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Chapter 23

LUXEMBOURG

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I INTRODUCTION

Recently published statistics regarding the insurance and reinsurance sector of the Grand Duchy of Luxembourg for 2014 once again illustrate how the sector has been able to remain stable despite a difficult economic environment. Compared with the previous year, the total number of insurance and reinsurance companies (at the end of the second quarter of 2014) slowly diminished to establish itself at 324 undertakings across the whole sector (life, non-life and reinsurance combined),² compared to 331 in 2013 (this number is mostly affected by the number of reinsurance companies having retired from the market in 2014).³ Generally speaking however, departures and arrivals in the sector remain stable and offset one another. By way of illustration, while three life insurance, four non-life insurance and 10 reinsurance companies (all of them governed by Luxembourg law) obtained their authorisation between 1 January 2013 and 30 June 2014, one life insurance, one non-life insurance and 22 reinsurance companies retired from the Luxembourg market.⁴

In 2014, employment in the insurance and reinsurance sector slightly increased representing a total workforce of 4,433 persons across the whole sector.⁵

In addition to a stable environment, the insurance and reinsurance sector showed off an outstanding progression of 20.90 per cent in terms of annual results representing

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2 Insurance Commission, Annual Report 2013/2014, p.34.

3 Ibid.

4 Ibid.

5 Insurance Commission press release, 'Belle progression des primes et des résultats du secteur des assurances en 2014'.

a total amount of €401.92 million, vastly outperforming the previous record set in 2011 of €338 million. The collection of life insurance premiums in the fourth quarter of 2014 increased by 15.73 per cent compared with the same quarter in 2013, whereas the collection of non-life insurance premiums progressed by 8.14 per cent. The life and non-life insurance sectors saw premiums increase by 20.87 per cent and 4.82 per cent, respectively, amounting to a total of €26,87 billion, once again outperforming the previous record set in 2010 by over €2 billion.

The total balance of technical provisions of life insurance companies established itself at €136.07 billion at the end of 2014; a rise of 15.44 per cent compared with 2013 and 4.37 per cent compared with the previous quarter.

As of the last quarter of 2014, the non-insurance sector registered a 4.82 per cent increase. Finally, insurers that essentially if not exclusively exercise their activities on the Luxembourg market registered an increase (which progressed significantly faster than inflation) of the collection of premiums of 5.59 per cent.⁶

II REGULATION

The insurance and reinsurance sector of the Grand Duchy of Luxembourg is governed by the Law of 6 December 1991 on the insurance sector, as amended (the Insurance Sector Law). The Insurance Sector Law is supplemented by grand-ducal regulations and circular letters, the latter being issued by the Luxembourg's insurance and reinsurance regulator, the Insurance Commission (CAA).

The establishment, powers, organisation and functioning of the CAA are laid down in the first part of the Insurance Sector Law. The CAA is a public institution placed under the authority of the relevant minister, benefiting from a legal personality and enjoying financial autonomy.⁷

As regulator of the insurance and reinsurance sector, the CAA has been assigned a number of duties under the Insurance Sector Law,⁸ including but not limited to:

- a* the review of applications for approval of insurance and reinsurance undertakings as well as of insurance intermediaries;
- b* the prudential supervision of these companies and individuals;
- c* the issue of regulations within the scope of the CAA's attributions;
- d* the receipt and assessment of complaints and claims emanating from an insurance policyholder or another interested party against any natural or legal person under its supervision;
- e* the coordination of the implementation of government initiatives and measures in order to ensure an organised expansion of insurance and reinsurance activities in the Grand Duchy of Luxembourg;
- f* the promotion of transparency, simplicity and fairness on the markets of insurance products and services.

⁶ Ibid.

⁷ Article 1 of the Insurance Sector Law.

⁸ Article 2 of the Insurance Sector Law.

The CAA is composed of two corporate bodies: the Council and the Management.⁹ While the Council is responsible for the establishment of the financial framework in which the CAA's activity will be deployed,¹⁰ the Management is the executive collegiate body of the CAA taking the CAA's day-to-day management decisions.¹¹

The exercise and taking up of both the insurance¹² and reinsurance¹³ business in the Grand Duchy of Luxembourg is a regulated activity subject, in principle, to authorisation from the minister responsible for the supervision of private insurance (the Minister). As an exception thereto, insurance companies having their registered offices in a third country that adheres to the General Agreement on Trade and Services are exempted from specific authorisation for operations relating to freedom to provide services but only for risks linked to maritime commerce, aviation, launch and loading of space gear including satellites and the insurance of international transit of goods.¹⁴

In order to be authorised, insurance and reinsurance companies are subject to similar rules, including:

- a* communicating the identity of their shareholders, whether legal or natural persons, holding directly or indirectly a qualifying participation in the insurance or reinsurance undertaking;
- b* having a transparent shareholding;
- c* having their central administration in the Grand Duchy of Luxembourg;
- d* adopting a specific corporate form (most commonly a *société anonyme*);
- e* limiting their corporate object to insurance or reinsurance activities and underlying operations;
- f* presenting an operations scheme in accordance with the rules and regulations;
- g* complying with specific capital requirements;¹⁵ and
- h* being effectively managed by one or more persons of good repute, having appropriate professional qualifications and experience.¹⁶

Regarding insurance activities in particular, general authorisations covering both life and non-life activities will not be delivered to insurance undertakings, which accordingly must choose between either one of them.¹⁷ Accordingly, authorisations are granted

9 Article 5 of the Insurance Sector Law.

10 Article 6 of the Insurance Sector Law.

11 Article 11 of the Insurance Sector Law.

12 Article 27 of the Insurance Sector Law.

13 Article 92 of the Insurance Sector Law.

14 Article 27, 3 of the Insurance Sector Law.

15 Capital requirements for both insurance and reinsurance undertakings comprise the holdings of a minimum guarantee fund, a solvency margin and the constitution of sufficient technical provisions, which must be represented at any time by sufficiently congruent and equivalent assets representing such technical provisions.

16 Article 103-17 of the Insurance Sector Law.

17 Article 30, 2 of the Insurance Sector Law.

separately for specific life or non-life insurance branches and will, unless specified by the insurance undertaking, cover all risks pertaining to such a branch.¹⁸

The requirement for authorisation further applies to insurance and reinsurance mediation, which, since Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, became a regulated activity. Accordingly, the Insurance Sector Law provides that physical and legal persons are prohibited from carrying out or attempting to carry out insurance or reinsurance mediation operations in or from the Grand Duchy of Luxembourg without previously being authorised by the Minister.¹⁹ Exceptions to this authorisation requirement may be granted in cases of establishment or free provision of services by foreign intermediaries already authorised in their home Member State and provided they have filed this intention with the CAA.

Upon authorisation, insurance and reinsurance companies may, within the territory of the entire European Union, carry out their business either under the right of establishment or the freedom to provide services.²⁰ Insurance undertakings intending to carry out their business under the freedom to provide services need to notify their intention to the CAA, which, within one month of such notification shall inform the host Member State of that intention.²¹ Similar notification requirements apply for reinsurance companies. In order to distribute their products, insurance companies will in practice have recourse to insurance intermediaries who or which will be responsible for the marketing of such policies to potential policyholders.

While in principle it is up to policyholders to decide to enter into insurance policies at their own initiative, certain compulsory insurance policies exist for certain professions, sports events or specific risks relating to humans and the environment.²² The most common compulsory insurance in the Grand Duchy of Luxembourg is the insurance of land motor vehicles as governed by the Law of 16 April 2003 relating to compulsory insurance against civil liability in respect of the use of motor vehicles, as amended.

From a tax perspective, all types of non-life insurance, provided that either the risk insured against or the policyholder is located in the Grand Duchy of Luxembourg, are in general, subject to an insurance premium tax of 4 per cent. Premiums for fire insurance policies are subject to an additional tax of 6 per cent. Life insurance premiums and reinsurance premiums are exempt from the insurance premium tax.

The regulatory environment in the Grand Duchy of Luxembourg is bound to change in the near future further to the implementation of 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) (the Solvency II Directive) into Luxembourg law.

18 Article 32 of the Insurance Sector Law.

19 Article 104-1 of the Insurance Sector Law.

20 Article 65, 100-9 of the Insurance Sector Law.

21 Article 71, A. 1 and 2 of the Insurance Sector Law.

22 R Bisenius, 'L'assurance du particulier, guide pratique', Promoculture, ed. 2007, p. 155.

The main purpose of the Solvency II Directive is to enhance supervisory controls relating to the financial soundness of insurance and reinsurance undertakings by imposing (1) quantitative rules as to technical provisions, capital solvency requirements and adequacy of own funds; (2) qualitative requirements in relation to the governance and follow-up of internal risks by the undertakings and regulatory authorities; and (3) disclosure and information requirements concerning the prudential reporting in relation to the aforementioned quantitative and qualitative requirements.

In relation to the implementation of the Solvency II Directive, the European Parliament and the Council adopted Directive 2013/58/EU,²³ which purports to amend the Solvency II Directive as regards the date of its transposition, the date of its application, and the date of repeal of certain Directives (Solvency I). As the initial implementation date was regarded to be overly burdensome, in particular with respect to each Member State's respective legislative obligations and the new supervisory architecture envisaged by the 'Omnibus II' directive²⁴, the date for implementation of the Solvency II Directive initially set at 1 January 2014 was postponed to 1 January 2016, which accordingly, should provide supervisors and insurance and reinsurance undertakings sufficient time to prepare for the application of that new architecture. The draft bills of law transposing the Solvency II Directive into Luxembourg law that were initially lodged with the Luxembourg parliament in July 2012 are still under discussion.

III INSURANCE AND REINSURANCE LAW

i Sources of law

Insurance contracts are mainly governed by the Law of 21 July 1997 on the insurance contract, as amended (the Insurance Contract Law). Depending on the contract type and the branch to which it refers, insurance undertakings may be subject to specific laws and additional provisions set out under specific circulars of the CAA. For instance, life insurance activities such as capitalisation operations are subject to specific rules in relation to the constitution of technical provisions.

Reinsurance contracts, on the other hand, are explicitly excluded from the Insurance Contract Law²⁵ and accordingly, parties to such contracts are not subject to the extensive rules applicable to insurance contracts. This may in particular be explained

23 Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I), L 341/1.

24 Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No. 1060/2009, (EU) No. 1094/2010 and (EU) No. 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority).

25 Article 4, 4 of the Insurance Contract Law.

by the fact that reinsurance contracts are entered into between professionals such as insurance companies, which are deemed to be well informed.

ii Making the contract

The Insurance Contract Law defines the insurance contract as an agreement whereby, in exchange for the payment of a fixed or variable premium, a party, the insurer, undertakes to provide another party, the policyholder, with a service specified in the contract in the case where:

- a* in damage insurance, an unpredictable event occurs that is not in the insured person's interest; or
- b* in personal insurance, an unpredictable event occurs that affects the life, physical integrity or the financial situation of the insured person.²⁶

The insurance contract thus involves at least two parties: the insurance undertaking and the policyholder. The latter may assign all the benefits of the insurance contract to a beneficiary who may be the insured person.²⁷

Before entering into an insurance contract, insurance undertakings are required to provide policyholders with an extensive list of pre-contractual information including, *inter alia*, information on the insurance undertaking and the regulatory authority in charge of its supervision, the duration of the contract and the applicable provisions relating to its termination and the fees and charges incurred by the policyholder as a result of entering into an insurance contract.²⁸ For life insurance contracts, additional information must be provided.²⁹

The Insurance Contract Law furthermore requires all pre-contractual information to be provided in writing, in a clear and precise manner and in one of the official languages of the Grand Duchy of Luxembourg, in a language understood by the policyholder or in another language if the policyholder has a choice in relation to the applicable law.³⁰

The policyholder is also required to comply with a certain number of obligations at the time of entering into the contract, such as his or her obligation to declare exactly all the circumstances known to him or her and which he or she reasonably considers to be elements of appreciation of the risk for the insurer.³¹

The consequences of any wrongful declaration should not be minimised as any intentional omission or inaccurate information declared by the policyholder could render the insurance contract null and void. Any premiums paid up until the moment the insurer has been informed of the intentional omission or inaccurate declaration are considered as due to the insurer.³²

26 Article 1, A of the Insurance Contract Law.

27 Article 30 of the Insurance Contract Law.

28 Article 10, 1 of the Insurance Contract Law.

29 Article 10, Points (s) to (w) of the Insurance Contract Law.

30 Article 10, 2 of the Insurance Contract Law.

31 Article 11 of the Insurance Contract Law.

32 Article 12 of the Insurance Contract Law.

Where the behaviour of the policyholder was unintentional as to the omission or declaration of inaccurate information, the insurance contract is not declared null and void. The insurer may in such case propose a contractual amendment to the policyholder within one month from the date on which he or she has had knowledge of the omission or inaccurate declaration. If, however, the insurer provides proof that it would never have insured the risk had it been aware of the unintentionally omitted or inaccurate information, it may terminate the contract with one month's notice.³³

The insurance contract as well as any amendment must be evidenced in writing as testimonials or presumptions are, unless evidence in writing exists, expressly excluded by the Insurance Contract Law.³⁴ The insurer shall, at the latest when the contract is signed, provide the policyholder with a certified copy of the information that the policyholder communicated in writing to the insurer in relation to the insured risk.³⁵

iii Interpreting the contract

In light of the legal definition, insurance contracts are characterised by their bilateral and unpredictable nature and are interpreted in light of the general rules of interpretation contained in the Luxembourg Civil Code.

The insurance contract must be dated as of the date on which it is entered into and must indicate a certain amount of information relating to the identity and domicile of the insurer, the person or the object of the insurance, the nature of the risks insured, the moment from which the risk is insured and the duration of such insurance, the amount of such insurance, the insurance premium or fee and how they are determined, the scenarios and methods relating to the termination of the contract and the competent jurisdictions for disputes arising under the contract. In addition, any limitation or exclusion of liability must be highlighted in the contract.³⁶

iv Intermediaries and the role of the broker

Intermediary activity is a regulated activity under Luxembourg law and must accordingly be authorised in order to be carried out. Upon authorisation, insurance intermediaries are inscribed in a register held by the CAA, which is accessible on its website. The Insurance Sector Law specifies that authorisations to natural persons may only be delivered to the latter as agents, insurance and reinsurance brokers or managers of brokerage or sub-brokerage companies whereas authorisations to legal persons will be delivered as insurance agency or insurance or reinsurance companies. While the agent (natural or legal person) carries out intermediary activities in the name and on behalf of the insurance undertakings, insurance brokers (natural or legal persons) act, without being bound to an insurance undertaking, as an intermediary between the policyholders and insurance undertakings.

33 Article 13, 1 of the Insurance Contract Law.

34 Article 16, 1 of the Insurance Contract Law.

35 Article 16, 3 of the Insurance Contract Law.

36 Article 16 of the Insurance Contract Law.

Natural persons willing to carry out an intermediary activity as broker are subject to the same honourability and professional knowledge requirements as the ones applicable to managers of brokerage companies.³⁷ In addition, brokers must possess all technical means and skills as well as the necessary human resources allowing them to accomplish their duties. Finally, in order to obtain the requested authorisation, the candidate broker needs to provide evidence as to the compliance with the financial resources and civil liability insurance requirements laid down by the Insurance Sector Law.³⁸

Brokers are required prior to entering into an insurance contract to communicate certain information to policyholders such as their address and identity, the register in which they have been inscribed, and the procedures allowing clients and other interested persons to file their claims against brokers including extrajudicial procedures for claims and complaints handling.³⁹

Brokers are moreover required to recommend contracts that are adapted to their clients' needs and to specify the incentives that ultimately led the broker to recommend that insurance product. However, the information that has to be specified is adapted in light of the complexity of the proposed insurance contract.⁴⁰

As to the form of the information, brokers are required to provide information on paper or any durable medium within the meaning of the Insurance Contract Law, in a clear, accurate and comprehensible manner and in an official language of the Member State of the commitment or any other language agreed between the parties.⁴¹ Should immediate insurance be required, information may first be communicated orally before being communicated on paper or any other durable medium once the contract⁴² has been concluded.

Premiums and other sums relating to an insurance contract governed by the Insurance Contract Law must be transferred via strictly segregated client accounts that may not be used to reimburse other creditors in the event of intermediary's bankruptcy.⁴³

Finally, and in addition to the aforementioned rules, the Federation of Insurance Brokers in the Grand Duchy of Luxembourg established a series of rules of conduct to which brokers are requested to adhere, such as putting the client's interests before their own and the communication of transparent and objective information.⁴⁴

v Claims

Upon occurrence of a claim, the policyholder must as soon as possible and within the period stipulated in his or her contract notify the insurer thereof. Any notification made after this period may not be refused by the insurer provided that the notification has been

37 Article 105, 1) a) of the Insurance Sector Law.

38 Article 105, 1) d) of the Insurance Sector Law.

39 Article 108, 1 of the Insurance Sector Law.

40 Article 108, 3 and 4 of the Insurance Sector Law.

41 Article 108, 1 of the Insurance Sector Law.

42 Article 108-1, 2 of the Insurance Sector Law.

43 Article 108-2, 2 of the Insurance Sector Law.

44 Charter of the Insurance Broker Federation, 'Service à la clientèle'.

made as soon as reasonably possible by the policyholder. Moreover, the policyholder must provide all useful information without delay and answer the insurer's demands in order for the latter to determine the circumstances and extent of the claim.⁴⁵

If the non-compliance by the policyholder of one of the aforementioned obligations results in a loss suffered by the insurer, the latter may claim a reduction of its services up to the amount of the loss incurred. If such non-compliance results from the policyholder's fraudulent intent, the insurer may cancel its cover altogether.⁴⁶

As soon as the insurer is in possession of all useful information regarding the occurrence, circumstances and where applicable, the amount of the claim it is required to execute its services under the contract. The Insurance Contract Law specifies, however, that any sums due must be paid within 30 days of their determination. After this period, monetary interest at the legal interest rate applies *ipso jure*.⁴⁷

The insurer's ability to perform its services is secured under Luxembourg law through the establishment of the 'triangle of security' regime. Under this regime, insurance companies are required to constitute sufficient technical provisions, including mathematical provisions, in respect of their entire business.⁴⁸ Such provisions must at all times be covered by equivalent and matching assets.⁴⁹ Assets representing technical provisions must be deposited with a credit institution approved by the CAA.⁵⁰ Under the terms of the Insurance Sector Law, this deposit constitutes a separate group of assets and preferentially secures the payment of insurance debts.⁵¹ Moreover, the deposit of assets representing technical provisions is formalised through a model deposit agreement,⁵² which is entered into between the insurance company, its depositary and the CAA. The model deposit agreement constitutes the basis upon which insurance undertakings and their depositaries must agree. Additional clauses may be added provided, however, that they do not constitute counter letters. The use of side-letters affecting in any way the provisions of the deposit agreement is also prohibited.⁵³ Along the same lines, any amendments to the deposit agreement must obtain the prior approval of the CAA in order to enter into force.⁵⁴

45 Article 26, 2 of the Insurance Contract Law.

46 Article 28, 1 and 2 of the Insurance Contract Law.

47 Article 29, 1 and 2 of the Insurance Contract Law.

48 Article 35 of the Insurance Sector Law.

49 Article 36 of the Insurance Sector Law.

50 Article 37 of the Insurance Sector Law.

51 Article 39 of the Insurance Sector Law.

52 The CAA requires insurance undertakings and their depositaries to use the model deposit agreement available on the CAA's website.

53 Article 12 of the model deposit agreement.

54 Article 13 of the model deposit agreement.

IV DISPUTE RESOLUTION

i Jurisdiction, choice of law and arbitration clauses

The Insurance Contract Law specifies that all claims arising in relation to the contracts governed thereby are, without prejudice to the application of treaties or international agreements, of the exclusive competence of Luxembourg courts.⁵⁵

Parties may, however, choose to submit their claims to extrajudicial procedures such as arbitration as outlined under subsection iii, *infra*.

Regarding the governing law, the Insurance Contract Law distinguishes between contracts that are automatically governed by Luxembourg law and those where the parties have a right to choose the governing law. Generally speaking, non-life insurance contracts where the insured risk is located in the Grand Duchy of Luxembourg within the meaning of the Insurance Sector Law or contracts that are intended to satisfy an insurance obligation imposed by Luxembourg law are governed by Luxembourg law.⁵⁶ The same applies for life insurance or capitalisation contracts where the insurance commitment has been taken on the territory of the Grand Duchy of Luxembourg within the meaning of the Insurance Sector Law (i.e., where the policyholder is deemed to have his or her principal residence or establishment).⁵⁷

Parties to non-life insurance contracts that are not required to be governed by Luxembourg law may for example choose to apply the law of (1) the country where the policyholder has his or her usual residence or central administration or (2) the state of occurrence of the claim where the contract relates to risks for which claims can only occur in a state other than in a Member State of the European Economic Area (EEA).⁵⁸ For life insurance and capitalisation contracts, parties may choose to apply the law of the home country of the policyholder provided that the policyholder is a natural person having the nationality of a Member State of the EEA other than the Grand Duchy of Luxembourg.

When the parties' choice of applicable law is permitted, this choice must be express or result in a certain manner from the clauses of the contract or the circumstances of the contractual clauses. If such criteria are not met or if no choice has been expressed, the contract will be governed by the law of the Member State of the EEA with which the policyholder has the closest links. For non-life insurance contracts, the contract will be presumed to have the closest link with the Member State in which the risk is located whereas for life insurance and capitalisation contracts, such presumption will apply to the Member State of the (insured) commitment.⁵⁹

55 Article 47 of the Insurance Contract Law.

56 Article 5, 1, (a) Insurance Contract Law.

57 Article 5, 1, (b) of the Insurance Contract Law.

58 Article 5, 2, (a) and (c) of the Insurance Contract Law.

59 Article 5, 4, (a) and (b) of the Insurance Contract Law.

ii Litigation

Claims arising out of insurance contracts are subject to the same litigation stages as those arising out of contracts in general. The number of litigation stages and the nature of the competent jurisdiction will depend on the financial value of the claim itself.

iii Arbitration

Parties to an insurance contract may choose to submit their claims to an arbitration procedure. However, the Insurance Contract Law expressly forbids parties to stipulate arbitration clauses that – prior to any litigation – submit any claims to an arbitration procedure.⁶⁰ Such prohibition does not, however, apply to insurance contracts covering significant risks and insurance contracts relating to judicial protection.

iv Mediation

Policyholders willing to resolve their disputes through preventive extrajudicial means have the possibility to do so by filing a mediation request to Luxembourg's Insurance Mediator. This mediation body, whose primary mission is to conciliate the parties, is composed of the Luxembourg Union of Consumers (ULC) and the Association of Insurance Companies (ACA).⁶¹

The Insurance Mediator issues motivated opinions that are non-binding for the parties. The Insurance Mediator's functioning rules specify, however, that its moral authority should suffice to settle the litigation.⁶² The seizure of the Insurance Mediator does not prevent the parties from bringing their disputes before Luxembourg courts. In this case, however, the Insurance Mediator loses its competence.⁶³

Notwithstanding the foregoing, the Insurance Contract Law as amended by the Law of 21 December 2012⁶⁴ specifies that the insurer may voluntarily intervene in a litigation or a mediation procedure initiated by the injured party against the insured party.

V YEAR IN REVIEW

2014 was mostly marked by regulatory changes at the European level, which are likely to have an impact on the management of insurance undertakings in general as further outlined below. At the national level, although the main pieces of legislation such as the

60 Article 46 of the Insurance Contract Law.

61 Insurance Mediator's functioning rules, which may be found at www.ulc.lu/Uploads/Reglement/Doc/7_1_R%C3%A8gles%20de%20fonctionnement%20MEDIATEUR%20ASSURANCES%20REGLES%20-%2001.2006.pdf.

62 Ibid.

63 Ibid.

64 Law of 21 December 2012 amending : 1) the amended Law of 16 April 2003 on compulsory insurance against civil liability in respect of the use of motor vehicles; 2) the amended Law of 27 July 1997 on insurance contracts (Mémorial No. 276, Parliamentary Works No. 6424).

Insurance Sector Law and the Insurance Contract Law were not amended in 2014, an interesting point to note is the entry into force of the law of 28 July 2014 concerning the compulsory deposit and immobilisation of shares and units in bearer form which imposes the compulsory deposit and immobilisation of shares and units in bearer form and provides transitory provisions in order to appoint a depositary and to proceed with the relevant deposit. The last date for appointing a depositary was 18 February 2015, and the compulsory suspension of voting rights failing the deposit of the shares or units entered into force on the same date. The CAA published a press release on 21 January 2015 in which it gave a reminder of this deadline to the sector and invited any entity impacted by this new law to submit a specific form (appended to the press release) by 20 February 2015 at the latest. The CAA furthermore stated that failure to appoint a depositary within the legal deadlines, or omitting to hold a register of registered shares, was subject to specific criminal sanctions.

From a tax point of view, two initiatives are worth mentioning.

The first initiative, Directive 2014/107/EU, amends Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation, which has so far provided for an automatic exchange of information procedure from 1 January 2015 for income from employment, director's fees, pensions, life insurance products not covered by other union legal instruments on exchange of information and other similar measures, and income from ownership of immovable property. Directive 2011/16/EU was implemented into Luxembourg domestic law by the Law of 26 March 2014, which opted to automatically exchange information on (1) income from employment, (2) director's fees and (3) pensions; but not on income deriving from life insurance products. However, the amendments introduced by Directive 2014/107/EU have strengthened the cooperation obligations and provide among others that the cash value of insurance contracts or annuity contracts with cash value will be subject to automatic exchange of information between EU tax administrations. The exact impact of these amendments on insurance products has to be assessed in the near future.

The second directive is the Savings Taxation Directive (2003/48/EC). The Council has invited the European Commission to present a proposal for the repeal of the Savings Taxation Directive, as amended, and to coordinate the repealing of that directive with the date of application of the revised directive on administrative cooperation. The European Commission, in its frequently asked questions, specified in this respect that:

The revised Administrative Cooperation Directive, agreed by Ministers yesterday, covers a wide scope of income and capital – including most of what is covered by the revised Savings Directive. Therefore, in order to have just one standard of automatic exchange and to avoid legislative overlaps, the Commission will now consider the repeal of the Savings Directive. Coordination of the likely repeal of the Savings Directive with the introduction of the revised Directive on Administrative Cooperation will ensure that we do not create or leave any loopholes for tax

*evaders. The Administrative Cooperation Directive is comprehensive and largely covers all areas that had previously been covered by the Savings Directive.*⁶⁵

From a Luxembourg perspective, this means that the mandatory automatic exchange of information under Savings Taxation Directive will be in effect with respect to the year 2015 only, and shall be superseded as of 1 January 2016 by the revised Directive on administrative cooperation.⁶⁶ Luxembourg agreed to automatically exchange information for tax purposes on the basis of the OECD Common Reporting Standard. Indeed, further to a political arrangement reached at the ECOFIN meeting on 14 October 2014, the application of the common reporting standard within the EU shall be effected via a repeal of the Savings Taxation Directive and the revision of Directive 2011/16/EC.

Finally, a rather unfortunate trend was pointed out by the ACA with respect to the freedom to provide services principle under the Insurance Sector Law. Part of Luxembourg's attractive and dynamic sector revolves around the possibility for insurance companies to be able to serve clients that are either resident in Luxembourg or, more particularly, abroad (within the European Economic Area). The ACA observed that certain countries imposed strict rules inspired by national protectionism on foreign entities carrying out services via the freedom to provide services. Such restrictions directly infringe the relevant freedom while, as clearly indicated by the CAA, insurance and reinsurance companies having their registered office in the European Economic Area are subject to the exclusive prudential supervision of the regulatory authority of the country in which they have their registered office in application of the 'home country control' principle, it being specified that such principle applies to their activities carried out within the European Economic Area as a whole.⁶⁷

VI OUTLOOK AND CONCLUSIONS

Looking to the future, Luxembourg's insurance and reinsurance sector is turning its attention to the upcoming implementation of the Solvency II Directive. While in the past all undertakings were easily able to comply with the applicable prudential rules, the CAA admits that the introduction of the Solvency II Directive regime will in the future pose major challenges across the whole sector, both in terms of capital and organisational requirements.⁶⁸ Aware of such challenges, the CAA accompanied the whole sector early on by launching several quantitative impact studies⁶⁹ and elaborating common mathematical models for capital solvency requirements. Explanatory and presentation

65 European Commission, Press release 14 October 2014, http://europa.eu/rapid/press-release_MEMO-14-591_en.htm.

66 ABBL, Automatic Exchange of Information, <http://www.abbl.lu/en/professionnals/legaltax/automatic-exchange-of-information>.

67 See footnote 2, p. 19.

68 See footnote 2, p. 9.

69 An example of which may be found at www.commassu.lu/upload/files/252/QIS5_results.pdf.

seminars were held on the results and conclusions of these studies.⁷⁰ The CAA reports that since 2009 it has noticed a significant improvement in the methodology and quality of information provided. Where the relevant methodologies could benefit from additional fine-tuning, suggestions for improvements have been communicated by the CAA during individual and collective meetings.⁷¹ Very recently, the CAA published a press release on the reporting requirements within the Solvency II Directive in which it encouraged the sector to familiarise itself with the various reporting requirements under the Solvency II Directive. This includes implementing the technical standards published by the European Insurance and Occupational Pensions Authority (EIOPA). The CAA furthermore suggests familiarisation with the current software known as 'Tool for undertakings' or T4U. From a costs perspective, the Solvency II Directive raises a certain concern in terms of the costs linked to the implementation and fulfilment of the reporting requirements. Industry participants such as the ACA pointed out, for instance, that costs related to reporting would be particularly high for small and medium-sized undertakings while underlining the fact that the Luxembourg sector is exclusively composed of such undertakings. The ACA thus underlines the importance for both European and national authorities to acknowledge the proportionality principle when implementing the various reporting rules.⁷²

Another important piece of legislation which has not gone unnoticed at European level is the new PRIPS⁷³ regulation, recently published in the Official Journal of the European Union. Its provisions become directly applicable under national law, without the need of further implementing measures. Notwithstanding the foregoing, the regulation specifies that it shall apply from 31 December 2016 (although under certain circumstances and for certain entities such as management companies of UCITS funds the regulation shall only apply as from 31 December 2019).

The rationale of this regulation is to protect retail investors in a market dominated by packaged retail investment products (PRIIPs) in which financial product manufacturers intercede between retail investors and financial markets. Investor protection becomes even more relevant as PRIIPs may be sold to them both directly or indirectly via intermediaries. Product disclosure is accordingly seen as an important medium to enhance investor protection. The new PRIIPs regulation will have an impact on the insurance sector since certain insurance products fall within its scope. Indeed, Article 4(2) of the PRIIPs regulation refers to 'insurance-based investment products', defined as 'an insurance product which offers a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations'. The European Banking Authority, the EIOPA and European Securities Markets Authority issued a discussion paper in which they clarify which insurance products are likely to fall

70 Insurance Commission, Appendix to the Annual Report 2013/2014, p. 12.

71 See footnote 2, p. 14.

72 ACA Press conference, 25 March 2014, 'IV. Solvabilité 2', p. 4.

73 Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

within the scope of Article 4(2) of the PRIIPs regulation and for which, as a consequence, a Key Investor Document would need to be provided to retail investors. In summary, the discussion paper indicates that:

Non-life and pure protection life insurance are excluded. All other products that meet the definition in Article 4(2) would be in scope (so long as they are not 'pension products' as defined in the exceptions). In practice this would appear to mean life insurance other than pure protection is normally in scope.⁷⁴

The discussion paper furthermore lists the following relevant products:

- a* insurance products with-profits or traditional life insurance contracts with variable bonuses;
- b* hybrid life insurance contracts which contain both unit-linked and with-profit elements; and
- c* unit-linked and index-linked life insurance contracts.

74 Discussion paper Key Information Documents for Packaged Retail and Insurance-based Investment Products (PRIIPs) of 17 November 2014 (JC/DP/2014/02) p. 12, 13.

Appendix 1

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Michel Marques Pereira became a member of the Luxembourg Bar in 2011 and joined Elvinger, Hoss & Prussen the same year.

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After initial experience at the Luxembourg Bar in 1984, he joined one of the major Luxembourg banks where he headed the legal and tax department. His experience of more than 20 years in the banking industry allowed him to gain extensive expertise in banking, finance, and corporate law as well as in regulatory issues. He has intensively practised mergers and acquisitions and restructurings on a local and cross-border basis.

He lectures on banking law in the master's degree in European law (European banking and finance law) course at Luxembourg University.

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