inspection by the DGSFP of the settlement of the surcharges collected by the insurance undertakings for the CCS. This verification function is attributed legally to the State Insurance Inspection, given the public nature of such surcharges which, in the case of the winding-up surcharge, also has the nature of a tax. The novelty stems from the fact that a mechanism is established for the compensation of any costs incurred by the DGSFP in the performance of such inspection tasks. The new legal provision will enable an accurate calculation of the costs for the use of resources between public sector bodies and is in line with the suggestions made by the International Monetary Fund in its 2012 report on the insurance supervisory authority, issued in the framework of the Spain: Financial Sector Assessment Programme (FSAP).[7]

5. Winding-up of insurance undertakings

In the regulation of the activity of the winding-up of insurance undertakings by the CCS , changes were introduced both in the formal and material aspects of the administrative winding-up procedure contained in the supervision legislation, as well as in the regulation of this function in the Articles of Association of the CCS.

[7] The part of the report referring to insurance in the "*IMF Country Report No. 12/139*" is available on the IMF website: www.imf.org/external/pubs/ft/scr/2012/cr12139.pdf

In any case, these are improvements derived from the experience gained in winding-up processes already concluded, as well as from the need to achieve consistency with other recent legal reforms, particularly the reform of the Bankruptcy Act or the labour law reform, but without altering the basic elements or the stages of the procedure.

Thus, article 179 determines with greater precision what credits have the status of insurance contract credits, a relevant circumstance in the context of the purchase of credits charged to the resources of the CCS, which is one of the central aspects of the administrative winding-up procedure.

Another significant aspect –due to its importance for the best defence of the interests of the insured and for the speed of the procedure- is the provision whereby the function of the CCS as the liquidator of an insurance undertaking will also involve its appointment as the liquidator of the subsidiaries in which the undertaking holds a majority interest and whose corporate purpose is the management of assets for such undertaking (article 184.5)

In relation to the action of the CCS in the bankruptcy proceedings of insurance undertakings, provision is made for the function of the receiver to be performed exclusively by the CCS; similarly, in the case of a request for an intermediary pursuant to article 5 bis of the Bankruptcy Act, the CCS will also be appointed. Moreover, in the event of the participation of the CCS in a bankruptcy proceeding, the judge, in view of the report issued by the DGSFP, will be able to decide ex officio on the initiation of the winding-up stage without further procedural steps (article 189).

Finally, an innovative provision is introduced in the amendment to article 14 of the CCS Articles of Association with respect to the winding-up of insurance undertakings domiciled in another State of the European Union, circumscribed exclusively to the insurance contracts which such undertakings may have entered into in Spain under the right of establishment or the freedom to provide services. In these cases, the CCS, following a decision by the DGSFP, will be able to carry out activities of providing information to insurance contract creditors. For this purpose, the CCS will be able to sign agreements with the winding-up bodies of the State where an undertaking being wound up is domiciled, in order to facilitate for the insurance contract creditors resident in Spain the submission and processing of their claims. In no case will these activities involve the taking-up of receivership functions with respect to such undertakings or the making of payments or advances of any kind.[8]

6. Conferral of new public functions of an informative nature

During a number of years, the CCS has been managing the Insured Vehicle Database, a central element in the control of the obligation to insure vehicles in our country. The LOSSEAR now confers two new functions of an informative nature upon the CCS. On the one hand, the management of the compulsory third-party insurance register which the new legal provision creates (additional provision two); and on the other, certain activities for facilitating winding-up processes and the collection of taxes

[8] It must be kept in mind in relation to this new function that the insurance contracts entered into in Spain under the right of establishment or the freedom to provide services, covering risks located in Spain or assuming commitments in Spain, are subject to the winding-up surcharge to be paid to the CCS (article 53).

relating to the provision of the fire prevention and extinguishing service by the local corporations (additional provision fourteen).

The regulation of the register of compulsory third-party insurance policies is connected with the provision contained in article 179.4 of the Solvency Directive II[9] concerning the requirement for Member States to inform the European Commission about those risks for which the contracting of compulsory insurance is required. The new register will make it possible to provide this communication, but goes even beyond this to the extent that it gives general publicity to all of the compulsory insurance established by a legal provision, many of which policies are constituted as authentic administrative requirements for access to professional or business activities.

In effect, Public Administrations of all levels have traditionally required the taking-out of compulsory insurance, usually civil liability or surety insurance, either on an exclusive basis or as an alternative to other financial sureties for access to the exercise of certain activities.

The LOSSEAR has an unquestionable regulating purpose in this field. It indicates that it will be possible to require persons who engage in certain activities involving a direct and specific risk to people's health or safety, including their financial security, to take out insurance or provide an equivalent guarantee to cover any damages they may cause and for which they may be liable; however, it establishes that the obligation to take out insurance must be established by means of a provision with the rank of a law and which must have obtained a positive report issued by the DGSFP or a competent authority of the Autonomous Communities. It therefore appears to block the way to the proliferation of compulsory insurance policies through regulatory provisions of different ranks or even through municipal ordinances.

What is entrusted to the CCS is the management of this register, which is updated through the information transferred by the DGSFP, to which the Autonomous Communities, in turn, will communicate the compulsory insurance they create.

The other new informative function attributed to the CCS refers to the work of compiling and processing the information furnished by the insurance undertakings operating in the fire insurance branch, for the purpose of improving the settlement and collection of the fees for the provision of the fire prevention and extinguishing service and the special charges for the establishment or expansion of such services by the local entities (additional provision fourteen of the LOSSEAR).

It is evident that the insurance undertakings have a direct economic interest in the implementation and performance of the fire prevention and extinguishing services, the existence of which should lead to a lower loss ratio, which is the reason why the Law Regulating Local Finances makes provision for

[9] Article 179.4 of the Solvency Directive provides that *"Each Member State shall communicate to the Commission the risks against which insurance is compulsory under its legislation, stating the following: (a) the specific legal provisions relating to that insurance; (b) the particulars which must be given in the certificate which a non-life insurance undertaking must issue to an insured person where that Member State requires proof that the obligation to take out insurance has been complied with.*
(...)
The Commission shall publish the particulars referred to in point (b), of the first paragraph in the Official Journal of the European Union".

local participation in the financing of these services through fees and special charges collected by local corporations, who are the managers of these public services.

The specification of the taxpayers and of the amount of tax attributable to each requires the availability of the necessary information on the turnover of each undertaking by municipality. Up to now this information was provided by the insurance undertakings themselves through an economic interest group created for this purpose. With the entry into force of the LOSSEAR, the CCS will be responsible for compiling the information on the volume of premiums collected in each municipality by each undertaking, conveying such information to the local corporations through the Spanish Federation of Municipalities and Provinces, to enable the latter to collect the taxes. The reason for the change should perhaps be sought in formal reasons of transparency, with the intention that a public body should be the institution responsible for processing and supplying the information used to determine the amount of the undertakings' tax obligations.

Conclusion

To sum up, the LOSSEAR introduces new developments in the regulation of a number of issues directly affecting the activity of the CCS. In addition to taking in the overall framework of Solvency II, to which the CCS will adapt in all that is compatible with its nature, specific aspects are regulated, either by attributing new functions to the CCS or by reconsidering some aspects of the current regulation.

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