

Avenue Louise 240, Box 5
1050 Brussels
Telephone: 32 (0)2 626 05 00
Fax: 32 (0)2 626 05 10
www.steptoel.com
E-Mail: pwoolfson@steptoel.com

BRIEFING

30 November 2006

Re: **Implementation of the Insurance Mediation Directive into French law – publication of secondary legislation (*Décret* n° 2006-1091 of 30 August 2006)**

1. Introduction and background

On 31 August, the Official Journal of the French Republic published Decree n° 2006-1091 of 30 August 2006 “... relating to intermediation in insurance and amending the Insurance Code (*réglementaire* section)” (the “Decree”). The Decree is a secondary text further implementing the Insurance Mediation Directive (the “Directive”) into French law¹. The Decree amends *réglementaire*, i.e. secondary, provisions of the Insurance Code (“IC”).

This briefing addresses the principal provisions of the Decree. These are of direct relevance to: (i) insurance intermediaries authorised in France or which intend to use “passport” rights to approach the French market; and (ii) the French and foreign insurers working with such intermediaries. In addition, although it does not analyse certain specific waivers set out in the Decree, a number of options exercised by the French legislator are highlighted (see 2 to 9 below).

In accordance with the French Civil Code, the Decree entered into force on the day following its publication in the Official Journal, i.e. on 1 September. Transitional provisions apply (see 10 below). Furthermore, the Decree includes several Articles which refer to additional implementing orders (*arrêtés*).

Lastly, the Decree is considered from a broader, international perspective (see 11 below).

2. Definition of the activity of insurance mediation (Article R 511-1, IC)

The Decree expands the basic definition of “insurance mediation” set out in the *législatif* part of the IC. Specifically, the act, by any natural or corporate person, of introducing, proposing or assisting in the conclusion of an insurance transaction includes the following: (i) soliciting a person to enter into a contract (whether individual or group); (ii) collecting applications for such contracts; or (iii) setting out orally or in writing the conditions for coverage under a contract to a future policyholder or group member with a view to entering into such contract.

¹ The primary legislative text implementing the Directive into French law was Law n° 2005-1564 of 15 December 2005. This Law, which amended the *législatif* section of the Insurance Code, was subject matter of our Briefing of 21 February, per copy available on request.

The Decree also provides a definition of "...work preparatory to the conclusion of contracts of insurance": this includes all analytical and advisory work carried out by any natural or corporate person who introduces, proposes or assists in the conclusion of an insurance transaction. The provision of information or advice on an incidental basis in the context of another professional activity is not, however, mediation activity.

In sum, the Decree closely follows the provisions of the Directive itself, but with certain linguistic and technical amendments to reflect the previous drafting in the IC.

3. Categories of intermediaries (Article R 511-2, IC)

The Decree lists the categories of persons authorised to carry on an activity of insurance or reinsurance mediation for remuneration.

Broadly, the list comprises: (i) brokers (*courtiers*); (ii) general agents (*agents généraux*); (iii) agents of insurers, other than general agents (*mandataires d'assurance*); (iv) agents of insurance intermediaries (*mandataires d'intermédiaires d'assurance*)²; (v) salaried persons duly mandated either by insurers or by intermediaries (*salariés commis en tant qu'intermédiaires*); and (vi) intermediaries registered on the register of another Member State who have exercised passport rights into France, together with their salaried employees.

The Decree allows an intermediary to carry on a mediation activity under one or more of the above categories³. The Decree also applies the Directive's exemption of persons proposing insurance mediation services complementary to their main professional activity and for strictly defined contracts (essentially certain product warranties and travel insurance contracts).

Lastly, a specific category of persons under French insurance law – known as *indicateurs* – whose role is limited to putting the (prospective) insured in contact with the insurer or an intermediary, or in pointing out (*signaler*) one to the other, do not come within the above categories. This is an interesting exception, in that it draws a fine technical (and linguistic) distinction between insurance intermediaries within the scope of the Directive and its implementing rules and the activity of an *indicateur*. Thus:

- A person who carries on the activity of "introducing" contracts of insurance is carrying on an activity of insurance mediation and so is an insurance intermediary within the scope of the Directive; in this context, "introducing" in French is "*présentation*";
- An *indicateur* would be translated as an "introducer". However, the *indicateur* is not introducing insurance contracts under the Decree; he is introducing a prospective insured

² The powers of *mandataires d'assurances* and of *mandataires d'intermédiaires d'assurance* are restricted by the Decree, except where such *mandataires* are credit institutions; this means, for example, that banks can act as policyholders for group schemes and enjoy broader powers as intermediaries in the context of such schemes.

³ This contrasts with the situation in, for example, Belgium. Belgian law requires the intermediary to select one category.

to an insurer or intermediary. As such, the *indicateur* is not within the scope of the Directive and will be able to carry on (unregulated) activities much as in the past⁴.

4. **Remuneration of intermediaries (Article R 511-3, IC)**

The English version of the Directive narrates that “remuneration .. may be pecuniary or take some other form of agreed economic benefit tied to performance”. Remuneration is slightly differently defined in the French version and this is reflected in the Decree as “.. any pecuniary payment or any other form of economic benefit agreed and tied to the mediation service”⁵.

In accordance with the previous position under French law, retrocession (*rétrocession* i.e. passing on) of remuneration is only lawful between intermediaries. *Indicateurs* may also receive remuneration by way of retrocession of initial commission (*commission d'apport*).

The Decree introduces a further, key provision on remuneration. A person who is considering taking out insurance for his business activities for an annual premium in excess of €20,000 has the right to request the intermediary to provide him with details of the amount of the commission and of any other remuneration paid by the insurer. This rule applies irrespective of the capacity in which the insurance intermediary acts (whether for the insurer or not) and whether or not the intermediary's recommendation is based on a “fair analysis” of the market.

In other words, the Decree introduces a measure of “commission disclosure” into French law. The scope (business insurance), amount of premium (€20,000) and the trigger for disclosure (i.e. a right exercised by the client, rather than a duty for the intermediary) have been favourably received by the insurance intermediary sector⁶. This limited commission disclosure is unlikely to have significant effects in the retail life and non life sectors⁷.

5. **Registration (Article R 512-4, IC)**

The Decree provides for the setting up of an association whose duties will include: receipt of applications to register and to renew registration; deciding upon such applications; and carrying out deletions from the register.

The association also sends and receives notifications for passport purposes. France is therefore one of the Member States which requires receipt of notification from the competent authority of another Member State of an insurance intermediary's intention to operate on the French market on a services or branch basis.

⁴ In fact, the *indicateur* has a well recognised role in French insurance practice and regulation, for example, some years ago, the question arose whether putting a *Minitel* at the disposal of a prospective insured was a form of activity of an *indicateur*. The parallels with e-commerce are obvious.

⁵ A person – such as a charity – who carries an intermediation activity without remuneration would not appear, therefore, to be subject to the provisions of the Decree and the IC generally.

⁶ See, for example, *L'Argus* of 8 September 2006. This article ironically notes the possible emergence of policies with a premium of €19,999.

⁷ ...though the point does arise whether a policy taken out by a corporate policyholder on the life of a director with the director's spouse and family as beneficiaries would truly qualify as “for business purposes” and, therefore, be subject to the right of the policyholder to require disclosure of commission.

The Decree provides full details of the membership, operation, financial management and powers of the association. By way of example, personnel responsible for processing of files are subject to a duty of confidentiality, but must waive this in criminal proceedings and in the context of information exchange with the competent authorities of other Member States.

6. **Registration procedure (Article R 512-4, IC)**

An intermediary must apply for registration on the register of intermediaries and specify the category, or categories, of intermediary under which he wishes to carry on his activity. An order will set out details of the initial and renewal applications.

Registration takes place within two months of date of receipt of a complete file. The association notifies the intermediary of the registration number and the date of registration. If the application cannot be accepted, the association must notify its decision by recorded delivery letter with acknowledgement of receipt slip requested within two months.

Furthermore, the French competent authority for insurance intermediaries, the *Autorité de Contrôle des Marchés et des Mutuelles (ACAM)*, may require the association to strike off an intermediary who no longer fulfils the conditions required for the category in which he is registered. The strike off is published and is also notified to the registrar of the Trade and Companies Register. Lastly, the association draws up an annual report on registrations and deletions, statistics, etc. The report is made available to the public.

7. **Fitness and capacity requirements (Article R 512-7, IC)**

The Decree sets out an ongoing duty to fulfil fitness and capacity requirements. These vary depending on the category of intermediary; the Decree provides detailed guidance on professional training, experience, academic diplomas, etc.

8. **Professional indemnity insurance and financial guarantee (Article R 512-14, IC)**

The Decree provides that professional indemnity insurance (“PII”) must cover the whole of the European Economic Area⁸. Insurance is annual, tacitly renewed and subject to a statutory minimum coverage. The insurer must inform the association in 5 above of any suspension or termination of coverage. Transitional provisions apply.

The Decree maintains the financial guarantee requirements previously in force (and subject to transitional provisions). The guarantee is tacitly renewed on 1 January of each year. Its amount is subject to revision at each anniversary. The Decree also sets out detailed rules on calling and enforcement of the guarantee and the consequences of multiple claims, i.e. a *pro rata* division (*au marc le franc*) is applied. Again, transitional provisions apply.

At first sight, the PII provisions represent an improvement on the previous provisions by explicitly providing for EEA-wide coverage. Similarly, the provisions on the guarantee would

⁸ i.e. the 25 (soon, 27) Member States of the European Union, plus Iceland, Liechtenstein and Norway.

appear to remove an ambiguity in the previous text, namely whether a guarantee extended to premium paid to, or benefits received from, EEA insurers. In the life sector, premium payments are unlikely to be held by the intermediary because of anti-money laundering rules. If, nevertheless, the intermediary is holding client premiums (or benefits), insurers should still require details of the guarantee so as to ensure that these funds will be guaranteed⁹.

9. **Pre-contractual information (Article R 520, IC)**

The Law of 15 December introduced the pre-contractual information requirements of the Directive into the IC. The Decree imposes further requirements which complete the general provisions sent out in the *législatif* part of the IC. The intermediary must: (i) provide the client with details of his name, company name, business address and registration number; (ii) give details of how to check this registration; (iii) disclose holdings held, directly or indirectly, which are in excess of 10% of the voting rights or capital of an insurance undertaking; (iv) provide details of holdings of more than 10% which an insurer may hold in the intermediary's capital; and (v) set out details for the procedure for claims, including complaints to the ACAM.

An intermediary who is not bound to work exclusively with one or more insurers and who provides advice on the basis of a fair analysis of the market (i.e. a broker) must provide details of the insurer (or its group) in the event that, in the course of the previous year, he has placed in excess of 33% of his turnover with that insurer (or group).

Information must be provided in paper form or by any other durable means to which the policyholder has easy access. The intermediary can provide the information orally on request by the policyholder, or where immediate cover is required. However, written information must be provided immediately following conclusion of the contract. In the case of a distance sale, the information provided must fulfil the requirements of Article L 112-2-1, IC¹⁰.

Lastly, the Decree sets out various requirements regarding correspondence and advertising material, both in relation to the intermediary himself and, in certain circumstances, the insurer.

10. **Transitional provisions**

The various requirements of the Decree are to be progressively phased in. For example, brokers have a period of 18 months following the date of commencement of the register of intermediaries to decide whether they wish to work on an exclusive or non-exclusive basis with one or more insurers. Furthermore, those intermediaries who do not at present come within one of the categories listed at 3 above, have a period of 12 months from the date of commencement of the register to apply. Likewise, employers have a period of 12 months to fulfill certain fitness requirements as applicable to their employees.

The register of intermediaries must be operational at the latest by 31 January 2007.

⁹ Note that, if the insurer grants express authority to hold premiums or benefits, the guarantee does not apply.

¹⁰ i.e. pre-contractual information for distance sales.

11. A broader perspective

As noted above, the Decree introduces secondary regulations into the IC. The Decree, in fact, provides for additional ministerial orders (*arrêtes*, all but one of which have been published)¹¹. For a full understanding of the implementation of the Directive into French law, intermediaries and insurers should ensure that they are aware of the content of these orders.

Generally, the Decree represents a moderate and balanced implementation into French law of the Directive. It is an indispensable complement to the basic implementing text, the Law of 15 December 2005. By way of example, the Decree introduces the framework for notification of the exercise of passport rights, subject to compliance with French general good. Certain provisions reflect domestic concerns, e.g. the specific role of *indicateurs*; other provisions reflect a more European perspective, e.g. the territorial scope of the financial guarantee.

A particularly sensitive issue has, of course, been commission disclosure: the French market appears to have escaped, meantime, the regulatory zeal shown in other jurisdictions. Thus, for example, reaction by the regulatory authorities in France regarding Attorney-General Spitzer's investigation into "contingent commissions" in the US has been limited, whereas this issue continues to "rumble on" on both sides of the Atlantic:

- Two additional class action suits were filed in the US at the end of October alleging an illegal conspiracy to set prices¹²;
- The settlement announced between UnumProvident Corporation and the California Department of Insurance regarding "disclosure of broker compensation programs"¹³;
- Criticism by the head of the UK's FSA, John Tiner, of buyer "apathy" in relation to transparency of commission disclosure in the UK market¹⁴;
- Publication in Belgium of an official opinion on commission "transparency"¹⁵; and
- Continued interest of the European Commission in the context of its sector inquiry¹⁶.

Lastly, brokers in France itself have been in the spotlight with the recent judgement against Gras Savoye for over €15 million on grounds of failure to provide its insured, a paper company, with sufficient information on the scope of coverage of a fire insurance policy¹⁷.

* * * * *

¹¹ Official Journal of the French Republic of 7 November.

¹² Competition Law 360, 27 October.

¹³ UnumProvident press release, 1 November.

¹⁴ "...it would seem that disappointingly few buyers are exercising their right to request disclosure and, as a result, there is an absence of transparency to the customer." (speech to the Insurance Institute, London, 2 October). In the same speech, Mr. Tiner announced that "...commission disclosure will be highlighted as a priority ...in the FSA's coming Business Plan for 2007/8..."

¹⁵ Opinion of the *Commission des Assurances*, 17 October.

¹⁶ Presentation to the European Risk Managers' Federation, *FERMA*, in Brussels on 11 October.

¹⁷ *L'Argus*, 20 October. An appeal is expected.

If you have any questions concerning this Briefing, please contact Philip Woolfson on +32 2 626 05 19 (pwoolfson@step toe.com) or Guy Soussan on + 32 2 626 0535 (gsoussan@step toe.com).

© Copyright 2006 Steptoe & Johnson LLP. All rights reserved. No distribution or reproduction of this Briefing or any portion thereof is allowed without our written permission except by the recipient for internal use only within the recipient's own organisation.

Neither this Briefing, nor the information it contains, constitutes legal, counselling, accounting or other professional services. The opinions expressed in this Briefing are for the purpose of fostering productive discussions of legal issues and do not constitute the rendering of legal advice or other professional services. No attorney-client relationship is created, nor is there any offer to provide legal services, by the publication and distribution of this Briefing.