INSURANCE - LUXEMBOURG

Third-country (re)insurance operations in Luxembourg post-Brexit

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Introduction

The United Kingdom's planned exit from the European Union would result in it losing the fundamental freedoms guaranteed by the Treaty on the Functioning of the European Union and its status as an EEA third country.

As such, it is timely to examine the regulatory framework governing the Luxembourg activities of (re)insurers registered outside the European Economic Area.

Insurance

The operation of third-country insurers in and from Luxembourg is subject to prior authorisation from the minister of finance.(1) Such authorisation will be granted on fulfilment of the conditions and requirements provided for in the Insurance Sector Act(2) and is subject to three exemptions.

Licensing conditions

A licence to operate an insurance business in Luxembourg will be granted to any company established in an EEA third country that:

- is entitled to pursue insurance business under its national law;
- has established a branch in Luxembourg;
- has designated a representative who:
  - meets the fit and proper requirements;
  - has been granted sufficient powers; and
  - has been approved by the minister of finance;
- owns assets in Luxembourg worth at least €1.25 million or €1.85 million – depending on the insurance classes that the branch proposes to cover – and deposits one-quarter of such amount as security;
- has undertaken to meet the solvency capital requirement and the minimum capital requirement, calculated in accordance with the Insurance Sector Act;
- has submitted a business plan in accordance with the Luxembourg regulatory requirements;
- satisfies the governance principles set out in the Insurance Sector Act; and
- limits its corporate purpose to insurance activity and related operations, to the exclusion of any other commercial activity.

In addition to the above requirements, companies offering motor vehicle liability insurance (except carrier's liability insurance) must provide the names and addresses of all claims representatives appointed in other EEA member states.

In order to apply for a licence, third-country companies must file a request with the Commissariat aux Assurances (CAA) – the Luxembourg supervisory authority – the content of which is specified in a relevant regulation.

Notably, licences can be refused if reciprocity is not guaranteed to Luxembourg insurers in the applicant's national legislation, unless the applicant is a third-country insurer with a registered office in an Organisation for Economic Cooperation and Development (OECD) member state.

Exemptions

The Insurance Sector Act provides for three exemptions from the licensing requirement, one of which is temporary and contingent on Brexit.

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General Agreement on Trade in Services exemption
Third-country insurers established in a signatory country to the General Agreement on Trade in Services are exempt from the obligation to obtain a licence to conduct business in Luxembourg under the freedom to provide services principle, provided that such business relates to:

- risks associated with maritime commerce, aviation or the launch and loading of spacecraft, including satellites; or
- the insurance of goods in international transit.

Temporary Brexit exemption
In March 2019 a new draft bill was adopted by the Luxembourg Parliament regarding the measures to be taken in relation to the Luxembourg financial and insurance sectors in the event of a no-deal Brexit.(3)

The Brexit Law has introduced a new Article 321-1 into the Insurance Sector Act, according to which the CAA can exempt UK (re)insurers from the requirement to obtain an authorisation for a maximum period of 21 months from the Brexit date.

The temporary exemption concerns only UK (re)insurers which have passported their rights as of the Brexit date – either through a branch establishment in Luxembourg or by operating in Luxembourg under the freedom to provide services principle. However, this grandfathering regime does not apply to new or renewed (re)insurance contracts issued by UK (re)insurers unless they have close links with contracts in force as of the Brexit date.

Policyholder's initiative
According to the Insurance Sector Act, third-country insurers operating in Luxembourg under the freedom to provide services principle will not be deemed to operate an insurance activity in Luxembourg if the policyholder entered into the contract on its own initative.

Policyholders will be deemed to have entered into a contract on their own initiative if they did so without being contacted by the insurer or another person, whether appointed by the insurer or not.

Apart from the above exemptions, the free provision of services in Luxembourg by third-country insurers is prohibited.

Reinsurance

Similar to the European passport principle, reinsurers that are registered in third countries can operate in Luxembourg either through a branch establishment or under the freedom to provide services principle.

Branch establishment
A third-country reinsurer can conduct reinsurance business in and from Luxembourg through a branch, provided that it has been authorised by the minister of finance.

Such authorisation is subject to the following minimum requirements:

- The reinsurer must be authorised under its national law to pursue the applied-for reinsurance business or provide the reasons why it has not been granted such authorisation.
- The reinsurer must limit its corporate purpose to reinsurance activity and related operations, to the exclusion of any other commercial activity.
- The reinsurer must have established its central administration in Luxembourg.
- The reinsurer must be supervised in accordance with recognised international standards.
- There must be no legal, regulatory or administrative obstacle to sufficient cooperation between the authorities of the country in which the reinsurer has its registered seat and the CAA.
- The reinsurer must own assets in Luxembourg worth at least €1.8 million (for ordinary reinsurance undertakings) or €600,000 (for captive reinsurers) and deposit one-quarter of such amount as security.
- The reinsurer must undertake to meet the solvency capital requirement and the minimum capital requirement calculated in accordance with the Insurance Sector Act.
- The reinsurer must ensure the direction and daily management of the branch in accordance with the Insurance Sector Act.
- The reinsurer must satisfy the governance principles required by the Insurance Sector Act.

Licence applications must be made by filing the required documents and information with the CAA, as specified in the applicable regulation.

Licences can be refused if reciprocity is not guaranteed to Luxembourg reinsurers in the applicant's national legislation, unless the applicant is a third-country reinsurer with a registered office in an OECD member state.

Unlike for insurers, the authorisation enables the Luxembourg branch of a third-country reinsurer to carry out its activities in one or more foreign countries, subject to compliance with the legislation of the state of origin of the ceding undertaking and provided that the CAA has been notified beforehand.

Free provision of services
Reinsurers from third-countries can operate in Luxembourg without establishing a branch.(4) Nonetheless, the Insurance Sector Act provides that such undertakings cannot be treated more favourably than Luxembourg reinsurers.

For further information on this topic please contact Miryam Lassalle at NautaDutilh Avocats Luxembourg by telephone (+352 26 12 29 1) or email (miryam.lassalle@nautadutilh.com). The NautaDutilh Avocats Luxembourg website can be accessed at www.nautadutilh.com.

Endnotes

(1) The operation of insurance or reinsurance activities from Luxembourg within the European Passport framework – either through a branch establishment or under the freedom to provide services in another EEA member state principle – is subject to the granting of a licence to a corporate (not a branch) entity whose registered office and central administration is in Luxembourg.

(2) The Law of 7 December 2015 on the Insurance Sector, as amended. The Luxembourg insurance and reinsurance regulatory frameworks are based mainly on the EU Solvency II Directive (2009/138/EC).

(3) Further information is available here.

(4) However, reinsurance agreements entered into between a Luxembourg-ceding company and a third-country reinsurer are subject to the principle of equivalence set out in Article 172 of the EU Solvency II Directive.
