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Insurance & Reinsurance 2023

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Belgium: Law & Practice
and
Belgium: Trends & Developments

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BELGIUM

Law and Practice

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Contents

1. Basis of Insurance and Reinsurance Law

1.1 Sources of Insurance and Reinsurance Law

Insurance and reinsurance law is governed by a comprehensive body of law.

Firstly, the authorisation and supervision of (re) insurance undertakings is governed by the Law of 13 March 2016 on the statute and supervision of insurance and reinsurance undertakings (Solvency II Law), which implemented Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II Directive).

Other implementing Royal Decrees and regulatory guidance by the national competent authority for prudential supervision, the National Bank of Belgium (NBB), supplement the Solvency II Law.

Secondly, the Law of 4 April 2014 on insurance (the "Insurance Law") governs, among others, the activity of (re)insurance distribution. The Insurance Law implements Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) – the Insurance Distribution Directive (IDD).

Laws governing specific aspects of insurance law, implementing Royal Decrees and regulatory guidance by the national competent authority for supervision on (re)insurance distribution, the Financial Services and Markets Authority (FSMA) supplement the Insurance Law.

Finally, the Insurance Law and related texts set out general Belgian rules relating to insurance contracts including, among others, mandatory formalities for the conclusion and performance of insurance contracts, rules of conduct and minimum content for various types of insurance contracts.

2. Regulation of Insurance and Reinsurance

2.1 Insurance and Reinsurance Regulatory Bodies and Legislative Guidance

Insurance and reinsurance business is regulated by the Solvency II Law, which is supplemented by implementing Royal Decrees and regulatory guidance by the national competent authority for prudential supervision, the NBB.

The activity of (re)insurance distribution is governed by the Insurance Law. Among others, this law implements the IDD. The FSMA is the national competent authority for supervision on (re)insurance distribution.

2.2 The Writing of Insurance and Reinsurance

Insurance and reinsurance undertakings are not allowed to carry out any activity of insurance in Belgium unless they have obtained a licence.

The Solvency II Law has implemented the European rules with regard to passporting rights for insurance and reinsurance undertakings established in other EEA member states.

Additional requirements are imposed on insurance undertakings established and licensed in third-country jurisdictions. They must establish a local Belgian branch before carrying out activities in Belgium.

Reinsurance undertakings established and licensed in third countries have a choice: they can establish a branch in Belgium or carry out their activities by way of the freedom to provide services with regard to the same activity for which they have obtained authorisation in their home state.

The requirements for carrying out insurance or reinsurance activities do not differ depending on whether those activities relate to consumers or to SMEs and corporations. Furthermore, no different rules apply to the underwriting of excess layers.

The requirements for authorisations are described in the Solvency II Law and the Royal Decree of 22 February 1991 on the general regulation on the supervision of insurance undertakings. In its 2017 memorandum on the application for authorisation by an insurance or reinsurance company under Belgian law and related communications, the NBB issued further practical guidance.

The key criteria for authorisation relate to quantitative requirements (such as minimum capital requirements), qualitative requirements (such as governance) and transparency requirements (such as reporting to the NBB and disclosures to the general public).

Reinsurance undertakings are equally subject to a comprehensive body of insurance regulation. However, both the Solvency II Law and the Insurance Law take into account the specific nature of reinsurance business. Often, this results in less stringent regulatory conditions, such as the requirements for market access for third-country reinsurance undertakings or the (non-)imperative nature of the provisions governing reinsurance contracts.

2.3 The Taxation of Premium

An insurance premium tax is due when the insured risk is located in Belgium. The normal rate is 9.25%, but there are also reduced rates, depending on the nature of the insurance products. Additional contributions may apply to specific insurance coverages (excluding third-party motor liability insurance coverage).

3. Overseas Firms Doing Business in the Jurisdiction

3.1 Overseas-Based Insurers or Reinsurers

Insurance and reinsurance undertakings established in other EEA member states may exercise passporting rights through a branch or by way of the freedom to provide services in accordance with European rules.

Insurance undertakings established in third-country jurisdictions can only carry out activities in Belgium after establishing a local branch.

This procedure is governed by the Solvency II Law and regulatory guidance by the NBB, notably the NBB's 2017 Communication on the procedures for the performance of insurance or reinsurance activities in Belgium by insurance or reinsurance companies governed by foreign law.

The branch of an insurance company from a third country may only perform insurance activities in Belgium if, among others:

- the insurance company is governed by the law of a third country that is considered "equivalent";
- the NBB has entered into a co-operation agreement with the supervisory authorities of the third country of origin;

- the insurance company has been granted authorisation in the third country of origin for performing the insurance activities it intends to carry out through its Belgian branch; and
- the branch has been granted prior authorisation by the NBB.

To obtain NBB approval, the branch of the insurance undertaking must submit a dossier to the NBB, containing, among others, information on its organisation, solvency and prudential information, proof that it has the necessary eligible own funds to attain half of the absolute floor of the minimum capital requirement and sufficient collateral in Belgium and the contact details of the authorised representative in Belgium.

The UK became a third party since 1 February 2020 but benefited from the EU's passporting arrangements until 31 December 2020. In the context of Brexit, the Belgian legislature has provided for a transitional regime for which it requires insurance undertakings governed by UK law that have lost their passporting rights and intend to run off (that is, decrease assets of) an existing portfolio to notify the NBB of their intention. This notification must contain the following information.

- A pledge not to conclude any new insurance contracts in Belgium.
- Evidence that the insurer is duly licensed to carry out activities of insurance in the UK.
- Evidence that the insurer complies with UK legal and regulatory requirements, that it is not subject to a recovery plan, a plan of short-term financing or a comparable measure of the UK supervisors and that no reorganisation measure is imposed in the UK.
- A run-off plan.
- A commitment to support the Belgian activities financially and operationally in order to pay insurance benefits in the interest of policyholders and beneficiaries.
- The provision of any information allowing the NBB to assess the insurer's commitments in Belgium.
- The appointment in Belgium of a representative who meets the requirements of Article 593 of the Solvency II Law. In particular, the representative must:
  (a) be domiciled or have their usual residence in Belgium;
  (b) have sufficient authority to bind the company towards third parties and represent it before Belgian authorities and courts; and
  (c) meet the same fit and proper requirements as a board member or a member of the management committee.

Furthermore, the insurer in run-off must comply with the following requirements:

- it must update this information at least once a year and on the occasion of every important change; and
- it must inform the policyholders and beneficiaries as soon as possible that the continuity of the insurance benefits is guaranteed and provide all useful information in this regard.

Reinsurance undertakings established and licensed in third countries may establish a branch in Belgium or carry out their activities by way of the freedom to provide services with regard to the same activity for which they have obtained authorisation in their home state.

3.2 Fronting

Fronting (that is, a risk-management mechanism in which an insurer underwrites a policy to cover a specific risk or a set of risks, then cedes the risk(s) to a reinsurer) is permitted in Belgium but

it cannot be excluded that the NBB will consider that the reinsurer should exercise insurance activities. Depending on the concrete circumstances, the amount of risk ceded will probably be relevant. The NBB could rely on the European Insurance and Occupational Pensions Authority (EIOPA) recommendation, according to which a minimum retention of 10% of the business written could be envisaged.

4. Transaction Activity

4.1 M&A Activities Relating to Insurance Companies

Pursuant to Article 102 of the Solvency II Law, the prior approval of the NBB is required for mergers involving an insurance or reinsurance undertaking, as well as for demergers. The same applies to the transfer of all or part of the business, including the complete or partial transfer of a portfolio, resulting in the transfer of the rights and obligations arising from the insurance or reinsurance contracts. The NBB can only refuse its approval for reasons relating to the undertaking's ability to comply with the provisions of the Solvency II Law or other measures implementing the Solvency II Directive, or for reasons relating to a sound and prudent policy of the undertaking or if the decisions could seriously affect the stability of the financial system. The NBB has published a circular concerning the procedure to be followed in the case of transfer of a portfolio of insurance or reinsurance contracts and in the case of mergers or demergers (NBB_2021_006).

The NBB shall publish in the Belgian Official Gazette an extract from any decision approving a merger or a transfer of rights and obligations arising from insurance or reinsurance contracts.

Portfolio transfers involving the transfer of rights and obligations of insurance contracts for which the member state of the commitment or of the risk is Belgium, carried out by an insurance undertaking governed by the law of another member state and approved by the supervisory authorities of its home member state, are published in Belgium as well.

The Insurance Law provides that transfers of insurance contracts relating to risks or commitments situated in Belgium are opposable to the policyholders, the insureds, the beneficiaries and any third party that has an interest in the performance of the insurance contract when they are authorised by the NBB or by the competent authorities of another member state. This opposability takes effect as soon as the NBB's approval is published in the Belgian Official Gazette.

However, the Insurance Law provides a right of cancellation for the policyholder which must be exercised within three months from the date of publication. Moreover, this right of cancellation does not apply to mergers and demergers of insurance companies or to transfers carried out within the framework of a contribution of assets in general or of a branch of activity, or to other transfers between insurance companies that are part of the same consolidated whole.

Several insurers specialised in run-off are active on the Belgian market. It is expected that this run-off business will only grow in the future.

According to a study of the NBB, inward direct investments exceeded outward investments until 2015. More was invested in Belgium than what Belgium invested abroad, mainly because of the central location of Belgium within the EU and its well-educated labour market. However,

there has been a shift towards more outward investments since 2015. Note that this study does not focus on insurance and reinsurance undertakings alone but provides an overall insight to inward and outward investments in Belgium. Furthermore, there have been no mergers or demergers of (re)insurance undertakings in 2022 according to the website of the NBB. There have only been transfers of portfolios (18 to be exact).

5. Distribution

5.1 Distribution of Insurance and Reinsurance Products

In the Insurance Law, insurance distribution is defined as:

"... the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media."

The following activities are considered as insurance distribution:

- presenting insurance contracts;
- proposing insurance contracts;
- carrying out other work for the conclusion of insurance contracts;
- concluding insurance contracts;
- contributing in the administration of insurance contracts; and
- contributing in the execution of insurance contracts.

Among others, the following are not considered as insurance distribution activities:

- the occasional provision of information to a customer in the context of another professional activity (other than insurance distribution), insofar as the information provider does not take any further steps to assist in the conclusion or execution of an insurance contract;
- professional claims handling for an insurance undertaking and claims settlement and expert assessment;
- the mere provision of data and information on potential policyholders to insurance intermediaries or insurance undertakings, provided that the information provider does not take any further steps to assist in the conclusion of an insurance contract; and
- the mere provision of information on insurance products or on an insurance intermediary or insurance undertaking to potential policyholders, provided that the information provider does not take any further steps to assist in the conclusion of an insurance contract.

The last two activities mentioned are the typical activities of a client contributor. The FSMA provides more guidance on the qualification as client contributor.

The activity of (re)insurance distribution is governed by Part 6 of the Insurance Law, as well as its implementation of Royal Decrees and FSMA regulatory guidance.

(Re)insurance intermediaries must register with the FSMA before carrying out (re)insurance distribution activities in Belgium or, alternatively, exercise passporting rights when registered in another EEA member state.

The FSMA register of insurance intermediaries consists of the following categories:

- insurance brokers;
- insurance agents;
- insurance sub-agents;
- mandated underwriters; and
- ancillary insurance intermediaries.

In addition to these categories of insurance intermediaries, insurers may also act as (direct) insurance distributors without the intervention of an insurance intermediary. In that case, the insurers have to comply with the provisions of Part 6 of the Insurance Law as insurance distributors. Sometimes, these provisions are less stringent than the provisions applicable to insurance intermediaries. Bancassurance (a strategy where a bank cross-sells by selling insurance products through its own bank distribution channels) is also a common practice in Belgium. The FSMA has drawn attention to the EIOPA warning with regard to bancassurance to ensure that credit protection insurance (CPI) products offer fair value to consumers by:

- taking action to address issues with high remuneration paid by insurance manufacturers to insurance distributors for the sale of CPI products; and
- preventing detrimental conflicts of interest in the context of bancassurance business models.

Reinsurance distribution is equally regulated by the Insurance Law. The FSMA register of reinsurance intermediaries consists of the following categories:

- reinsurance brokers;
- reinsurance agents; and
- reinsurance sub-agents.

The FSMA regularly emphasises that the whole chain of (re)insurance distribution is regulated and that any (re)insurance undertakings must verify whether all intermediaries in the distribution chain are duly authorised. For example, the FSMA reminded insurance distributors on 9 June 2022 of the prohibition on relying on insurance intermediaries and ancillary insurance intermediaries who are not registered, referring to the applicable criminal sanctions and administrative fines.

The Insurance Law sets out detailed registration conditions (eg, professional knowledge and experience requirements for regulated positions), as well as rules of conduct (eg, precontractual disclosures, conflict of interest management). These rules are further supplemented by Implementing Royal Decrees, such as the Royal Decree of 18 June 2019 on the implementation of Articles 5, 19°/1, 264, 266, 268 and 273 of the Insurance Law, and FSMA guidance (eg, Handbook on IDD rules of conduct of 25 January 2022, newsletters, FAQs).

6. Making an Insurance Contract

6.1 Obligations of the Insured and Insurer

Under Belgian law, the (prospective) policyholder is the most suitable person to inform the insurer of the risk to be insured. For this reason, the (prospective) policyholder has been assigned a spontaneous obligation to inform, which also

forms the essence of the insurance agreement. This obligation stems both from the principle of good faith and from the concern to correct the imbalance of information between the insurer and the policyholder. As soon as possible and before the insurance contract is concluded, the (prospective) policyholder must inform the insurer of "all circumstances known to him, which he must reasonably consider to be information that may influence the insurer's assessment of the risk".

The fulfilment of the duty of disclosure by the policyholder is a crucial element in the insurer's risk assessment. Article 58 of the Insurance Law requires the policyholder to disclose all circumstances known to them, which they ought reasonably to consider as constituting a basis for the assessment of the risk by the insurer. The policyholder does not have to disclose those circumstances that are already known or should be known to the insurer. By "should be known" is meant that the insurer is deemed to know facts of common knowledge, of what it was able to deduce from the policyholder's statements and knowledge that, as an insurance specialist, it cannot be unaware of. Furthermore, genetic data may not be communicated.

From the fact that the Insurance Law assumes a spontaneous duty of disclosure, it follows that the insurer has no duty of investigation and verification. In principle, the insurer is not obliged to ask questions about any element of the risk to be assessed. Even though the policyholder is in principle required to disclose all essential circumstances, the use of a questionnaire can sometimes lead to discussions on whether elements that were not mentioned in the questionnaire needed to be disclosed by the policyholder, or can lead to issues regarding the proof of a breach of the duty of disclosure. However, as a general rule the insurer needs to maintain a professional attitude. According to case law, the insurer can be obliged to ask questions about the risk if it is plausible that the (prospective) policyholder cannot assess their relevance. If the (prospective) policyholder does not answer the questions posed by the insurer and the insurer nevertheless concludes the policy, it may be assumed that the unanswered question was not relevant to the assessment of the risk (except in cases of fraud).

Article 58 of the Insurance Law applies to consumers in the same way as it does to enterprises.

6.2 Failure to Comply With Obligations of an Insurance Contract

Articles 59 and 60 of the Insurance Law contain a strict and mandatory penalty mechanism in the event of a breach of the policyholder's duty of disclosure.

In the case of intentional omission or intentional misstatement of information about the risk, which misleads the insurer in the assessment of that risk, the insurance contract is null and void. The premiums that have matured up to the moment the insurer became aware of the intentional omission or intentional misstatement of information shall accrue to the insurer.

If the omission or misstatement of information is not intentional, the contract shall not be null and void. Within a period of one month from the day on which the insurer became aware of the omission or misstatement, it shall propose that the contract be amended with effect from the day on which it became aware of the omission or misstatement. If the insurer provides evidence that it would never have insured the risk, it may cancel the contract within the same period. If the proposal to amend the contract is refused by the

policyholder or if, after the expiry of a period of one month from the receipt of such a proposal, it is not accepted, the insurer may cancel the contract within 15 days. An insurer who has not cancelled the contract or proposed an amendment within the periods previously stipulated may not subsequently refer to facts of which it was aware.

If the unintentional omission or misstatement of information cannot be attributed to the policyholder and if a claim occurs before the amendment or cancellation has taken effect, the insurer shall be bound to pay out the benefit.

If the unintentional omission or misstatement of information can be attributed to the policyholder and if a claim occurs before the amendment or cancellation took effect, the insurer shall only be obliged to pay out the benefit based on the ratio of the premium paid to the premium that the policyholder would have had to pay if they had properly disclosed the risk. However, if, in the event of a claim, the insurer provides proof that it would not under any circumstances have insured the risk, the true nature of which is revealed by that claim, its payment shall be limited to the payment of an amount equal to all premiums paid.

6.3 Intermediary Involvement in an Insurance Contract

The Insurance Law does not regulate the legal relationship between the insurance intermediary and the policyholder on the one hand and between the insurance intermediary and the insurer on the other.

The sector has, however, introduced certain customs, such as the brokerage customs, which include some of the obligations of insurers in relation to insurance brokers. Consequently, the parties themselves largely determine the content of their co-operation. It must be noted that the Insurance Law does impose an obligation to regulate the relationship between the insurer and the insurance intermediary in a written agreement. For whom the insurance intermediary acts will depend in practice on the status of the insurance intermediary and the specific mandates which may or may not be given to the insurance intermediary, such as collecting premiums, settling claims and paying out the insurance benefits.

An insurance broker undertakes towards a prospective policyholder to seek out an insurer who can insure the risk offered on optimum terms. This creates a contracting relationship between the prospective policyholder and the broker. When the broker can perform legal acts, however, it concerns a mandate.

If the intermediary is an insurance agent, it acts for the insurer in view of its dependence on a particular insurer and the fact that it looks for customers exclusively for that insurer. In that case, the rules on commercial agency in accordance with the Code of Economic Law apply to the relationship between an insurer and an insurance agent.

The Insurance Law provides that the payment of a premium by the policyholder to a party other than the insurer may be a liberating act if that party demands payment and apparently acts as an agent for the collection of the premium.

From Belgian case law, a duty to inform, a duty to advise, a duty to warn, a duty to investigate and a duty to assist can be derived on the part of the insurance intermediary.

6.4 Legal Requirements and Distinguishing Features of an Insurance Contract

Article 5, 14° of the Insurance Law defines an insurance contract as follows:

"… an agreement under which one party, the insurer, undertakes towards another party, the policyholder, and in return for payment of a fixed or variable premium, to provide a service stipulated in the agreement in the event of an uncertain event occurring in which, depending on the case, the insured or beneficiary has an interest that it does not occur."

Subject to admission and oath and regardless of the amount of the commitments, the insurance contract and its amendments have to be proved by writing. No evidence provided by witnesses or presumptions over and above the contents of the writing is admissible. However, if a beginning of proof is made in writing, proof by witnesses or presumptions is admissible.

The insurance contract must at least contain:

- the date on which the insurance contract was concluded and the date on which it commences;
- the duration of the contract;
- the identity of the policyholder and, where appropriate, of the insured and the beneficiary;
- the name and address of the insurer or co-insurers;
- where appropriate, the name and address of the insurance intermediary;
- the risks covered; and
- the amount of the premium or the way in which the premium may be determined.

In its communication of 2015 on the essential elements of the insurance agreement, the FSMA clarified that five essential conditions must be met in order to conclude that a contract qualifies as an insurance contract/product (position of the FSMA_2015_13 dated 26 August 2015 on the essential elements of an insurance policy), as follows:

- an uncertain event;
- an insurable interest;
- a premium;
- an insurance service; and
- an operation of an independent nature.

An Uncertain Event

This condition concerns a possible future event of which the actual occurrence or timing is uncertain. The occurrence of this event cannot depend on the will of the parties. The insurer's intervention depends on the occurrence of this uncertain event. If the intervention of the insurer is not dependent on a specific event that is future and uncertain at the time of the conclusion of the contract, there is no insurance contract.

An Insurable Interest

The second condition is the insurable interest, meaning the interest that the uncertain event does not occur. This characteristic distinguishes the insurance contract from a bet. It should be noted that prior to the conclusion of the insurance policy, the insurable interest exists exclusively on the part of the insured person (or, where applicable, the beneficiary) and not on the part of the insurer.

A Premium

This condition concerns the obligation of the policyholder to pay a premium. The premium is legally defined as "any form of compensation requested by the insurer as counterpart for its

obligations". The compensation as counterpart is sufficient, regardless of how this is (technically) obtained.

An Insurance Service

This condition concerns the service provided by the insurer: the payment by the insurer of a certain amount or the provision of a service due upon the occurrence of the uncertain event. This may be the payment of a sum or the provision of breakdown assistance, repatriation or any other form of assistance.

An Operation of an Independent Nature

This final condition is met when the obligation that is the subject of an insurance contract, and that seeks to offer coverage if a specific, negative, uncertain event occurs, has an independent character. It is not independent (and as a consequence not an insurance contract) if it is:

- ancillary to a principal operation which is not uncertain (eg, a sales contract); and
- limited to indemnification or compensation for a (direct) loss arising from an event whose cause is intrinsic to the main operation or to its subject (eg, a defect due to a material or manufacturing defect inherent in the purchased device).

6.5 Multiple Insured or Potential Beneficiaries

Article 77 of the Insurance Law provides that the parties may agree at any time that a third party, under the conditions they determine, can claim the benefits provided by the insurance.

This third party does not have to be designated or even conceived at the time of the stipulation, but they must be identifiable on the day that the insurance benefits are due and payable.

The possibility of a claim by beneficiaries not named in the insurance contract may affect the duty of disclosure by the policyholder at the time of the conclusion of the insurance contract, if it concerns a circumstance which the policyholder is aware of at the time of the conclusion of the policy and which they may reasonably know may affect the insurer's risk assessment. This is a factual matter.

6.6 Consumer Contracts or Reinsurance Contracts

Although consumer protection was one of the main goals of the Belgian legislature when it drafted Part 4 of the Insurance Law, it should be noted that the legislature did not make a distinction in the application of the provisions between a policyholder-consumer or a policyholder-enterprise.

The rules of Part 4 on insurance contract law do not apply to reinsurance contracts.

7. Alternative Risk Transfer (ART)

7.1 ART Transactions

Alternative Risk Transfer (ART) transactions such as insurance-linked securities (ILS) can be subscribed in Belgium, depending on the concrete circumstances.

ILS typically involve the intervention of investment banks to create special purpose vehicles, through which (re)insurers cede premiums and risks associated with a portfolio of (re)insurance business to investors.

Special purpose vehicles are defined in the Solvency II Law as any undertaking, which has legal personality or not, other than an existing insurance or reinsurance undertaking, which assumes

risks transferred from insurance or reinsurance undertakings and which fully funds its exposure to such risks through the issuance of debt or any other funding mechanism, where the repayment rights of those who have made a payment under that debt or other funding mechanism are subordinated to the reinsurance obligations of such an undertaking.

7.2 Foreign ART Transactions

In principle, ART transactions subscribed in other jurisdictions will be treated in accordance with the rules applicable in these other jurisdictions. Special purpose vehicles wishing to establish themselves on Belgian territory must obtain prior authorisation from the NBB.

8. Interpreting an Insurance Contract

8.1 Interpretation of Insurance Contracts and Use of Extraneous Evidence

The Insurance Law contains a specific interpretation rule. This provision states that, in the case of doubt about the meaning of a clause, the interpretation most favourable to the policyholder shall prevail in all cases. If the policyholder and the insured are not one and the same person, the interpretation most favourable to the insured shall prevail. This interpretation rule goes beyond the general civil law interpretation rule. It is a kind of civil sanction against terms whose meaning is unclear. The scope of application also includes, besides insurance contracts concluded with consumers, insurance contracts concluded with companies and professionals. Only in the case of large risks does this interpretation rule not apply.

This interpretation rule takes precedence over the general interpretation rules, in accordance with general civil law. However, it should be noted that, in addition to this interpretation rule in favour of the policyholder, other interpretation rules are also taken into account in Belgian case law. Therefore, the common intention of the parties is often verified and the actual meaning and scope of the policy is sought. In this regard, there is considerable scope for the court to take into account the underwriting process between the parties, the circumstances in which the policy was entered into, as well as common practice or understanding of a particular type of insurance contract or clause.

8.2 Warranties

Warranties and breach of warranty (meaning a clause which goes to the root of the insurance contract, whose breach cannot be remedied and automatically discharges the insurer from any further liability from the date of the breach) are not explicitly provided for under Belgian insurance law.

From an insurance law perspective, it is likely that a breach of warranty will be construed as a misrepresentation of the risk (see also **6.2 Failure to Comply with Obligations of an Insurance Contract**).

8.3 Conditions Precedent

Conditions precedent are not explicitly provided for under Belgian insurance law. In the absence of any specific insurance law rules, general Belgian contractual law principles have to apply. In accordance with these standard principles, conditions precedent are authorised in a contract.

A similar principle can be found in the partial or total forfeiture of right to the insurance benefits. The Insurance Law provides that the insurance contract can impose a specific obligation on the policyholder and/or insured and provide for the

partial or total forfeiture of the right to the insurance benefits, due to the non-respect of this specific obligation (imposed by the contract), provided that the non-respect of the obligation is causally related to the occurrence of the loss.

9. Insurance Disputes

9.1 Insurance Disputes Over Coverage

Insurance disputes in Belgium are resolved in accordance with the provisions of the Belgian Judicial Code. Belgium is a civil law jurisdiction. Therefore, the rule of precedent does not apply.

The general rules on limitation are laid down in the Civil Code and vary between five years to 20 years before a claim is time-barred, depending on whether the claim is based on contractual or non-contractual liability. In the case of criminal prosecution, shorter limitation periods apply, which vary depending on the type of crime that was committed.

For insurance disputes, specific limitation periods are prescribed imperatively in Article 88 (and following) of the Insurance Law, for example as follows.

- In principle, the limitation period in the case of coverage disputes is three years starting from the day of the event giving rise to the right to bring legal proceedings. If the person to whom the right to bring legal proceedings belongs proves that they only became aware of the event at a later time, the limitation period starts to run from that time, but in any event it expires five years after the event, barring fraud.
- In the case of liability insurance, that limitation period of three years only starts to run on the date on which the injured party or victim has filed a legal claim against the insured.
- In life insurance, the time limit is 30 years for the right of legal action relating to the reserve formed on the date of termination or on the expiry date by the premiums paid, minus the sums used.
- The direct action of the injured party against the liability insurer is time-barred five years after the damage-causing act, or after a crime, if one has been committed, took place. However, if the injured party can prove they became aware of their right of direct action against the liability insurer on a later date, the limitation period will start to run from that later date, but in any event it expires ten years after the damage-causing act or crime.

Coverage disputes relating to consumer contracts are normally brought before the competent courts, whereas reinsurance contracts are more often resolved through arbitration (see **9.5 The Enforcement of Arbitration Clauses**).

As a general rule, a third party can only rely on the existence of an insurance contract.

9.2 Insurance Disputes Over Jurisdiction and Choice of Law

Jurisdiction disputes between Belgian policyholders/insurers and policyholders/insurers situated in another EU member state are governed by the Brussels I bis Regulation, which contains specific provisions on insurance disputes, in essence leaving a broad choice for policyholders and insureds to sue insurers before the courts of their own country (Article 11(1b) of the Brussels 1 bis Regulation) or in the courts of the place where the harmful event occurred (in the case of liability or immovable property insurance) (Article 12 of the Brussels I bis Regulation). However, these protective provisions do not apply in the

case of so-called large insurance risks or other risks described in Article 16, for which forum clauses can be concluded between the parties (Article 15(5) and Article 16 of the Brussels 1 bis Regulation).

As to the applicable law, the provisions of the Rome I Regulation on the law applicable to international contracts will apply. This Regulation also has particular provisions to protect the interests of policyholders laid down in its Article 7. These protective provisions in favour of the policyholder, however, again do not apply in the case of "large risks insurance contracts", in which case the contractual freedom prevails (Article 7.2 of the Rome 1 Regulation). This Article 7 also does not apply to reinsurance contracts.

In the case of disputes with non-EU insurers, it must first be established whether an international treaty on this subject is in place. This is very seldom the case. If there is no relevant international treaty in place, the rules of the Belgian International Private Law Code will apply. In principle, Belgian courts have jurisdiction to hear contractual claims if the contractual obligation arose in Belgium or is performed or has to be performed in Belgium. With regard to the applicable law, the Code makes a full circle and refers to the Rome I Regulation.

9.3 Litigation Process

The litigation process is a contradictory process in which the rights of the defendant are fully observed. The defendant must be summoned in court by way of a writ of summons and has the right to file defence by way of written pleadings and to be heard during oral pleadings. Examination and cross-examination of witnesses is very rare, but sometimes parties produce written witness statements in order to substantiate their (factual) arguments. Judges mostly take their decisions in insurance disputes on the basis of contemporaneous paper trails (including the insurance policy) and the final reports of court-appointed experts after a contradictory investigation involving all parties and their experts which in complex cases may easily take more than one year (as in France). The evidence value of reports drafted by party-appointed experts and adjusters is very limited.

Finally, court proceedings in Belgium will always be conducted in either French, Dutch or German. Depending on the court that rules on the matter, it may even be the case that evidence drafted in another language (including English, which is often the case for industrial risk or financial lines insurance contracts) must be translated by the parties into the language of the court proceedings (either French, Dutch or German). Sometimes, the court will oblige the parties to have that translation carried out by a "sworn" translator. This obviously increases the cost of litigation in Belgium.

9.4 The Enforcement of Judgments

If a judgment is rendered by a foreign court of a country that is a member of the EU, the issue of enforcement is again regulated by the Brussels I bis Regulation and is rather straightforward. If it is rendered by another court and there is no international treaty that applies (which is usually the case), enforcement will have to be conducted on the basis of the provisions of the Belgian Judicial Code and the Belgian International Private Law Code (exequatur requested from the court of first instance) and will be far less straightforward to obtain.

Particular attention will then be given by the Belgian court to the observance of the rights of defence of all parties by the foreign court whose judgment is sought to be enforced in Belgium.

9.5 The Enforcement of Arbitration Clauses

The arbitration provisions in commercial contracts of insurance and reinsurance are enforced by the courts because arbitration is a dispute resolution mechanism that is recognised and regulated by the Belgian Judicial Code, including the issue of enforcement of arbitral awards. Courts must declare themselves without jurisdiction if a valid arbitration clause is invoked by one of the parties before any substantive argument on the merits is raised (Article 1679, Section 1 of the Judicial Code).

Arbitration is not allowed in the case of private insurance disputes on the basis of Article 90 Section 1 of the Insurance Law, unless agreed after the dispute arose (which, in practice, never happens). It is allowed and often used in the case of industrial risk insurance, financial lines, professional indemnity, casualty and reinsurance disputes. Both ad hoc arbitration and institutional arbitration (mostly Cepani, the Belgian arbitration and mediation centre) are chosen by the parties in their policy conditions. In reinsurance contracts, Bermuda arbitration or that of the London Court of International Arbitration (LCIA) are often applied, usually in combination with Bermudan or UK law. These clauses are valid and enforceable in the context of a reinsurance agreement.

9.6 The Enforcement of Awards

Belgium is a party to the New York Convention. Parties must file an enforcement request with the court of first instance of the place where the arbitration proceedings were conducted, and the test applied by the court will be fairly limited. In essence, the court will check whether:

- the parties agreed to arbitration;
- the rights of defence of any of the parties were not violated; and
- the arbitration award does not violate any provisions of public order in Belgium (Article 1721 of the Judicial Code).

The party that was convicted may also apply to the same court to obtain a ruling setting aside or annulling the arbitral award (Article 1717 of the Judicial Code).

9.7 Alternative Dispute Resolution

Alternative dispute resolution (ADR) in Belgium basically comes down to mediation and arbitration (see **9.5 The Enforcement of Arbitration Clauses**). Belgian law does not (yet) recognise the concept of court-ordered or imposed mediation in insurance law. It largely depends on the judge sitting on the bench whether they will promote mediation to the parties at dispute. Overall, mediation is not (yet) very popular or used in insurance disputes, probably because many disputes are settled without the assistance of a mediator.

9.8 Penalties for Late Payment of Claims

As a general rule, insurers will only have to pay statutory interest on the principal amount. Only if an insured can prove that an insurer deliberately postponed payment in order to inflict specific damages on the insured will the insured be able to obtain additional damages from the insurer.

There are some exceptions to this general rule. Third party motor liability insurance and fire insurance against ordinary risks may lead to increased interest if the insurer does not comply with the time limits imposed by law.

Belgian law is not familiar with the concept of punitive damages. However, late payment in third-party motor liability insurance can also

be penalised by a compensation of EUR250 in addition to the increased interest.

9.9 Insurers' Rights of Subrogation

Article 95 of the Insurance Law confers statutory subrogation claims to insurers. The insurer who has paid the compensation shall, to the extent of the amount of that compensation, subrogate the rights and actions of the insured or the beneficiary against the liable third parties.

If, through the fault of the insured or the beneficiary, the subrogation cannot take effect to the benefit of the insurer, the latter may claim from the insured or the beneficiary the reimbursement of the compensation paid, to the extent of the loss suffered.

The subrogation may not prejudice the insured or the beneficiary who has been only partially compensated. In that case they may exercise their rights for what is still due to them in priority to the insurer.

The insurer shall have no recourse against the relatives in the direct ascending or descending line, the spouse and the relatives in the direct line of the insured, nor against the persons residing with them, their guests and their household staff, except in the case of malicious intent. However, the insurer may exercise recourse against these persons in so far as their liability is actually covered by an insurance contract.

10. Insurtech

10.1 Insurtech Developments

Digital innovation is growing rapidly. Insurers innovate by:

- applying digital techniques for the distribution of their insurance policies (eg, smart phone apps);
- co-operating with (ancillary) insurance intermediaries having innovative distribution models;
- implementing advanced internal processes (eg, cloud computing); and
- developing new insurance products (eg, cyber cover).

There has been a rise in the number of banks acting as insurance distributors for insurance products offered through their websites or apps, with no physical contact with the policyholders. Finally, in the last few years a number of specialised companies have entered the Belgian market as a Lloyd's broker or cover-holder (or its Belgian equivalents – respectively, the insurance broker and the mandated underwriter) who underwrite insurance only via the internet.

10.2 Regulatory Response

The regulator prioritises its supervision on new technologies. While there is no overall approach to insurtech or digitisation, the regulator regularly issues specific guidance. For example, the NBB has published guidance on the outsourcing to cloud service providers and cloud computing. Detailed rules on cybersecurity exist, such as the FSMA's communication on basic principles for the management of cyber risks and the NBB's prudential expectations on the management of cyber risks.

The NBB and FSMA offer a fintech contact point that explains specific supervisory rules, policies and authorisation procedures, assists in navigating the supervisory landscape and provides information on potential supervisory issues, for example when developing an innovative financial concept.

11. Emerging Risks and New Products

11.1 Emerging Risks Affecting the Insurance Market

The NBB continues to monitor closely the impact of COVID-19 and low interest rates on the insurance industry.

Furthermore, the insurance sector has an increased interest in catastrophe risks, following the floods of July 2021. Together with the Belgian government, the insurance sector aims to help victims of natural disasters, resulting in a dialogue about affordable risk allocation. An interpretative law broadened the scope of natural disasters to subsidence of a significant mass of the soil layer, causing destruction or damage to property, resulting in whole or in part from a prolonged period of drought.

Finally, there has been an increased focus on sustainability on all policy levels. These developments should be monitored closely, as the new regulatory initiatives may have a large impact on various aspects of insurance business (capital requirements, disclosures, investments, risk management, reporting, internal trainings, etc). On 29 April 2022, the FSMA published a communication with key guidelines on sustainable financing by insurance undertakings.

For the regulator's response to new technologies, refer to **10.1 Insurtech Developments** and **10.2 Regulatory Response**.

11.2 New Products or Alternative Solutions

Insurance policies related to new technologies (such as cyber-insurance policies) have developed significantly and are becoming more and more common on the market. In the future, insurance products for drones, robotics, and automated guided vehicles may enter the market.

Insurers have tried to amend their existing products in order to take possible new pandemics into consideration.

12. Recent and Forthcoming Legal Developments

12.1 Developments Impacting on Insurers or Insurance Products

Litigation and Coverage Issues

The pandemic does not appear to have had any impact on the type or amount of litigation and insurance-related litigation; neither has there been an important portion of COVID-19 coverage disputes in Belgium, mainly because there were not many business interruption policies entered into which provided cover for business interruption losses without any evidence of physical loss being required. Also, the Belgian legislature has not obliged insurers to pay pandemic losses, which normally under the policy conditions were not insured.

A limited number of coverage disputes on COVID-19 losses are currently pending before various Belgian courts, but have not yet led to any (published) case law. Because most, if not all, business interruption policies only provide cover in the case of a physical damage, there has not been a great number of cases before Belgian courts. As far as is known, there has been only one case in relation to an event cancellation policy and one case in relation to a limited property and business interruption cover in an environmental liability insurance policy. No definitive judgments, however, have yet been rendered in these cases.

In certain policies (for instance, event-cancellation or property), insurers are careful to stipulate an exclusion for pandemic losses in general and COVID-19 losses in particular. Particular orders by the regulator prohibit such clauses in healthcare insurance policies.

Regulators' Response

As the FSMA anticipated that insurance companies would offer more distance insurance services in the context of the pandemic, it formulated a series of recommendations in this regard. The FSMA points out the additional legal obligations that apply when insurance contracts are concluded remotely. The FSMA also expects the internal supervisory bodies of the company to actively oversee the adaptation of the usual procedures or alternative procedures in order to verify whether – by means of these procedures – compliance with the rules of conduct can be guaranteed. The FSMA further stipulates that insurance companies must examine how they can ensure that the interests of the client remain a priority during and in the aftermath of the COVID-19 crisis.

The FSMA has also made adjustments to the training requirements and examination system for insurance intermediaries. For instance, certain deadlines for following the required continuing training courses were extended.

Moreover, the FSMA has sent a questionnaire to various Belgian insurance undertakings to evaluate the impact of COVID-19 on the implementation of the product oversight and governance (POG) rules, and in particular on the changes of risk profiles of products as a result of changes in the habits and behaviours of policyholders after the heath crisis and the impact on the exclusions in insurance contracts (coverage of pandemics, clarity of clauses, etc). The FSMA will publish the results of its study in the near future.

The NBB took several measures related to COVID-19, such as the creation of the Economic Risk Management Group (ERMG). The NBB continues to monitor closely the impact of COVID-19 and low interest rates on the insurance industry.

13. Other Developments in Insurance Law

13.1 Additional Market Developments

The Belgian legislature is currently rewriting the Civil Code. On 1 January 2023, Book 5 regarding the law of obligations/contract law enters into force. Some of these provisions will have a (limited) impact on insurance and reinsurance law.

To date, no other significant legislative or regulatory developments that may affect insurance coverage, insurance litigation or claims have been identified. However, it is not impossible that they will be enacted in the near future, in particular in relation to climate change and perhaps also in relation to certain pandemic coverages.

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Trends and Developments

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Lydian see p.29

Insurance Distribution Through Third-Party Providers

The activity of insurance distribution in Belgium is regulated by Part 6 of the Insurance Act of 4 April 2014 (the Insurance Act). The most common form of insurance distribution concerns the offering of insurance contracts through insurance distribution by insurance intermediaries. The insurance broker and the insurance agent are the most well-known examples of Belgian insurance intermediaries. Insurance undertakings may also offer insurance contracts directly to prospective policyholders without the intervention of an insurance intermediary. However, insurance contracts are increasingly no longer concluded exclusively through these traditional channels. More and more companies whose main activity is something other than insurance distribution (such as travel agencies, tour operators, car dealers, leasing companies, supermarkets, sports shops, funeral undertakings, opticians, banks and health insurance funds), are offering insurance products on the Belgian market.

In this article, an overview is presented of the Belgian legislature's and regulator's response to these types of insurance distribution, the different types of statutes of these undertakings that can be distinguished and the points of attention that should be noted.

Insurance Distribution Activities

Third-party providers of insurance contracts who perform insurance distribution activities in Belgium must in principle be duly registered in the register of insurance and ancillary insurance intermediaries maintained by the Financial Services and Market Authority (FSMA) and must comply with all the applicable conditions and obligations. Whether or not insurance distribution activities are carried out will therefore be important in determining the appropriate status of the third-party provider.

The following activities are considered as insurance distribution:

- presenting insurance contracts;
- proposing insurance contracts;
- carrying out other work for the conclusion of insurance contracts;
- concluding insurance contracts;
- contributing in the administration of insurance contracts; and
- contributing in the execution of insurance contracts.

Among others, the following are not considered as insurance distribution activities:

- the occasional provision of information to a customer in the context of another professional activity (other than insurance distribution), insofar as the information provider does not take any further steps to assist in the conclusion or execution of an insurance contract;
- professional claims handling for an insurance undertaking and claims settlement and expert assessment;
- the mere provision of data and information on potential policyholders to insurance interme-

diaries or insurance undertakings, provided that the information provider does not take any further steps to assist in the conclusion of an insurance contract; and
- the mere provision of information on insurance products or on an insurance intermediary or insurance undertaking to potential policyholders, provided that the information provider does not take any further steps to assist in the conclusion of an insurance contract.

Ancillary Insurance Intermediary
Third-party providers of insurance products carrying out insurance distribution activities frequently act as ancillary insurance intermediaries. The status of ancillary insurance intermediary was introduced in the Belgian Insurance Act following the implementation of the European Insurance Distribution Directive (2016/97/EU) (IDD), though similar conditions existed in Belgium before the implementation of the IDD for bypassing the provisions on insurance distribution.

One qualifies as an ancillary insurance intermediary if one carries on, or has access to, insurance distribution activities against remuneration as ancillary to one's principal professional activity and, in this context, offers insurance products that are complementary to a good or service.

Ancillary nature of the insurance product
With regard to the ancillary nature of the insurance product, the FSMA clarifies that this may involve any type of insurance product closely related to a good or service. The provider may distribute insurance products, with the exception of life insurance products or civil liability products, which are complementary to goods or services supplied by the provider themselves, but also those supplied by a third party. For example, a self-employed seller of an energy contract who also sells a related insurance product will qualify as an ancillary insurance intermediary, even though they are not the energy supplier themselves.

However, in order to qualify as an ancillary insurance intermediary, the person distributing life insurance or civil liability insurance must themselves supply the good or service to which that insurance is ancillary.

Exempted Ancillary Insurance Intermediary
If the retailer is found to meet the definition of an ancillary insurance intermediary, they must register as an ancillary insurance intermediary in the register of the FSMA and comply with the corresponding conditions and obligations. However, under certain conditions, an intermediary can be exempted from this registration obligation and other distribution requirements.

The insurance is complementary to the good or service of the provider and covers specific risks
The insurance must be complementary to the good or service supplied by a provider, where such insurance covers:

- the risk of breakdown or loss of, or damage to, the good or the non-use of the service supplied by that provider; or
- damage to, or loss of, baggage and other risks linked to travel booked with that provider.

Examples include a car dealer who, when selling a car, also offers vehicle casco (casualty and collision) insurance, or an optician who, when selling spectacles, also offers loss insurance in case of damage to the spectacles purchased. For the non-use of a service within the meaning of this

condition, the following examples are given in the IDD: a train journey, a gym membership or a season ticket for a theatre.

The Belgian regulator clarifies that the cause of the occurrence of a risk is not relevant for the assessment of the exemption condition. In order to fall within the exemption condition, the ancillary insurance intermediary may not distribute insurance products that also cover the consequences when these risks occur with other goods or services. However, in the case of travel insurance, the risks covered are both the non-use of the service (the trip) and the other risks linked to the service. Furthermore, the Belgian regulator interprets this exemption condition strictly, which means that the insurance must be taken out by the provider of the good or service to which it relates. Thus, the ancillary insurance intermediary will only benefit from the exemption if it is both the provider of the insurance and of the good or service to which the insurance relates.

Insurance premium must remain below a certain threshold

The amount of the premium paid for the insurance product cannot exceed EUR200 calculated on a pro rata annual basis. Where the insurance is complementary to a service and the duration of that service is equal to, or less than, three months, the amount of the premium paid per person cannot exceed EUR200. It is remarkable that the Belgian legislature has opted for a lower threshold than the one provided for in the IDD of EUR600. It is even more remarkable that a legislative proposal has been introduced on 8 July 2022 to lower that threshold from EUR200 to EUR50. The legislative process is time-consuming and the question remains whether this proposal will ever become law.

Client Contributor

The status of (exempted) ancillary insurance intermediary shall apply only to the natural person or undertaking carrying out insurance distribution activities. However, if one does not carry out insurance distribution activities, one is not required to register as an ancillary insurance intermediary and does not have to fulfil the associated conditions and obligations. If, in the course of another professional activity, one does not offer insurance contracts to prospective policyholders but only directs prospective customers to insurance undertakings and insurance intermediaries, one may qualify as a client contributor.

Client contributors are described by the FSMA as persons who, within the context of another professional activity, direct (potential) clients to insurance companies or insurance intermediaries, or introduce them to those clients (for example, car dealers, funeral organisers and real estate agents) without acting as an insurance intermediary.

Limitation of activities

Client contributors cannot exercise insurance distribution activities.

Persons who limit themselves to communicating to insurance intermediaries or insurance companies the identity of potential clients, or who direct potential clients to insurance intermediaries or insurance companies by giving them the relevant address and contact details, do not practise insurance distribution activities.

Client contributors may, without being registered as insurance intermediaries, provide potential clients with documentation on insurance products, communicated by an insurance company or an insurance intermediary, provided that the

communicated documentation only contains general and non-personalised information, and/or may refer them to an insurance intermediary or an insurance company.

Drafting of personalised offers, drafting of insurance conditions, treatment and settlement of insurance proposals, insurance applications and pre-signed policies do not fulfil this requirement. Finally, the clients' contributor is not authorised to collect premiums or pay the insured or the policyholder. Therefore, it should be realised that, within the status of a client contributor, the possible actions of the person concerned are limited.

Collective Policyholder

Third-party providers whose principal professional activity is something other than offering insurance contracts could also act as collective policyholders, and their customers will be considered to be insured persons under the insurance contract entered into by the third-party provider as a collective policyholder.

Collective insurance policies under the Insurance Act

Belgian law does not prohibit collective insurances. However, there are no specific legal provisions that are (only) applicable to collective insurances under Belgian law. Insurance law is based on the common (individual) policy structure with one policyholder, who in most cases is also the insured, and one insurer, through the intervention of an insurance intermediary. Since the implementation of the IDD, only Article 279 Section 2 of the Insurance Act contains a reference to collective insurance contracts:

"In the case of group insurance, 'customer' must be understood to mean the representative of a group of members who enter into an insurance contract and where the individual members cannot take an individual decision to join. The representative of the group must, without delay after the member joins the group insurance, provide this member with all the information required under this act and the decrees and regulations implementing it."

Thus, the law imposes on the collective policyholder of a collective insurance contract with compulsory affiliation an explicit information obligation with respect to affiliated members. No similar statutory rule is provided for collective contracts with optional affiliation. However, in such contracts, an obligation of this kind can always be contractually imposed on the collective policyholder. Furthermore, the same obligation can be derived from case law of the European Court of Justice (see f.ex. C-143/20 and C-213/20 of 24 February 2022 on unit-linked insurance).

Well-known examples of collective insurances on the Belgian market are professional liability policies concluded by professional associations (eg, lawyers and insurance brokers), and car insurance policies concluded by automobile clubs for the benefit of their individual members. Collective insurance is widespread in sectors such as mobile telephony, credit cards, travel and energy.

As for mobile telephony and multimedia devices in general, the FSMA has issued a general regulation which entered into force on 13 November 2022 and which prohibits various multimedia insurance contracts with variable premiums sold together with multimedia devices. Any person is prohibited from marketing multimedia insurance policies to consumers in Belgium or proposing to them the subscription of such multimedia insurance policies for which the premium is paid

in instalments and not, in a manner determined by agreement at the outset, split in equal parts whose payment is regularly spread over the full term of the contract. This regulation should be read in the light of the FSMA's strict approach to the distribution by ancillary insurance intermediaries of multimedia insurances.

The collective policyholder acts as a client contributor or an insurance intermediary

In principle, it is usually not the intention that the collective policyholder act as an insurance intermediary. However, the FSMA further considers that a person can have the capacity of policyholder and (ancillary) intermediary at the same time. This has also been confirmed at the European level by the European Court of Justice (see f.ex. C-633/20 of 29 September 2022).

There is therefore a risk that a regulator, an authority or a court would re-qualify the collective insurance contract as an individual insurance contract and regard the collective policyholder as an insurance intermediary. Once someone is considered to be an insurance intermediary, they are subject to the legal requirements set out in Part 6 of the Insurance Act (obligation to register, rules of conduct, etc) and fall under the control of the FSMA, unless they can rely on the exemption as an ancillary insurance intermediary (as previously mentioned).

With regard to this last point, the FSMA has published a newsletter in which it sets out criteria on which it assesses whether the collective policyholder should be considered an insurance intermediary, confirmed in its Handbook on IDD rules of conduct of January 2022. The FSMA refers to the following elements.

- Voluntary or mandatory adherence to the collective policy:
  - (a) if the customers have a choice on whether to adhere or not, a choice between different types of cover or a choice between the offer with adherence to the insurance policy and the same offer without that adherence, it is "likely" that the collective policyholder is carrying out regulated activities; or
  - (b) if the customer must adhere to the policy without further options, it is "unlikely" that the collective policyholder is carrying out regulated activities.
- Insurable interest:
  - (a) if the collective policyholder does not have any interest in the occurrence of the insured risk or the customers' principal aim is to insure their own interests, it is "likely" that it is carrying out regulated activities of insurance distribution; or
  - (b) if the collective policyholder does have an interest in the occurrence of the insured risks (and not in that of the insured customers), it is "unlikely" that it is carrying out regulated activities of insurance distribution.
- Other relevant elements:
  - (a) the FSMA notes that its assessment depends on the factual circumstances at hand and that it is important to consider all relevant elements, such as the identity of the beneficiary, the marketing of the insurance policy as an essential part of the offering, and the role of the collective policyholder in the management and performance of insurance contracts; and
  - (b) if the insurance component is not promoted in the commercial offer as an essential component, it is less "likely" that the collective policyholder is carrying out regulated activities of insurance distribution.

The qualification therefore must be verified on a case-by-case basis.

Conclusion

Increasingly, insurance products are no longer sold solely through traditional channels. More and more companies whose main professional activity is something other than selling insurance products are offering their customers the possibility of concluding an insurance contract through them, or are directing their customers towards an insurer or insurance intermediary with a view to concluding an insurance contract. The legislature anticipated this by introducing the new status of ancillary insurance intermediary. Similarly to other insurance intermediaries, ancillary insurance intermediaries are subject to a registration requirement. Most of the applicable obligations that rest on other insurance intermediaries also apply to ancillary insurance intermediaries. The main criterion for determining whether or not the third party qualifies as an (ancillary) insurance intermediary relates to the performance of insurance distribution activities.

Insurers and insurance intermediaries co-operating with third-party providers should, therefore, pay attention to a clear delineation of their activities. On 9 June 2022, the FSMA reminded insurance distributors of the prohibition on relying on insurance intermediaries and ancillary insurance intermediaries who are not registered, referring to the applicable criminal sanctions and administrative fines. This clearly shows that the Belgian regulator keeps a close watch on such activities, which will prompt increased caution on the Belgian insurance market.

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