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Accessing the German market

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2 December 2010 Malta's insurance industry is growing fast making the island a centre of excellence for financial services at a European level. Indeed, Malta offers a unique mix of an EU-compliant regulatory framework for the insurance industry coupled with an interesting tax regime and a highly qualified and multi-lingual workforce. By harmonising the legal framework, the European legislator has created vast opportunities for the Maltese and its insurance industry. Relying on the European passporting regime, Malta licensed insurers can write business throughout the whole Community and the EEA. Against this background, more and more insurance businesses based in Malta have also accessed the German market.

At the same time, non-unified domestic laws or peculiarities in the application of European regulations still remain relevant. This holds also true for Germany. An insurer aiming at this attractive market will therefore have to consider certain legal issues.

Insurers doing business in Germany via an intermediary have to be licensed. In this regard, European passporting means a big progress for Maltese insurers. In the case of an EU-insurer, the regulatory powers of BaFin are indeed limited recognising the primary jurisdiction of the insurer's home country. Obligations of a Maltese insurer vis-à-vis BaFin are therefore confined to notify its German activities and to provide specified information and documentation. In this regard, the German Insurance Supervisory Act stipulates for a detailed catalogue depending on whether the insurer sells its products via independent brokers or opens its own German branch. Non-compliance may give rise to a fine or imprisonment.

Against this background, a Malta-based insurer has to decide on its sales strategy prior to entering the German market. In practice, it can be difficult to distinguish whether business is written under Freedom of Services or Freedom of Establishment. This is namely the case where a foreign insurer uses brokers. What Freedom applies here depends on the broker's integration in the underwriting process. As the notification-obligations vary, the differentiation is important to be regulatory compliant.

An alternative to be considered may be to offer exclusively online products. In such case no notification is required.

The efforts to unify insurance law at a European level are still in an infant stage. For now, the pertaining stipulations of the Rome-I-Regulation have only harmonised the choice-of-law-rules. It is recognised that these regulations are complex as they distinguish between (1) insurance and re-insurance, (2) mass and large risks. As a general rule, one can note that the underlying rationale of the regime is to protect the insured, where necessary, by limiting the parties' freedom to choose the applicable law.

Hence, in direct insurance for mass risks the law of the country where the insured risk is

located shall in general govern and any choice-of-law-clause to another effect shall be void.

This means, in practice, that insurance for Germany-based mass risks are governed by German law, namely by the German Insurance Contract Act and the stringent rules on standard terms and conditions. A Maltese insurer has to take this into account when drafting its policies and should seek respective advice from German counsel. Moreover, in spite of European harmonisation an insurer will have to adapt its sales procedures to German standards.

Whereas the described restrictions to the choice-of-law applies to mass risks, the European legislator recognises that in the case of large risks the parties are free to choose. Hence, Maltese insurers can offer their products for industrial risks to German insurers using their standard wording governed by their respective domestic laws. The same holds true for captive insurers providing coverage to their respective mother companies. Although it is not settled whether in cases of insurance for large risks German rules on standard terms and conditions apply notwithstanding the pertaining governing-law-clause, the better arguments indicate that Freedom of Services prevails to the effect that the stringent German law cannot invalidate stipulations in the insurance policy.

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