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The Collection of Premiums on Behalf of Insurers – A Look at the Impact of The Exemption of Juristic Representatives from Section 13(1)(C) of FAIS

4 November 2024 *10 min read*

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Introduction:

1. In practice the need may arise for an insurer to appoint a third party to collect premiums on its behalf. This can be due to a number of reasons, for example where the insurer is a member of a larger group and underwrites insurance products which are linked to a non-insurance product made available to consumers by its sister company. Typical examples are groups that are active in the retail industry, or act as credit providers or service providers, and own a captive insurer which writes third party business and is both a financial services provider (FSP) in terms of the Financial Advisory and Intermediary Services Act, No 37 of 2002 (FAIS) and an insurer (for ease of reference an 'FSP-insurer'). In such a scenario, the question arises as to whether a) the sister company of the FSP-insurer may collect premium on behalf of the FSP-insurer if the sister company is not an intermediary/FSP, b) whether the sister company can receive premium payments from policyholders into its own bank account (as opposed to that of the FSP-insurer), and c) whether the sister company may collect premiums on behalf of more than one FSP-insurer. In what follows, we give an overview of the provisions of section 13(1)(c) of FAIS in this regard, and consider an exemption which has been granted as regards its operation.

Discussion:

2. In terms of section 1 of FAIS, 'representative' (in contradistinction to an *'intermediary'* in insurance parlance) is defined as meaning any person, including a person employed or mandated by such person, who renders a 'financial service' to a client for or on behalf of an FSP, either in terms of conditions of employment or in terms of any other mandate, but excludes a person rendering clerical, technical, administrative, legal, accounting or other service in a subsidiary or subordinate capacity, which service a) does not require judgment on the part of the latter person, or b) does not lead a client to any specific transaction in respect of a financial product in response to general enquiries.
3. FAIS defines *'financial service'* as meaning any service contemplated in the definition of 'financial services provider', including any category of such services. A *'financial services provider'* is in turn defined in FAIS as 'any person, other than a representative, who as a regular feature of the business of such person, a) furnishes advice, or b) furnishes advice and renders any intermediary service, or c) renders an intermediary service'. FAIS defines *'intermediary service'* as including collecting or accounting for premiums or other moneys payable by the client in respect of a financial product, and a *'financial product'* includes a long-term or a short-term (non-life) insurance contract or policy. The collection of premiums on behalf of an FSP-insurer therefore clearly falls within the definition of 'intermediary service' and is thus a 'financial service' as contemplated in FAIS.
4. A 'representative' as defined in FAIS is an agent of the FSP which represents that FSP when rendering 'financial services' to clients. As a consequence, the general principles applicable to agency as entrenched in the common law, apply to 'representatives' as contemplated in FAIS. FAIS not only codifies the common law principles of agency insofar as they relate to the relationship between an FSP and its 'representatives', but also prescribes additional requirements applicable to that relationship.
5. By law an agent (and therefore also a FAIS 'representative') concludes juristic acts (*e.g.* enters into contracts) or other acts on behalf of the agent's principal (such as an FSP). The rights and duties arising from such acts are those of the principal and not of the agent,

although the act itself is concluded by the agent. In other words, if the agent has the requisite authority, it is the principal and not the agent who is the party to the contract.

6. Whether an agent intends to conclude a juristic act for himself or on behalf of a principal is a question of fact. Since a person who concludes a juristic act ordinarily acts for himself and not for another person, the intention to act as agent must be apparent to the person to whom the expression of intention is addressed.
7. FAIS *inter alia* requires a person who acts as a representative of an FSP, prior to rendering a financial service, to provide to the client confirmation by the FSP that a service contract or other mandate to represent the FSP exists, and that the FSP accepts responsibility for activities performed by the representative that fall within the scope of the mandate.
8. Section 13(1)(c) of FAIS provides that a person may not render financial services or contract in respect of financial services other than in the name of the FSP of which such person is a representative. The regulators are on record as stating that the reasons for this requirement include the following –

- to ensure that consumers of financial services know with whom they are contracting and who will ultimately be responsible for performing in terms of their contract;
- to remove any uncertainty as to whether the representative is acting for or on behalf of a principal, or on its own behalf;
- to prevent what they regard as the undesirable business practice of 'renting an insurance licence' which the regulators consider to be undesirable, contrary to the legal position of a 'representative' as contemplated by FAIS, and creating uncertainty and the likelihood of disputes, which may be prejudicial to clients; and
- to ensure that all monies received by an FSP and its representatives, are duly reported on by the auditor of the FSP, as required in terms of FAIS.

9. When section 13(1)(c) of FAIS is applied to the factual scenario sketched in paragraph 1 above, it has the effect that, unless an exemption is granted under section 13(1)(a)(ii), a representative of the FSP-insurer may not contract directly with or be authorised by the FSP-insurer in the representative's own name in respect of the collection of premiums. This is so because the collection of premium constitutes the rendering of financial services as set out above, and a 'representative' may not (absent an exemption) render financial services or contract in respect of financial services other than in the name of its FSP.
10. FAIS requires that a representative's business documentation must clearly reflect the position that it is not acting as a principal, but as a representative. The business documentation must further clearly and prominently indicate the name of the FSP on whose behalf the representative acts.
11. FAIS does not prohibit an FSP-insurer from delegating the function of premium collection to any one or more of its representatives. The representative may therefore (in the factual scenario sketched in paragraph 1 above) collect premiums in its capacity as a representative of the FSP-insurer, but (absent an exemption) may only do so in the name of the FSP, not in its own name.

The Juristic Representatives Exemption:

12. On 26 February 2021 the Commissioner of the Financial Sector Conduct Authority, acting under section 44(4) of FAIS, issued FAIS Notice 15 of 2021, exempting juristic representatives from the provisions of section 13(1)(c) of FAIS to the extent and subject to the conditions set out therein. The exemption is known as the Exemption of Juristic Representatives, and came into effect on 1 March 2021. It was set to expire on 31 December 2023, but has since been extended and will now expire on 20 June 2026 (unless extended again). (For ease of reference, we will hereinafter refer to this exemption as the Juristic Representatives Exemption, or the exemption.)
13. The exemption is limited in its scope and extent and is subject to certain conditions. A juristic representative to which it applies, is only exempted from section 13(1)(c) of FAIS when rendering a *'specific financial service'* on behalf of a *particular FSP*[1] (typically the FSP-insurer in the factual scenario sketched in paragraph 1 above). For current purposes, the term *'specific financial service'* as used in this exemption means the collection, receiving or holding of or dealing in any other manner with premium on behalf of a 'particular FSP' in respect of a financial product issued by that FSP as a registered insurer.
14. Importantly, for purposes of the exemption, the term 'juristic representative' means a person that is a) a company or a close corporation (as defined in section 1 of the Companies Act No. 71 of 2008), b) appointed as a representative of only one particular FSP, and c) has a written mandate from that the 'particular FSP' to render a 'specific financial service' on behalf of that 'particular FSP'. For the exemption to apply, the juristic representative concerned must a) have a written mandate from the 'particular FSP' to render the specific financial service, b) annually obtain written confirmation from the 'particular FSP' that the latter still meets the relevant criteria, and c) comply with certain provisions of the General Code of Conduct for Authorised Financial Services Providers and Representatives.

15. Failure by the juristic representative to comply with the provisions of the exemption will result in the exemption not being available to that juristic representative, which means that section 13(1)(c) of FAIS will apply fully as if no exemption has been granted.
16. If regard is had to the aforegoing, the question as to whether the exemption granted by the exemption is available to an FSP-insurer and its representative (as juristic representative of the insurer) in a particular factual context will also depend on whether the FSP-insurer complies (and continues to comply) with each of the requirements in set out in the definition of 'particular FSP' as set out in the exemption.

Conclusion:

17. In conclusion, if an FSP-insurer complies with all the requirements set out in the definition of 'particular FSP' as contained in the Juristic Representatives Exemption, and the representative concerned complies with all the requirements set out in the definition of "juristic representative" contained therein, then the Juristic Representative Exemption is indeed available to them and the representative may collect premium in their own name and into their own bank account on the FSP-insurer's behalf until 20 June 2026, but may only do so on behalf of one FSP-insurer. This means that the exemption does not allow the juristic representative to do premium collection for multiple FSP-insurers, the idea being to limit the arrangement to a very bespoke factual scenario that will be relatively easy to regulate.

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[1] In the Juristic Representatives Exemption, 'particular FSP' means a Category I or Category IV authorised FSP that

(a) is also an insurer as contemplated in the Short-term Insurance Act, 53 of 1998 or the Long-term Insurance Act, 52 of 1998;

(b) is satisfied and able to demonstrate that the specific financial service rendered on behalf of the FSP by its juristic representative will not

- materially impair the quality of the governance framework of the particular FSP, including its ability to manage its risks and meet its legal and regulatory obligations;
- impair the ability of the relevant regulators to monitor the particular FSP's compliance with regulatory obligations; and
- compromise the fair treatment of or continuous and satisfactory service to clients; and
- monitors, manages and regularly reviews the level and standard of service rendered by the juristic representative to clients, as well as the juristic representative's performance under and compliance with the mandate.



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