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Belgian Reinsurance Law Briefing - September 2009

An Overview of the Implementation of the Reinsurance Directive into Belgian Law

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1. INTRODUCTION

On 16 February 2009, Belgium implemented the Reinsurance Directive ("RID") into national law. The implementing text, the "Law relating to reinsurance" ("the Reinsurance Law") was published in the Belgian Gazette on 16 March and entered into force ten days later. A second law, relating to certain procedural matters was also enacted.

The Reinsurance Law comprises 151 Articles most of which are devoted to implementation of the RID. The remaining Articles address certain other prudential matters applicable to the Belgian financial services sector.

This briefing is not an exhaustive analysis of the Reinsurance Law; instead, it summarises the principal provisions, in particular from an EU, cross-border perspective.

2. SCOPE AND AUTHORISATION

The Reinsurance Law applies to Belgian reinsurance undertakings and to reinsurance undertakings established in Belgium or operating in Belgium but without being established in the country, i.e. on a "freedom of services" ("FOS") basis¹. "Reinsurance undertaking" is defined as,

"any undertaking which, for its own account, exclusively carries on the activity of reinsurance, i.e.

a) the activity of accepting risks ceded by an insurance undertaking or by another reinsurance undertaking;

b) [*specific provisions regarding Lloyds*]"².

Therefore, the key concept introduced by the Reinsurance Law is part or full transfer of a risk underwritten by an insurance undertaking to another insurance or reinsurance undertaking; the ceding insurer remains however liable for insurance towards its insured. The business of reinsurance may extend to reinsurance of institutions for occupational retirement provision³. Captives also come within the scope of the text.

¹ Article 3, §1, Reinsurance Law.

² Article 4, 1°, Reinsurance Law.

³ Such institutions are regulated by the Law of 27 October 2006. This Law implements Directive 2003/41/EC (the Pension Funds Directive).

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The Reinsurance Law sets out conditions for taking up the business of reinsurance and for authorisation for life or non-life reinsurance business (or for both), including:

- the legal form and corporate objects of the reinsurance undertaking⁴;
- the minimum guarantee fund which it must hold⁵;
- the identity of its shareholders and whether they are fit and proper⁶;
- the undertaking’s management⁷; and
- the organisation and central administration of the undertaking, for example accounting, IT security, internal audit, adequate management of duties, risks and responsibilities, audit committee, external audit and reporting requirements⁸.

The competent authority for the authorisation and prudential supervision of Belgian reinsurance undertakings is the Banking, Finance and Insurance Commission (“CBFA”)⁹. The CBFA is also the competent authority for the Belgian branches of undertakings established in a third country, i.e. in a State which is not a Member State of the European Economic Area¹⁰.

Operating conditions are set out in detail in the Reinsurance Law and largely follow the provisions of the RID itself. Thus, the Reinsurance Law includes detailed requirements for:

⁴ Articles 13 and 14, Reinsurance Law.

⁵ Article 15, Reinsurance Law. A lower amount is required for a captive reinsurance undertaking.

⁶ Article 16, Reinsurance Law. A recent text (Law of 31 July 2009 implementing Directive 2007/44/EC “...as regards procedural rules and evaluation criteria for the prudential assessment of acquisitions and increase of holdings in the financial sector”) has further tightened the rules on shareholders and shareholdings.

⁷ Article 17, Reinsurance Law.

⁸ Articles 18 and 19, Reinsurance Law: the provisions regarding organisation are largely inspired from the equivalent provisions governing direct insurance undertakings; the central administration must be in Belgium (provision applying Directive 95/26/EC (the Post-BCCI Directive)).

⁹ See: www.cbfa.be. The CBFA is, of course, also the competent authority for the direct insurance sector (insurance undertakings and insurance intermediaries).

¹⁰ The EU Member States are: Austria, Belgium, Bulgaria, the Czech Republic, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Spain, Slovakia, Slovenia, Sweden and the United Kingdom. Together with Iceland, Liechtenstein and Norway they are the Member States of the Economic European Area (“EEA”). The Belgian branches of non-EEA undertakings are subject to authorisation and other requirements comparable to those applicable to Belgian undertakings. See Articles 59 ff, Reinsurance Law.

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- Technical provisions and covering assets¹¹. The Reinsurance Law establishes a general principle of adequacy of provisions for all activities. As with the RID itself, it sets out further principles which govern the choice of covering assets, for example diversification. The King may, for prudential supervision purposes, impose quantitative limits (these are not specified and would have to reflect those set forth in the RID¹²) and may also set more detailed rules defining the extent to which (i) shares of non-EEA reinsurance undertakings in technical reserves and (ii) claims against such undertakings are recognised.

Although it is not expressly stated, this means that EEA reinsurance undertakings are no longer required to post collateral to secure the claims of Belgian cedants. The Reinsurance Law therefore purports to implement the requirement of the RID¹³ that Member States shall not retain or introduce a system with gross reserving which requires pledging of assets to cover unearned premiums and outstanding claims provisions if the reinsurer is a reinsurance undertaking authorised in accordance with the RID or an insurance undertaking authorised in accordance with the Insurance Directives¹⁴. It is understood that the collateral requirements set out in secondary legislation will be amended in due course to restrict their scope to non-EEA reinsurers¹⁵;

- Solvency margin¹⁶. Again, the Reinsurance Law sets a general requirement of adequacy at all times taking into account the reinsurance undertaking's entire business and comprising its assets free of any foreseeable liabilities, less intangible items. Reinsurance undertakings which carry on life and non-life business must have a solvency margin to cover the total sum of required solvency margins in respect of both activities¹⁷. In each case, the King shall set out additional, detailed rules;

¹¹ Articles 20 - 22, Reinsurance Law.

¹² Article 34, 4, RID.

¹³ Article 32 (2), RID. Belgium is a "gross reserve" jurisdiction.

¹⁴ Directives 73/239/EEC or 2002/83/EC.

¹⁵ Article 10, §3, Royal Decree of 22 February 1991 setting out the general regulation for supervision of insurance undertakings provides that the covering assets of Belgian insurance undertakings may include claims against reinsurers; it is not necessary for such claims to be localised in the EU. However, they are only recognised if they are subject matter of a formal acknowledgement of debt and secured in a manner satisfactory to the CBFA. Such collateral requirements will now have to be restricted to non-EEA undertakings (though they might still arise for EEA undertakings as a result of contractual negotiation).

¹⁶ Article 23, Reinsurance Law.

¹⁷ Cf. Article 39, RID.

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- Guarantee fund¹⁸. This is set at one third of the solvency margin (as defined);
- Changes in shareholders and management¹⁹. Such changes are subject to detailed notification and approval procedures with the CBFA, including consultation with other competent authorities, in terms which are similar to Belgium’s implementing text for the direct insurance sector; and
- Mergers and portfolio transfers²⁰. Subject to CBFA approval, a Belgian authorised undertaking may merge with another insurance or reinsurance undertaking; it may also carry out a part or full portfolio transfer to a Belgian or other insurance or reinsurance undertaking. On request by the competent authority of the State of a transferor undertaking, the CBFA may, subject to conditions, issue a solvency certificate with regard to the transferee undertaking²¹. CBFA approval of a portfolio transfer does not extend to transfer of the benefit of retrocession contracts (such contracts are outside the scope of the “portfolio of reinsurance contracts” whose transfer is subject to CBFA approval). Furthermore, because of a restrictive definition of the term “reinsurance undertaking”, the approval is only available for undertakings which are “pure” reinsurance undertakings. The Belgian legislator has also favoured a “fast track” procedure avoiding, for example, any requirement to notify reinsureds or to publish in the official gazette. This approach is markedly different from Belgian provisions on transfer of a direct insurance portfolio (these provisions include, for example, a right of cancellation by the policyholder)²².

Additional provisions govern the conditions under which a Belgian authorised undertaking may carry on reinsurance business abroad²³ (see also section on “European passport” below).

The CBFA enjoys wide powers to require provision of information relating to the organisation and operation of undertakings. These powers include “site and copy” powers, i.e. inspection on the undertaking’s premises, whether in Belgium or abroad, and copies of all relevant materials, in order to:

¹⁸ Article 23, Reinsurance Law.

¹⁹ Articles 24 – 26, Reinsurance Law.

²⁰ Article 28, Reinsurance Law.

²¹ The rules are similar to those set out for mergers of direct insurance undertakings and for transfers of direct portfolios.

²² This summary is based on the primary legislation. The CBFA is preparing regulations to complement the primary legislation, for example providing, as already applies in the direct sector, for publication in Belgium of portfolio transfers between foreign undertakings.

²³ Article 30 - 36, Reinsurance Law.

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- Check compliance with statutory or regulatory provisions, including ensuring that the accounting, annual accounts, returns and other information provided are true and accurate;
- Check that the undertaking has sound management structures, administrative and accounting procedures and adequate internal control mechanisms; and
- Ensure that the undertaking is managed in a sound and prudent manner and that its situation or operations do not put its liquidity, profitability or solvency at risk²⁴.

Reinsurance intermediaries must also, on request, provide information to the CBFA regarding all reinsurance contracts in their possession²⁵.

3. AUDITING AND ACTUARIAL

The Reinsurance Law provides that appointment of the principal and deputy auditors of a reinsurance undertaking is subject to prior approval by the CBFA²⁶. Auditors cooperate with the CBFA in the latter's exercise of its supervisory powers. The auditors remain solely and personally liable for the performance of their duties. These include:

- Assessing the methods of internal supervision adopted by the reinsurance undertaking and providing the CBFA with their conclusions;
- Reporting to the CBFA on review and audit of periodic returns in accordance with specific criteria and other requirements;
- On request from the CBFA, preparing specific reports on the administrative procedures, business and financial structure of the reinsurance undertaking (at the undertaking's cost); and
- On their own initiative, reporting to the CBFA acts, decisions and developments which might influence the financial situation of the undertaking, its administrative and accounting procedures or its internal audit. They must also report facts and decisions which constitute breaches of applicable legislation (in particular the Companies Code and the Reinsurance Law), the undertaking's statutes, or which could lead to a refusal to certify the accounts, or which could give rise to qualifications²⁷.

²⁴ Article 37, Reinsurance Law.

²⁵ Article 37, *ibid.*

²⁶ Article 40, Reinsurance Law.

²⁷ Article 45, Reinsurance Law.

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Although personally liable, auditors enjoy immunity from civil, criminal, or disciplinary proceedings where they make a disclosure to the competent authorities in the terms set out above.

4. EXCEPTIONAL MEASURES AND LOSS OF AUTHORISATION

The CBFA has power to require remedial measures within a specified period, where it finds that:

- a reinsurance undertaking is not operating in accordance with the provisions of the Reinsurance Law and its implementing provisions; or
- its management or financial situation does not provide sufficient guarantees that it will be able to meet its commitments; or
- there are serious shortcomings in its administrative, accounting or internal audit procedures.

In the absence of remedial measures within the specified period, the CBFA may furthermore:

- appoint a special auditor with extensive supervisory powers; or
- suspend for a specified period the carrying on of part or all of the business of the undertaking or, even, prohibit activity; or
- require changes in the undertaking's management²⁸.

The CBFA may also restrict or prohibit disposal of the undertaking's assets²⁹. This is an exceptional measure subject to extensive conditions and procedural safeguards, for example: (i) rules setting out the circumstances in which the CBFA may so intervene; (ii) the nature of any financial recovery plan; (iii) the effectiveness of retrocessions; (iv) the consequences of the restriction or prohibition on the covering assets; and (v) cooperation with other competent authorities.

A reinsurance undertaking may abandon part or all of its authorisations, by notice to the CBFA which then determines the date that the notice will take effect³⁰. In addition to revocation powers under the exceptional measures noted above, the CBFA may also revoke authorisation if an undertaking:

- does not use its authorisation within twelve months; or

²⁸ Article 47, Reinsurance Law. This Article is without prejudice to loss of authorisation pursuant to insolvency proceedings.

²⁹ Article 48, Reinsurance Law.

³⁰ Article 52, Reinsurance Law.

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- ceases to carry on business in excess of six months; or
- no longer meets the conditions for authorisation³¹.

Authorisation is also deemed revoked by operation of law in the event of insolvency or winding-up of the undertaking.

Abandonment or revocation of authorisation, whether in full or part, prohibits the undertaking from underwriting new contracts in the relevant classes. The CBFA may intervene to authorise a transfer of portfolio. Reinsurance undertakings remain bound by the provisions of the Reinsurance Law until settlement of all reinsurance contracts and related commitments³².

5. EUROPEAN PASSPORT

The Reinsurance Law enshrines the principle of “mutual recognition” of prudential supervision for reinsurance, as already exists in other financial services sectors. Mutual recognition is the cornerstone of the “European passport” which allows a Belgian reinsurance undertaking to set up a branch in another EEA Member State or to operate there on a FOS basis³³; likewise, reinsurance undertakings incorporated and authorised in another EEA Member State may exercise passport rights to operate on a branch or FOS basis in Belgium³⁴.

In common with other EU financial services legislation, the passport is not available to the Belgian branch of a non-EEA reinsurance undertaking. The Reinsurance Law does, however, allow a non-EEA reinsurance undertaking to operate on the Belgian market without being required to set up a branch³⁵. The undertaking is subject to a number of provisions of the Reinsurance Law and implementing texts, including a requirement to notify the CBFA of the reinsurance it proposes to offer on the Belgian market³⁶. The CBFA may prohibit this activity if the State of origin of the

³¹ Article 53, Reinsurance Law. The scope of the terms, such as “use of authorisation”, is not defined in the Reinsurance Law.

³² Article 54, Reinsurance Law. In the absence of some form of commutation or scheme of arrangement under Belgian law, this rule may simply encourage the emergence of moribund undertakings, which are in run-off but cannot be definitively wound-up.

³³ Articles 30 – 36, Reinsurance Law. In short, these Articles provide for notification to the CBFA and the CBFA’s consent to carrying on business outside Belgium, whether on a FOS, branch or foreign subsidiary basis.

³⁴ Articles 55 – 58, Reinsurance Law. The CBFA retains residual powers in case of doubt as to the financial capacity of the EEA undertaking or where the undertaking is in an “irregular situation” (cf. Article 47, RID – which does not, however, refer to doubt regarding financial capacity).

³⁵ Article 68, Reinsurance Law.

³⁶ Articles 68, 70 -72, Reinsurance Law.

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undertaking does not grant reciprocal rights of access for Belgian undertakings. In any event, its activity on the Belgian market will be on a “national treatment” basis³⁷.

6. PROHIBITIONS AND SANCTIONS

The Reinsurance Law contains extensive provisions on prohibitions and administrative sanctions (which the CBFA may apply) ranging from “name and shame” to administrative prohibitions and orders, and fines for non-compliance. In theory at least, these can apply to foreign (EEA and non-EEA) undertakings³⁸.

Extensive criminal sanctions may also apply, in particular for carrying on unauthorised reinsurance business, failure in reporting and other filing requirements, breach of safeguard measures, false accounting, etc.³⁹ The CBFA is kept informed of such breaches and may be a party in criminal proceedings⁴⁰.

7. FINITE REINSURANCE AND SPECIAL PURPOSE VEHICLES

The Reinsurance Law devotes a separate section to “finite reinsurance” and “special purpose vehicles”, as contemplated by the RID itself⁴¹.

Firstly, it includes a general provision empowering the King, following an opinion from the CBFA, to adopt specific regulations on finite reinsurance. “Finite reinsurance” is defined in the same terms as those set out in the RID⁴². The Reinsurance Law lists those matters which may be further regulated by the King⁴³.

The King may also, following the opinion of the CBFA, adopt rules authorising the creation in Belgium of “special purpose vehicles”. Again, the Reinsurance Law

³⁷ Article 69, Reinsurance Law.

³⁸ Articles 73 and 74, Reinsurance Law.

³⁹ Articles 75 – 77, Reinsurance Law.

⁴⁰ Articles 78 and 79, Reinsurance Law.

⁴¹ Articles 45 and 46, RID.

⁴² i.e. “reinsurance under which the explicit maximum loss potential, expressed as the maximum economic risk transferred, arising both from a significant underwriting risk and timing risk transfer, exceeds the premium over the lifetime of the contract by a limited but significant amount, together with at least one of the following two features:

(i) explicit and material consideration of the time value of money,

(ii) contractual provisions to moderate the balance of economic experience between the parties over time to achieve the target risk transfer.” – Articles 2, 1(q) RID and 4, 18°, Reinsurance Law.

⁴³ Article 80, Reinsurance Law. To date, no secondary legislation has been adopted.

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provides a definition identical to that in the RID⁴⁴ and sets out the principal matters to be covered by the secondary legislation⁴⁵.

8. INSURANCE AND REINSURANCE GROUPS

Under the Reinsurance Law, a reinsurance undertaking which is a member of an insurance or reinsurance group (as defined) is subject to supplementary supervision on the same basis as insurance undertakings in a group. In addition, the Reinsurance Law has also already reflected expected amendments to the RID to bring it into line with the Financial Conglomerates Directive⁴⁶.

As with the supplementary supervision provisions applicable to direct insurance undertakings, the Reinsurance Law imposes a full panoply of definitions and conditions, for example to address intra-group transactions and cooperation between competent authorities.

9. TRANSITIONAL PROVISIONS

These largely reflect the solutions adopted in the RID:

- “Grandfathering” of Belgian undertakings as at 10 December 2005, subject to compliance with the new rules, including filing of a detailed scheme of operations;
- A waiver from the new requirements for reinsurance undertakings which, on 10 December 2007, have ceased concluding new reinsurance contracts and which administer their portfolio in order to terminate their activity (though they must still so notify the CBFA)⁴⁷.

10. THE PRACTICAL IMPLICATIONS OF THE REINSURANCE LAW

This section puts the Reinsurance Law in the broader context of Belgian reinsurance law.

⁴⁴ i.e. “any undertaking, whether incorporated or not, other than an existing insurance or reinsurance undertaking, which assumes risks from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the proceeds of a debt issuance or some other financing mechanism where the repayment rights of the providers of such debt or other financing mechanism are subordinated to the reinsurance obligations of such a vehicle;”

⁴⁵ Article 81, Reinsurance Law. To date, no secondary legislation has been adopted, nor is any contemplated.

⁴⁶ Articles 82 – 98, Reinsurance Law.

⁴⁷ Articles 148 and 149, Reinsurance Law.

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First of all, the Reinsurance Law complements the existing body of legislation governing reinsurance business, including: (i) the Law creating a single prudential supervisory authority in Belgium⁴⁸; (ii) annual and consolidated accounts requirements⁴⁹; (iii) Belgian implementation of the Insurance Mediation Directive, including its application to reinsurance intermediaries⁵⁰; and (iv) general provisions on insurance contracts set out in the Civil Code, mandatory coverage rules, e.g. for terrorism, and antitrust texts.

Furthermore, as noted in the introduction, at the same time as the Reinsurance Law was enacted, a separate law also sets out the procedure for appeal against decisions of the CBFA⁵¹: appeal lies to the Court of Appeal of Brussels against CBFA injunctions and fines; and to the Council of State against CBFA decisions regarding authorisation, objections and revocations.

Secondly, Belgium is a modest market and counts only one authorised reinsurance undertaking⁵² and a small number of Belgian and EEA-authorised reinsurance intermediaries⁵³. Consequently, the provisions of the Reinsurance Law addressing EEA and third country reinsurers' access to the Belgian market are likely to be more important in practice, for example ensuring that EEA undertakings do not have to satisfy any collateral requirements. Local market contract law and practice are likely to be key aspects of any decision to operate on the Belgian market.

Thirdly, the Reinsurance Law has undoubtedly simplified the terms of access for EEA undertakings to the Belgian market and usefully gathers in a single text the supervisory requirements for non-EEA undertakings. That said (and as noted above), the Reinsurance Law also grants power to the King to adopt secondary legislation; adoption and publication are imminent. In fact, the RID required implementation into national law by 10 December 2007⁵⁴, so Belgium was late. In an ironic, but not unusual, twist on 30 June, the European Court of Justice held that "... by not adopting all the laws, regulations and administrative provisions necessary to comply with [the RID] or, in any event, by not communicating those measures to the Commission, the Kingdom of Belgium has failed to fulfil its obligations under that directive;"⁵⁵

Finally, like markets, legislation never stands still: having now implemented the RID, Belgium will shortly have to consider the Solvency II Framework Directive in earnest and its possible impact on the various requirements of the Reinsurance Law.

⁴⁸ Law of 2 August 2002 relating to oversight of the financial sector and financial services.

⁴⁹ Royal Decrees of 17 November 1994 and 1996.

⁵⁰ Law of 27 March 1995 relating to mediation in insurance and reinsurance and to distribution of insurance.

⁵¹ The provisions implement Article 53, RID.

⁵² Secura: www.secura-re.com

⁵³ The CBFA website includes details of Belgian and EEA reinsurance intermediaries.

⁵⁴ Article 64, RID.

⁵⁵ Commission vs. Belgium, C-490-08.

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If you have any questions concerning this briefing, please contact Philip Woolfson (pwoolfson@step toe.com) or Guy Soussan (gsoussan@step toe.com). For more information about our EU Insurance Practice please [click here](#).

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