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Foreign insurance business in Belgium

Foreign – in particular, EU-origin – ownership of insurers and penetration of the market are strong characteristics of the Belgian insurance sector. As at 31 December 2006, there were: 107 Belgian-domiciled and authorised life and non-life insurance undertakings, of which a significant number are local subsidiaries of major European groups (this number confirms the gradual drop over the last five years, as companies consolidate, withdraw or downsize to a branch or freedom of services basis of operations); 55 branches of EEA insurers; and over 700 EEA insurers operating on a “freedom of services” basis on the market (UK, Irish, Dutch and French insurers to the fore).¹

On the distribution side, the sector comprises some 25,000 registered intermediaries (brokers, agents and sub-agents).²

In 2006, total direct insurance premiums were nearly €30 billion, substantially lower than 2005 and, in fact, largely explained by the re-introduction on 1 January 2006 of insurance premium tax on individual life policies, at the rate of 1.1%, a measure criticised as “an ill-thought out decision” which “...puts a brake on development of savings at a time when the baby-boom generation is retiring.”³ Non-life premiums enjoyed modest growth.

This article focuses on the regulatory regime in Belgium for authorisation and supervision of insurers. It also summarises requirements for distribution of insurance contracts and comments briefly on insurance contract law. Tax is not covered, nor pensions legislation.

1. Introduction and background to regulatory and legal environment

In common with other Member States of the European Union, authorisation and supervision of insurance and reinsurance undertakings follows Europe-wide rules, first set out in EU Directives dating back to the 1960’s and 1970’s (and now being modernised within the EU’s Solvency II project).

This means that the primary legislative text for the authorisation and supervision of insurers is a Law adopted in 1975, the Law of 9 July 1975 “relating to supervision of insurance undertakings” (the “1975 Law”). The purpose of the 1975 Law is:

“... to protect the rights of insured and third parties interested in performance of insurance contracts and, for this purpose, to set out the essential conditions and rules to which the activity of insurance undertakings is subject, to organise supervision of such activity and to fix the particular rules for liquidation of insurance transactions.”⁴

¹ Belgian Official Gazette, 19 February 2007, and CBFA. 2005 Annual Report.

² CBFA website.

³ Translated from Assuralia press release.

⁴ Article 1.

The 1975 Law applies to various categories of insurance undertakings, including the Belgian branches of foreign insurers. It is also the legal basis for authorisation and supervision by Belgium's single financial services authority, the Banking, Finance and Insurance Commission ("CBFA").

2. Authorisation and supervision of insurers

The 1975 Law prohibits: (i) underwriting by an unauthorised insurer; and (ii) insurance mediation by agents, brokers and others in relation to prohibited underwriting. In order, however, to protect the insured's interests, the Law adds that, although contracts covering risks situated in Belgium concluded in breach of the above prohibitions are null and void, the insurer which has concluded such contracts is bound to perform the contract provided the policyholder has taken out the contract in good faith.

Authorisation is granted on fulfilment of statutory and regulatory conditions. The insurer is authorised for specific classes of insurance (grouped under life and non life headings, for example, in life, unit linked and, in non life, accident, sickness, etc.; classes can be combined or "supplementary"). Authorisation must be granted or refused within a period of four months from date of receipt by the CBFA of a complete application. A refusal can be appealed to the Council of State; failure to reply on expiry of the formal period is deemed refusal. Authorisation is published in the State Gazette.

The 1975 Law and its implementing decrees (principally, a Royal Decree of 22 February 1991 - the "1991 Decree") provide a comprehensive list of the documentary requirements for an application for authorisation (see separate box).

Both Belgian and foreign companies must also demonstrate that, taking into account reinsurance cessions, the company's technical and financial resources are sufficient for its scheme of operations and that they meet other conditions and rules of the 1975 Law. By way of example, the 1975 Law prescribes the form of a Belgian insurance company (essentially, joint stock or mutual) and the scope of the objects of the company; the constitutive documents must be free of any provision detrimental to insureds, contracting parties and beneficiaries. Likewise, absent waiver by the CBFA, a Belgian insurer cannot grant loans in any form whatsoever to directors or management. Numerous provisions of the Companies Code, referring to the classic form of joint stock company under Belgian law, the *société anonyme* or *naamloze vennootschap*, apply to Belgian insurance entities, while specific adjustments also reflect the characteristics of Belgian mutual insurers.

Application for authorisation for the branch of a third country insurer is subject to similar requirements. In addition, the insurer must appoint an authorised agent for its Belgian branch, such agent being officially authorised to represent the company before the Belgian authorities and courts. Lastly, authorisation may be refused to a third country company if that country refuses equivalent treatment to Belgian insurers.

The 1991 Decree provides additional guidance on: how to apply; appeal procedure; classes of insurance, etc.

The CBFA issues the authorisation. Authorisation must be used within 12 months or it will be forfeited.

Incorporation and authorisation of a Belgian insurer (or authorisation of a non-EEA branch) is not the sole basis for market entry: EEA insurers can "passport" on to the market on a freedom of services or branch basis (see also below); insurers

can also take a holding in an existing company (whether active or in run-off), but will still face authorisation requirements, for example CBFA review (within a prescribed period of three months) of the suitability of the proposed shareholders.

The 1975 Law has been extensively amended over the years to reflect the increasing sophistication and scope of EU texts and supervisory expertise. Thus, a full panoply of basic prudential provisions applies covering: accounts; constitution and calculation of solvency margin including a minimum guarantee fund; technical provisions and their representative assets; disclosure and reporting requirements, etc. In addition, specific provisions address: notification of a change of control in shareholdings prior to an acquisition or disposal; the powers of supervision and intervention of the CBFA, including safeguard and recovery scenarios; cross-border insurance into and from Belgium on a freedom of services or branch basis; and portfolio transfers and similar transactions. These basic provisions are complemented by rules addressing EU-harmonised matters such as insurer solvency, supervision of insurance groups and financial conglomerates and the duty to ensure “effective management” of insurance companies (the CBFA is particularly attentive to “localisation” issues in this respect).

Summary checklist of authorisation requirements:

- Constitutive documents of the company;
- Details of directors and managers;
- [For Belgian companies] details of shareholders and their paid-up and subscribed holdings in the company (similar provisions apply for associations);
- Details of “close links” between the company and other natural or corporate persons;
- For a non-EEA company whose registered office is outside Belgium [therefore, applying for authorisation for a Belgian branch], evidence that the company is authorised to carry on the insurance activity in the country of its registered office which is subject matter of the application for authorisation, or an explanation why it is not so authorised;
- A scheme of operations comprising all technical and financial data relating to the proposed operations, together with details for setting up administration functions and a distribution network;
- Evidence that the statutory guarantee fund has been set up and, for foreign (non EEA) companies, that additional guarantee requirements have been met; and
- All other information and documents as provided by law.

Furthermore, authorisation as a Belgian insurer (i.e. as opposed to the Belgian branch of a non-EEA company) is subject to additional conditions:

- The head office must be in Belgium;
- Persons holding a “qualifying holding” (as defined - broadly, a significant holding) meet fitness criteria necessary to ensure healthy and prudent management of the company;
- “Close links” with other persons must not impede the CBFA from carrying out its statutory supervision of the insurer; and
- Legislative and other provisions of a third country (non EEA State) i.e. applicable, in law or practice, to persons with close links must not impede the CBFA from its statutory supervision.

Lastly, if the applicant company has previously carried on an insurance activity (and so is, for example, now in run-off) or other activity (and so wishes to extend its objects to include insurance), additional requirements apply.

3. Distribution

Belgium has a lively insurance distribution market with strong competition among the various categories of insurance intermediary. Brokers enjoy a strong position on the market reflecting the buying public’s confidence in independent insurance advice; although an early market for *bancassurance*, Belgium’s experience with this channel has been mixed.

The principal statutory texts are the Law on insurance and reinsurance mediation and on distribution of insurance of 27 March 1995 (the “1995 Law”) and a Royal Decree of 25 March 1996. The 1995 Law,

“..... organises protection of the rights of policyholders, insured and third parties who take part in performance of insurance and reinsurance contracts. For this purpose, it sets out the conditions regarding access to the activity of insurance and reinsurance mediation, to the exercise of such activity and to distribution of insurance, as well as the rules governing information for the public. It also organises supervision of compliance with these conditions and rules.”⁵

The 1995 Law was substantially amended in early 2006 by the text implementing the Insurance Mediation Directive. The amendments introduced into Belgian law definitions of “insurance intermediary” and of “insurance mediation” and the full range of requirements for this sector. The 1995 Law accordingly addresses: registration (based on appropriate professional experience and training); notifications for cross-border mediation activity; the form and content of the register of intermediaries; duties of intermediaries, including professional indemnity insurance and compliance with Belgian general good; complaints procedures; information to be provided by clients about the intermediary (content and form); supervisory powers of the CBFA, as the competent authority for the sector; and sanctions.

Belgium was late implementing the Directive but the new provisions of the 1995 Law have been well understood, are applied effectively and have also encouraged self-regulatory initiatives.

⁵ Article 1.

4. Insurance Contract Law

This overview would not be complete without reference to the principal law on insurance contracts, the Law of 25 June 1992 on terrestrial insurance contracts (the “1992 Law”). The 1992 Law applies “... to all terrestrial insurances save exceptions under specific laws. It does not apply to reinsurance or carriage of goods with the exception of baggage insurance and insurance for removals.”⁶

Although a jurisdiction with a strong tradition of codification (the Civil Code is a primary source for any question on Belgian insurance law), unlike France and Italy (for example), the legislator has not codified insurance contract law. The 1992 Law is, nevertheless, a comprehensive text, addressing domestic and EU-related aspects of insurance law. It comprises four Titles. Title I contains provisions common to insurance contracts generally, including in a distance selling context (e.g. definitions, formation, cancellation, performance and termination of contracts, representations by the parties, scope of coverage, rights and duties of persons with an interest in the contract, term and termination, etc., with specific provisions also on indemnity and lump-sum insurances). Title II is devoted to damage insurance with extensive provisions on insurable value, assignment, etc. and specific rules for fire, natural catastrophes and other defined risks, in particular liability insurance and legal expenses. Title III sets out the rules on life insurance, while Title IV lists criminal sanctions and the CBFA’s supervisory powers.

Two Royal Decrees of November 2003 on life insurance and pension products complement the basic statutory regime of the 1992 Law. As for other texts: marine insurance remains subject to separate provisions (dating back to a Law of 1874); certain pre-contractual information

requirements and disclosures are listed in the 1991 Decree, while the 1975 Law contains provisions on governing law of contracts (but not jurisdictional questions: the 1992 Law expressly limits recourse to arbitration in insurance disputes).

5. Authorisation and supervision in practice

Two recent examples illustrate how the CBFA and the sector generally seek to present a modern, dynamic image.

Firstly, in April 2006, the CBFA issued a 123-page guidance memorandum for applicants seeking authorisation as insurers. These guidelines set out a two-phase procedure for the application (preparatory and approval in principle; and formal filing) and comment on the scope of information required in support of the application, for example a business plan, insurance classes, organisation and management of the company, internal supervision, audit and compliance, technical and financial questions, asset liability, etc. No less than 19 annexes complete the picture.

The quality of the application and the scope of activities contemplated determine statutory and additional capital requirements which the CBFA is likely to set in a given case.

The CBFA is no less rigorous than its larger neighbours in its scrutiny of applications. CBFA officials make no bones about the need for full and frank disclosure when preparing an application. They will resist “forum shopping” and are concerned to avoid any major failure on the market following an inadequate vetting of an application. Furthermore, with regard to third country applicants, the CBFA emphasises its duty, under international reciprocity arrangements, to inform the European Commission of authorisations granted to such companies.

⁶ Article 2.

At the same time, CBFA officials do also adopt a business-like approach and will avoid unnecessary “gold-plating”.

Secondly, at the end of 2006, the insurer and intermediary sectors worked together, with support from the CBFA, to produce a Code of Good Practice. It entered into force on 1 January 2007 and identifies practical issues arising out of the implementation of the Insurance Mediation Directive into Belgian law. It seeks to resolve a number of sensitive questions, such as the scope of information to be provided to clients and liability for advertising and pre-contractual disclosures. The CBFA is also active in its regulation of distribution; it is, for example, one of the few competent authorities to have published a list of general good requirements applicable to intermediaries operating on the Belgian market.

6. Conclusion

Against a background of probable consolidation in the sector, at least three regulatory developments should be noted.

Firstly, the CBFA’s 2005-2007 action plan refers to six priorities: focus on operational supervision; interest rates in the life sector; risk management; flow of information regarding the sector; organisation of supervision; and self-assessment by undertakings.⁷

Secondly, the CBFA will extend authorisation provisions to reinsurance pursuant to implementation of the

requirements of the Reinsurance Directive (by 10 December 2007).

Lastly, in common with many other EEA Member States, Belgium will face a major challenge in implementing the Solvency II Directive into national law.

If you have any questions concerning this Briefing note, please contact Philip Woolfson on +32 2 626 05 19 (pwoolfson@steptoe.com), or Guy Soussan (gsoussan@steptoe.com) on +32 2 626 05 035.

Steptoe & Johnson LLP
Avenue Louise 240, Box 5
B-1050 Brussels
Belgium

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⁷ CBFA 2005 Annual Report.