PROCEDURE - Public or private hearing - Application for hearing of reference to be wholly in private - Whether necessary having regard to possible unfairness to Applicants - No - Whether necessary having regard to possible prejudice to consumers - No - Financial Services and Markets Tribunal Rules 2001 (SI 2001/2476)

FINANCIAL SERVICES AND MARKETS TRIBUNAL

EUROLIFE ASSURANCE COMPANY LTD	Applicant
-and-	
FINANCIAL SERVICES AUTHORITY	Respondent

Tribunal: STEPHEN OLIVER QC

ANDREW BARTLETT QC

TERENCE CARTER FCA

KEITH PALMER

Sitting in private in London on 23 May 2002

Ali Malek QC and John Taylor, counsel, instructed by Simmons & Simmons, solicitors for the Applicant

David Mayhew and Andrew George, counsel, for the Financial Services Authority

NOT FOR PUBLICATION UNTIL 26 JULY 2002

REASONS FOR DIRECTIONS

Introduction

1. Eurolife Assurance Company Ltd ("EAC") have applied pursuant to rule 17(3) of the Financial Services and Markets Tribunal Rules 2001 ("the Rules") for a private hearing. The application has arisen in the circumstances that are now summarized.

2. On 24 August 2001, the Financial Services Authority ("the FSA") served on EAC a notice under section 12A of the Insurance Companies Act 1982 ("the 1982 Act") directing that EAC ceased to be authorized to effect contracts of insurance on the grounds that it appeared to the FSA that EAC had not fulfilled the criteria of sound and prudent management required by the 1982 Act.

3. EAC, through its solicitors, objected to the procedure laid down by the 1982 Act in that, amongst other things, there was no provision for a review of the merits of the FSA's decision before an independent and impartial tribunal.

4. In the light of that objection it was agreed that the notices issued pursuant to the 1982 Act would remain in place until the new regulatory regime for insurance companies under the Financial Services and Markets Act 2000 ("FSMA") was introduced with effect from 1 December 2001.

5. Accordingly, on 29 November 2001, the FSA issued a supervisory notice pursuant to section 53(4) of FSMA. This withdrew EAC's authorization to conduct new insurance business with effect from 1 December 2001. It also required assets sufficient to meet EAC's liabilities within the European Community to be held by an approved trustee.

6. On 21 December 2001, EAC referred that action to this Tribunal in accordance with section 55 of FSMA. While it had the statutory right to make representations to the FSA, EAC chose not to exercise this.

7. At a directions hearing on 8 May 2002, this Tribunal ordered that the hearing of that reference be listed for four weeks commencing on 2 September 2002.

8. EAC has applied, pursuant to rule 17(3) of the Rules, for the hearing of that reference to be in private.

The facts relevant to this Application

9. The Group of which EAC is a member ("the Eurolife Group") has Eurolife Assurance Group Plc ("EAG") as its holding company. The subsidiaries relevant to this application are Eurolife Capital Funding Plc ("ECF"), Eurolife Fund Manangement Ltd ("EFM") and EAC.

10. EAG operates both as a holding company for the Eurolife Group and as a trading company providing hedging facilities to, and specialized accountancy, compliance and IT services for, the Eurolife Group. The turnover of EAG, in the year to 30 June 2001, was £10.91 million.

11. EAC has been a member of the Eurolife Group since 1988. It is a UK life assurance company which specializes in single premium bond products. These are issued in tranches and distributed through independent financial advisers ("IFAs"). There are at present some 22,000 policies in operation. The policyholders are in the main aged forty and over. The policies are of a "non-profit" nature in the sense that the amount which the policy in question will provide is defined at the outset. It was not disputed that a policyholder cashing in before maturity would suffer what was referred to as a "penalty" and that existing surrender penalties might, if many policyholders surrendered, have to be increased; this was in order to maintain equity between policyholders who went and those who stayed. EAC's life funds are currently approximately £323 million. Its monthly return to the FSA to 31 March 2002 shows that it was solvent. The return showed surplus assets of £1.4 million over its required solvency margin.

12. On 8 June 2000 HM Treasury started an investigation into EAC under section 43A of the 1982 Act. In June 2000 EAC decided to cease effecting new contracts of insurance.

13. In August 2001 the FSA directed (under section 12A of the 1982 Act) that EAC should cease to be authorized to effect new contracts of insurance.

14. On 20 August 2001 the FSA notified EAC of its intention to make requirements under sections 39 and 40 of the 1982 Act to the effect that EAC should maintain assets to the value of its liabilities within the European Community and that the whole of those assets should be held by a person approved by the FSA as a trustee. The purpose of that assets requirement (we were told in a witness statement of Mr P J Morris of the FSA) was to protect the interests of EAC's policyholders by putting assets in a trust that would not be controlled by EAC or its directors and to ensure that payments out of the funds in the trust could be effectively monitored and controlled. The current position is governed by a supervisory notice dated 29 November 2001, effective from 1 December. This varied EAC's position under the FSMA such that EAC continues not to be authorised to effect contracts of insurance and is subject to an assets requirement pursuant to sections 43 and 48 of the FSMA. The approved trustee of the trust is Royal Bank of Canada.

15. The latest report from EAC is for March 2002. This (as already noted) shows that EAC, at the month end, held sufficient capital to cover its required solvency margin but that the assets which EAC held in its "long-term business fund" were less than that fund's liabilities.

16. EAC's annual Report and Financial Statements for the years ending 30 June 2000 and 2001 report the investigation and the directions given by the FSA under section 12A of the 1982 Act. The Notes to the Accounts for the both years contain this passage:

"During the financial year ended 30 June 2001 the FSA has completed an investigation into the company ... The FSA's findings and actions have been referred to a hearing before an independent tribunal which is likely to take place in early 2002.

In June 2000 the company decided to cease effecting new contracts of insurance. In August 2001 the FSA directed ... that the company should cease to be authorized to effect new contracts of insurance. Whilst the company does not currently intend to start accepting new business, it has decided to challenge this direction.

The company has been the subject of an investigation by the FSA under section 105 Financial Services Act that commenced on 10 August 2001. The investigation is continuing, and the company is co-operating in it.

The directors are unable to assess the impact of the above investigations on the operations of the company until the outcome of the independent tribunal referred to above and the Section 105 investigation have been determined."

The Independent Auditors' Report on EAC's financial statements identifies as "fundamental uncertainties" the outcome and impact of that hearing and of the FSA's investigation. Similar entries are found in EAG's Financial Statements and in the Independent Auditors' Reports on EAG for the same two years.

17. The FSA Register is open to the public and shows the current authorization of all the firms regulated by the FSA. This shows that EAC is not currently authorized to effect new contracts of insurance.

Bond issues by other companies in the Eurolife Group

18. EAG issued publicly quoted bonds of £3.2 million in aggregate in 1996. These were sold to the public within PEPs (524 investors of which 517 were sold through IFAs). The debt to which the bonds relate has been listed on the Irish Stock Exchange. Repayment is due in December 2002. We were told that EAG is not obliged to make early repayment if asked to do so by an investor. We refer to these as "the 2002 Bonds".

19. In 1999 "secured bond ISAs" relating to group debt were "issued" as publicly quoted bonds. These were marketed and sold to the public in ISAs managed by EFM. Some 2,500 investors took them up (2,450 through IFAs). £15.2 million was raised. The proceeds were onlent to EAG. Repayment of the loan by EAG is due to ECF in 2005 when the bonds mature. The loan to EAG is secured on EAG's assets. The bonds were admitted to official stock exchange listing by the Irish Stock Exchange. We refer to them as "the Secured Bond ISAs 2005".

EFM

20. EFM, a financial intermediary, became subject to an investigation pursuant to section 105 of Financial Services Act 1986 on 13 August 2001. The investigations concerned the use of the proceeds of the Secured Bond ISAs 2005. The concerns were that four of the directors had failed to give any or any sufficient regard to earlier representations made to the PIA in 1999 and, contrary to those representations, funds raised by the Secured Bond ISAs 2005 had been used to meet shortfalls in the property linked funds in a Gibraltarian subsidiary of EAG (Eurolife Assurance (International) Ltd). Those concerns are part of the matters referred to this Tribunal by EAC. In November 2001 the four directors of EFM resigned and undertook to carry out no controlled functions at EFM. A new director, Mr Graham Devile (who provided a witness statement), has since been appointed. The FSA through its "Relationship Management Department" has been visiting EFM bi-monthly and receiving weekly reconciliations from EFM.

21. EFM has continued business from the end of 2001 marketing a range of new high income products and acting as plan manager of investment plans taken up by "planholders". The investments in these plans are in the shares of "Special Purpose Vehicles" which have no connection with the Eurolife Group. The marketing literature for these has been reviewed without objection by the FSA.

22. The FSA investigation into EFM has been mentioned in the Directors' Report and in the Independent Auditors' Report in EAG's Annual Report and Financial Statements for the year to 30 June 2001.

The Rules

23. The Financial Services and Markets Tribunal Rules 2001 were made by the Lord Chancellor after consultation with the Council on Tribunals. The enabling powers are in sections 132(3) and 137(6) of and Schedule 9 to FSMA.

24. Rule 17, so far as it is relevant, reads as follows:

"(2) Subject to the following provisions of this rule, all hearings shall be in public.

(3) The Tribunal may direct that all or part of a hearing shall be in private ...

(b) upon the application of any party, if the Tribunal is satisfied that a hearing in private is necessary, having regard to -

(i) the interests of morals, public order, national security or the protection of the private lives of the parties; or

(ii) any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public,

if, in either case, the Tribunal is satisfied that a hearing in private would not prejudice the interests of justice ...

(5) Before giving a direction under paragraph (3) that the entire hearing should be in private, the Tribunal shall consider whether only part of the hearing should be heard in private ...

(11) Where all or any part of a hearing is held or is to be held in private, the Tribunal may direct that information about the whole or part of the proceedings before the Tribunal (including information that might help to identify any person) shall not be made public, and such a direction may provide for the information (if any) that is to be entered in the register or removed from it."

Observations on the relevant law

25. At the time when the Tribunal was being set up there was considerable public debate over whether its hearings should be public or private. Strong views were expressed on each side of the debate. The matter was resolved in the manner set out in rule 17. Rule 17(2) sets out the general position, which is that hearings are to be held in public. But the Tribunal has power to direct that all or part of a hearing be held in private in the circumstances defined in rule 17(3). Both parties cited to us the debate in the House of Lords on the Tribunal's rules (Lords Official Report, 23 October 2001, Vol 627, No 31, Col 922-942). In the course of the debate Baroness Scotland of Asthal (The Parliamentary Secretary, Lord Chancellor's Department) stated that rule 17 "enables the [Tribunal] to exercise its judicial judgment, first, as to whether to decide that the matter should be heard in private and, secondly, which part of the hearing should be heard in private and how disclosure should be managed". She recited the terms of rule 17(3) and described it as a very flexible tool.

26. The remainder of rule 17 contains supplementary provisions, among which rule 17(11) is of particular practical importance. An application under rule 17(3) is likely to be accompanied or followed up by a further application under rule 17(11). (For the distinction between keeping proceedings secret, and merely holding the hearing in private, see Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056, 1070E-G.) It is to be noted that the provisions of rule 17 govern the hearings of references, including preliminary hearings under rule 13; they do not govern the giving of procedural directions or pre-hearing reviews as provided for in rules 9 and 10. Such procedural matters are normally dealt with in private.

27. The application in the present case is made under rule 17(3)(b), relying on sub-paragraph (ii). To justify an order that the hearing be in private the Tribunal must be satisfied upon two matters: (1) a hearing in private is necessary, having regard to any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public, and (2) a hearing in private would not prejudice the interests of justice. We will call these the 'unfairness or prejudice condition' and the 'interests of justice condition'. If satisfied on these

two matters, the Tribunal "may direct" that all or part of the hearing shall be in private. The word "may" indicates to us that the Tribunal, even when so satisfied, is not bound to order a private hearing, but has a discretion to exercise. However, if the two conditions are established, we think the normal course would be to accede to the application.

28. It is plain that rule 17 is partly modelled on Article 6 of the European Convention on Human Rights. The phraseology of rule 17(3)(a) is taken from Article 6. The provision for an applicant to seek a private hearing gives effect to the principle that a litigant may in appropriate circumstances waive the protection of a public hearing. The interests of justice condition gives effect (in part, at least) to the acknowledged limitation on the right of waiver, that such waiver may only be made where it does not run counter to an important public interest: Hakansson v Sweden (1991) 13 EHRR 1, at para 66.

29. It was common ground between the parties that rule 17 was compliant with Article 6, but the FSA and the applicant disagreed over the extent to which we should be guided by the Strasbourg jurisprudence relating to Article 6 or by the law applicable to the privacy of hearings in the ordinary courts of England and Wales. Mr Mayhew on behalf of the FSA submitted that we should be guided by these to a substantial extent, while Mr Malek QC on behalf of the applicant submitted that they were irrelevant, and that our task was simply to apply the terms of the rule. We have found the Strasbourg jurisprudence and English law to be of direct assistance in elucidating the interests of justice condition. We have not found them of direct assistance in relation to the first condition, albeit we have kept in mind the principle that the rule should be interpreted and applied in a manner proportionate to the objectives that are pursued. The function of the Tribunal, where an applicant challenges action taken by the FSA, is to consider the matter afresh and determine what is the appropriate action for the FSA to take in relation to the matter referred (see section 133 of FSMA). The judicial procedures of the Tribunal are designed to secure that justice be done, and to the fullest appropriate extent be seen to be done, within and as part of the regulatory objectives set out in sections 3-6 of the Act.

The unfairness or prejudice condition

30. The phrases "unfairness to the applicant" and "prejudice to the interests of consumers" are not found in Article 6 or in the Civil Procedure Rules but are specific to rule 17.

31. Mr Mayhew gave three categories of circumstances that would constitute unfairness to an applicant. The first was procedural abuse, as where, for example, the FSA reneged on an earlier agreement that the hearing should be in private, which had encouraged the applicant to proceed, or where there would be an unduly long lapse of time between the opening of the case, with consequent public airing of the allegations, and the applicant's opportunity of putting forward its defence to the allegations. The second was where publicity would prejudice the right to a fair trial because of the risk of intimidation of witnesses. The third was where publicity would deprive the proceedings of their purpose. He further submitted that reputational risk (ie the risk of damage to reputation due to adverse publicity) could never constitute unfairness to the applicant but was simply an unavoidable consequence of public hearings. Reputational risk (he said) might indeed be prejudicial, but it was not unfair.

32. We agree that there is a distinction between prejudice and unfairness. Prejudice is not necessarily unfair. We found Mr Mayhew's examples helpful.

However, we do not consider that cases of unfairness need or should be pressed into any particular category. It may well be that in the ordinary run of cases reputational risk will not in itself constitute unfairness, but we do not go so far as to say that reputational risk can never give rise to unfairness to the applicant. It might be unfair if, for example, the reputational damage occurring during the progress of the hearing might be such as to destroy the applicant's business. The suffering of disproportionate damage would be unfair. It is necessary to consider the circumstances of each particular case. The Tribunal is required under the terms of rule 17 to make a judgment whether reputational risk gives rise to unfairness or not. Mr Mayhew argued that, if reputational risk were to be regarded as constituting unfairness, most cases would be held in private, contrary to the plain intention of the rule. We do not agree. The existence of unfairness is not sufficient on its own to predetermine the Tribunal's exercise of its discretion.

33. The applicant in the present case relied on unfairness to associated companies, as well as to the applicant itself. Unfairness to associated companies is not within the terms of rule 17, and is irrelevant, save to the extent that the effect of publicity on associated companies may have knock-on effects upon the applicant itself.

34. There is no corresponding limitation on the prejudice to the interests of consumers which may be taken into account. "Consumers" are widely defined in FSMA sections 5(3) and 138. Any consumers may be relevant for the purposes of rule 17(3); they are not limited to those who are consumers of the applicant's products or who have dealings with the applicant. One of the regulatory objectives is securing the appropriate degree of protection for consumers: see section 5 of FSMA.

35. The rule refers to unfairness or prejudice that "might result" from a hearing in public. The Tribunal is unlikely to be influenced by a 'ritualistic assertion' of unfairness or prejudice (the pejorative phrase is from In re An Inquiry [1988] 1 AC 660 at 709G). The applicant will need to produce cogent evidence of how the unfairness or prejudice may arise. However, the expression "might result" recognises the inherent difficulty of assessing in advance the likelihood of unfairness or prejudice. The applicant is not required to demonstrate on a balance of probabilities that unfairness or prejudice would result. The Tribunal will consider the evidence presented and weigh the degree of risk.

36. This consideration must be done at a time when, ex hypothesi, the Tribunal has not formed any view as to the justification or otherwise of the action taken by the FSA which is challenged by the applicant. We cannot rule out the possibility of there being an extreme case where the merits or demerits of the FSA's action are plain at the time of the rule 17 application. But the normal position is that the Tribunal will approach the application without any investigation of the merits of the reference, on the footing that the FSA's action may ultimately prove to be fully justified, or wholly unjustified, or somewhere in between.

37. This exercise is not concerned with the prospect of unfairness or prejudice arising simply through knowledge of the action or decision taken by the FSA. In many cases the existence of the proceedings will already be a matter of public knowledge, prior to the hearing taking place. After the hearing the Tribunal's decision will normally be made public. The inquiry under rule 17(3) is confined specifically to the unfairness or prejudice that might result from the holding of the hearing in public. Subject to the details of any order made under rule 10(1)(p) or rule 17(11) the concern is likely to be with the effect of publication of allegations or evidence during the hearing itself and in the period up to the publication of the

Tribunal's decision. Such concerns may arise because press reporting may not always succeed in being accurate, or because during the hearing the allegations are more prominently reported than the applicant's answers to them, or because a decision by the Tribunal in the applicant's favour after the conclusion of the hearing may not in practice be sufficient to undo the damage done by the publicising of the allegations. There may also be concerns over other matters, such as unnecessary public disclosure of commercially sensitive or other confidential information.

38. The Tribunal must be satisfied that the risk of unfairness or prejudice resulting from holding the hearing in public makes it "necessary" to hold the hearing in private. Necessity is a question of degree. As Lord Griffiths has stated in a different context:

'"Necessary" is a word in common usage in everyday speech with which everyone is familiar. Like all words, it will take colour from its context; for example, most people would regard it as "necessary" to do everything possible to prevent a catastrophe but would not regard it as "necessary" to do everything possible to prevent some minor inconvenience. Furthermore, whether a particular measure is necessary ... involves the exercise of a judgment upon the established facts. In the exercise of that judgment different people may come to different conclusions on the same facts .... But this cannot be avoided and the task of the judge will not be lightened by substituting for the familiar word "necessary" some other set of words with a similar meaning. ... I doubt if it is possible to go further than to say that "necessary" has a meaning that lies somewhere between "indispensable" on the one hand, and "useful" or "expedient" on the other, and to leave it to the judge to decide towards which end of the scale of meaning he will place it on the facts of any particular case. The nearest paraphrase I can suggest is "really needed." ' In re An Inquiry [1988] 1 AC 660 at 704.

The Tribunal must therefore weigh both the likelihood and the seriousness of the possible unfairness or prejudice and consider whether, in the circumstances, a private hearing is really needed.

The interests of justice condition

39. If the Tribunal is satisfied that a hearing in private is necessary having regard to any unfairness to the applicant or prejudice to the interests of consumers that might result from a hearing in public, the Tribunal may still only direct that all or part of the hearing shall be in private if the Tribunal is satisfied that a hearing in private would not prejudice the interests of justice.

40. In general, justice requires openness. As this was the first case of its kind we agreed, without objection from the parties, to receive a written submission from Mr Joseph Egerton on behalf of Justice in Financial Services, an organisation which we were told exists to provide support and representation for individuals and small firms in difficulties with the FSA or facing a claim before the Ombudsman. Mr Egerton's submission dealt with general principles and was not made with reference to the facts of the particular case with which we are concerned. Mr Egerton's impressive and learned submission drew to our attention the wisdom of notable philosophers, the jurisprudence of the European Court of Human Rights, and historical examples ranging from the trial of Jesus Christ to the Nürnberg Tribunal. The general thrust was that it was in the interests both of the public and of the financial services industry that hearings be in public. Since Mr Mayhew for the FSA made detailed submissions on the topic of the public

interest in open justice, the parties did not find it necessary to offer specific comment on Mr Egerton's submission.

41. Mr Mayhew reminded us of Lord Shaw's endorsement of Bentham's opinion:

"Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." Scott v Scott [1913] AC 417, 477.

See, to the same effect, Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056, 1069G-H. The European Court of Human Rights said in Diennet v France (1995) 21 EHRR 554 at para 33:

"The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention."

Moreover, in some cases the best way of avoiding ill-informed comments in the media is for the court or tribunal to be as open as is possible and practicable: Hodgson v Imperial Tobacco Ltd [1998] 1 WLR 1056, 1073H.

42. Publicity is not, however, always appropriate. This is recognised, as the Court observed in Diennet v France (1995) 21 EHRR 554 at para 33, by the very terms of Article 6, which sanction the exclusion of the public where (among other things) publicity would prejudice the interests of justice. As Lord Diplock said in Attorney-General v Leveller Magazine Ltd [1979] AC 440, 843-844 (recently cited in R v Legal Aid Board, ex p Kaim Todner [1999] QB 966, 972-973):

"... since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule."

43. Rule 17 makes provision for such derogation in defined circumstances subject to the overriding condition that the interests of justice should not be prejudiced. It seems to us that, if the unfairness or prejudice condition is satisfied, in practice this will tend to have the effect that the interests of justice condition will also be satisfied. If the unfairness or prejudice condition is fulfilled, the interests of justice in the particular case are likely to be better served by the holding of the hearing in private. Nevertheless, the Tribunal must keep in mind the important public interest in open justice, which goes beyond the considerations arising from the circumstances of the particular case under review, and before making a rule 17 direction the Tribunal must in every case be satisfied also that the interests of justice in this more general sense will not be prejudiced.

Conclusions

44. With those general observations in mind we now turn to the first matter on which we must be satisfied if we are to direct that the hearing be wholly or partly in private. We have to be satisfied that this course is "necessary" having regard to any unfairness to EAC that might result from a hearing in public or prejudice to the interests of consumers that might so result.

45. The unfairness to EAC from the hearing being held in public was said to arise in at least two ways. First, a public hearing will cause irreparable damage to EAC's reputation, whatever the outcome. Second, the consequential damage to EAC's business will be so disproportionate as to be unfair.

46. Evidence in support was provided by a witness statement from Mr W H J Maidens, financial director of EAC and of EAG, and from Graham Devile, managing director of EFM since 28 November 2001. The reaction to a public hearing would, said Mr Maidens, be an immediate lack of confidence in all the companies comprised in the Eurolife Group. IFAs would, he predicted, no longer be able to recommend Eurolife products. New business would dry up and without new business the Eurolife Group would cease to be viable. Because the Eurolife Group is relatively small, damage to any part of the group would, he believed, impact unfairly on other parts.

47. We have already observed in paragraph 32 above that the risk of damage to reputation will not of itself normally be unfair; it is the suffering of disproportionate damage that could be unfair. Moreover we accept that while rule 17(3)(b)(ii) requires us to focus on the unfairness to the applicant (EAC), we are (as noted in paragraph 33 above) entitled to look at the matter in the round and examine the impact on EAC of collateral damage to other parts of the Eurolife Group.

48. Focusing on EAC and its business, we point out the following -

- The assets requirement imposed by the FSA pursuant to sections 43 and 48 of FSMA and their predecessors in the 1982 Act (see paragraph 14 above) means that the whole of EAC's assets are now held in a trust so as to protect the interests of its policyholders.

- In June 2000 EAC voluntarily declared that it would write no more insurance business. In August 2001 this became a mandatory requirement imposed by the FSA : see paragraphs 12 and 13 above.

- Policyholders are free to surrender early. But if they do so they could be penalized. According to a letter dated 21 May 2002 from Mr Tony Leandro, EAC's appointed actuary, "alarmed policyholders might take action that damaged their own interests" and, if so, he might be forced "to advise (EAC) to increase surrender penalties so that equity can be maintained between policyholders who stay and those who go".

- According to a letter of 29 November 2001 from Mr Maidens to the FSA, a sale of EAC by EAG was anticipated within the next 3-6 months at a "mid-market value" quoted at £16-17 million. Mr Maidens states in his witness statement that the valuation had been prepared by a leading firm of actuaries. It was accepted that due diligence enquiries would inevitably reveal to the potential purchaser the present regulatory requirements imposed on EAC.

Essentially therefore there are funds in EAC to meet the claims of policyholders and only those who, out of alarm, act irrationally and seek early surrender will be penalized when compared with those who stay. Even though EAC has ceased to write new business, the value of its undertaking (which must have taken account of the obligations to policyholders) is, according to Mr Maidens' letter of 29 November 2001, regarded as substantial. The evidence of unfairness to EAC does not satisfy us that a private hearing is necessary.

49. The final aspect of possible unfairness to EAC from a public hearing is that identified in paragraph 37 above. There is a possibility of the press reporting not succeeding in giving a balanced and accurate account of the proceedings at the main hearing. A robust opening for the FSA may be all that the press stay to hear and all they report. To overcome this possibility of imbalance we shall make a direction, the precise terms of which will be agreed between the parties and approved by the Tribunal, to the effect that there will be an opportunity for EAC to make a statement in rebuttal at some stage on day 1 of the hearing (and preferably in the morning).

Prejudice to consumers

50. The definition of the word "consumers" in section 138(7) of FSMA includes "persons who use, have used or may be contemplating using, any of the services provided by authorized persons in carrying on regulated activities or persons acting as appointed representatives". This casts the net wider than EAC's policyholders. There was no dispute that we should regard as consumers the bond holders described in paragraphs 18 and 19 above. We start with the policyholders.

51. We have already referred to the evidence of possible damage to the policyholders. They could be prejudiced if the circumstances of a public hearing cause them to be alarmed and to surrender their policies and suffer "penalties" in doing so. Otherwise they are protected by reason of the regulatory requirements (summarized in paragraph 14 above) imposed on EAC by the FSA. By contrast to the Equitable Life policyholders, referred to as comparables by Mr Maidens, the EAC policyholders have no "with profits" entitlement. There is a limit to the amount of protection that can be given to stop a person acting against his best interests. In this connection we note that there has not yet been any public announcement of the regulatory requirements imposed by the FSA on EAC, other than what has been reported in the Reports to the Annual Accounts of EAC and EAG. We refer to Direction (i) set out at the end of this Decision.

52. Are the bondholders prejudiced by a public hearing? The 2002 Bonds (£3.2 million in aggregate) are due for repayment in December 2002. The repayment problem will then crystallize. We know that EAG is currently seeking to sell EAC for £16-17 million. We are aware of the impact on the reputation of the Eurolife Group that might result from a public hearing. We heard no evidence about other resources, if any, available to EAG to repay those bonds. Nonetheless, EAG's Financial Statements for the years ending 30 June 2000 and 2001 report the fact of the FSA's investigations and the relevant directions. Thus information about the state of affairs surrounding EAG and its subsidiaries is available to the public. The evidence that we have seen gives no definitive indication either way whether the holders of the 2002 Bonds will be repaid on maturity. Overall, we are not satisfied that a private hearing is necessary having regard to any prejudice that might result to the holders of the 2002 Bonds.

53. Moving on to the Secured Bond ISAs 2005, the evidence is of a similar character. The Financial Statements relating to EAG explained that there have been investigations and that a hearing before this Tribunal is anticipated. The accounts reveal that a large proportion of the bonds were issued at a discount. Note 19 to the Group Accounts for the year to 30 June 2001 reads as follows:

"On the 23 July 1999 a subsidiary undertaking, Eurolife Capital Funding Plc issued £15,540,000 of Zero Coupon Capital Bonds 2005, £4,800,000 of 6.5% Annual Income Bonds 2005 and £2,900,000 of 6.2% Quarterly Income Bonds 2005, which are listed on the Irish Stock Exchange. On the same day the proceeds of the issue were lent to the company."

It appears from the evidence of Mr Robert Aitken of the FSA that as at 30 June 2001 £15.77 million would have been required to repay these bonds had they then been repayable. There is no obligation on the "borrower" company (ECF) to repay until 2005. The repayment in full of the bonds is dependent on EAG having sufficient funds to make repayment of the loan to ECF in 2005. The value of EAG's assets will in part be dependent on the price it will get if and when it sells EAC. Overall, the prospect to the holders of the Secured Bond ISAs 2005 of repayment will depend on the future of the Eurolife Group. But that was the position when they invested in those bonds in 1999. We have already referred to Mr Maidens' predictions (in paragraph 46 above) of the damage likely to be suffered by the Eurolife Group as the result of a public hearing. This evidence has not persuaded us that a private hearing is necessary on account of prejudice to consumers that might result from a hearing in public. We have noted in this connection (paragraph 48) Mr Maidens' anticipation that EAG would sell EAC for £16-17 million.

54. Other consumers include the "planholders" referred to in paragraph 21 above. Their "plans" relate to non-Eurolife Group investments. We do not see that any significant prejudice might result to them from a public hearing.

55. The only remaining point we need to consider is one mentioned in Mr Leandro's letter of 31 May 2001. A public hearing may lead to uncertainty and low morale among the staff. Many of the companies within the Eurolife Group share the same staff who are concerned in both dealing with policyholders and completing the year-end returns. For the staff to become disaffected could, we recognize, cause problems both to the companies in the Eurolife Group and to the consumers. So far as damage to EAC is concerned this could only be a relevant factor on "fairness" considerations. We are not persuaded. The possibility of staff loss is an exigency that a small business is normally exposed to. The problem should be capable of being managed. The policyholders, particularly those who seek to encash early, may not get a good service from EAC if there is any substance in Mr Leandro's views. However we do not think that the prejudice to them is such as to make it necessary for the hearing to be in private.

56. For all those reasons we are in principle against EAC's application for the hearing to be in private and decline to make the direction that is sought. We do not therefore have to address the "interests of justice" condition summarized in paragraphs 39-43 above. However, to mitigate the possible risks we will make two Directions as follows-

Directions

(i) That a statement (the terms of which shall be submitted for our approval at least 21 days before the hearing date) be released on the FSA's website

immediately before the start of the main hearing that explains the regulatory actions taken by the FSA in relation to EAC and the purpose of those actions, i.e. to protect the interests of the policyholders.

(ii) That EAC has the opportunity to make a statement in rebuttal of the allegations made by the FSA on the first day of the full hearing.

STEPHEN OLIVER QC ANDREW BARTLETT QC