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BRIEFING

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Re: **Implementation of the Insurance Mediation Directive into French law - status and compliance points for the insurance sector**

1. Introduction and background

Law n° 2005-1564 of 15 December 2005¹ (“the Law”) implements the Insurance Mediation Directive (“IMD”) into French law.

The Law makes a number of amendments to Book V of the French Insurance Code. Previously headed “General agents, brokers and insurance and capitalisation intermediaries”, this Book now adopts the IMD terminology “Insurance Intermediaries”.

Unlike certain other jurisdictions in which intermediary regulation was practically non-existent (Germany) or partly self-regulatory and partly regulated (the UK), French legislation already had detailed registration, fitness and capacity, professional indemnity insurance, guarantee and other requirements in place, as set out in Book V of the Code. The Law is therefore an amending text, building on a well understood and effective regulatory regime.

This memorandum sets out the principal amendments to the definition of an intermediary (2. below), the conditions intermediaries must fulfil (3. below), passport rights and information duties (4. and 5. below) and the supervisory regime and related matters (6. and 7. below). Each section includes suggestions and observations which insurers should bear in mind when appointing and working with intermediaries in France.

2. What is insurance mediation and who is an intermediary?

The definition of insurance and reinsurance mediation closely follows the definition in the IMD itself. It consists, in brief, of introducing, proposing or carrying out other work preparatory to the conclusion of insurance or reinsurance contracts.

Conversely, the Law provides that an activity exclusively consisting of management, loss adjusting and expert appraisal of claims is not insurance mediation.

¹ Law n° 2005-1564 of 15 December 2005 relating to various provisions adapting the insurance sector to Community law/*Loi no. 2005-1564 du 15 décembre portant diverses dispositions d'adaptation au droit communautaire dans le domaine de l'assurance*, published in the Official Journal n° 292 of 16 December 2005, page 19348.

An insurance intermediary is any person who, for remuneration, pursues insurance or reinsurance mediation. An exception is made for insurance and reinsurance undertakings, their employees and other persons to be identified in secondary regulations (these persons will be exempted taking into account the activity, the nature of the insurance contract and the amount of the premium).

3. Conditions for pursuit of activity as an intermediary

3.1 Registration

Insurance intermediaries must be registered in a register which must be accessible to the public, so that consumers and insurers (including foreign insurers) can confirm registration. Secondary regulations will set out the form and content of the register, but it is likely to follow the list currently in place for insurance brokers. Employees of insurance and reinsurance intermediaries need not register (so, insurers will need to obtain details of their employer for due diligence purposes). Registration must be renewed annually, for a fixed fee.

The duty to register has at least two consequences:

- Insurance and reinsurance undertakings are under a statutory duty to check that an intermediary is duly registered (for specified classes of business and a given category, such as broker, agent, etc.).
- The duty to check extends to intermediaries registered in other Member States: in this case, it will be necessary to confirm that the French registry sets out details which are consistent with the registration in the intermediary's home country².

Special provisions apply to "tied agents" i.e. agents which are not general agents (*agents généraux*). Such tied agents act in the name and on behalf of an insurance undertaking which assumes liability for the agent; the agent does not have power to receive premiums for clients or to pay benefits to them. The Law provides that the insurance undertaking may register such agents subject to the undertaking's duty to ensure that the agent fulfils the requirements to pursue a mediation activity.

Registration is a continuing duty. Failure to meet the conditions, or to renew registration, will result in deletion from the registry. Other, more severe, sanctions can apply.

3.2 Fitness and professional qualifications

Insurance intermediaries who are natural persons acting in their own name, corporate officers of intermediaries which are in corporate form, and officers and employees of insurance and reinsurance undertakings with binding authority or who have direct responsibility for mediation activity must fulfil fitness requirements which are identical to those applicable to

² This means that France, as the "host Member State", requires notification from the "home Member State" of the intermediary's intention to operate in the French market. The IMD provides for this as an option; France has exercised that option.

corporate officers of insurance undertakings. In the event of failure to do so, criminal sanctions apply (imprisonment for three years and a stiff fine (€375,000)).

The IMD does not expressly contemplate extension of the fitness requirements to officers and employees of insurance undertakings: Book V of the Insurance Code is usually deemed to be French general good binding in its entirety on foreign undertakings, but it is still doubtful whether this requirement could apply to foreign undertakings operating on the French market (at least, on a freedom of services (“FOS”) basis).

These same persons are subject to professional qualification requirements to be set out in secondary regulations and which will take into account the nature of the mediation activity and the products distributed. The regulations will not, however, be binding on intermediaries from other Member States operating on the French market, even if the foreign qualifications are not as strict as those applicable to French intermediaries.

3.3 Professional indemnity insurance (“PII”) and financial guarantee

Book V has for many years imposed PII and guarantee requirements on certain insurance intermediaries.

The Law extends these requirements to intermediaries generally, with the exception of those cases where the requirements are assumed by another person (insurance undertaking, another intermediary, etc.) on the intermediary’s behalf and by virtue of a mandate or similar arrangement.

With regard to the guarantee, the new provisions remove an ambiguity in the previous text, the effect of which was to exclude the benefit of the guarantee where premiums or benefits were held in relation to a non-French insurance undertaking. The new rule expressly and generally refers to funds intended to be paid either to an insurance undertaking or to insured i.e. without reference to the nationality of the undertaking.

Intermediaries must be able to provide evidence at all times of their PII and guarantee. Insurance undertakings should, therefore, include this as part of their due diligence and terms and conditions with insurance intermediaries (at least, the PII and, if the intermediary is handling client money, the guarantee also). The Law has not yet set the amount of the PII, but this must be at least €1,000,000 per claim and €1,500,000 per annum³. Likewise, secondary regulations will impose guarantee amounts of 4% of annual premiums and a minimum of €15,000⁴.

4. Passports

The Law duly implements the freedom of services (“FOS”) and branch passport provisions of the IMD. France has elected to require a French insurance intermediary to inform its registration authority of its intention to operate on a FOS or branch basis in another State. This

³ Article 4, IMD.

⁴ Article 4, IMD.

authority would then inform the host State authority. One month timelines apply. The registration authority must also inform other, host State, authorities of deletion from the French registry.

Insurance intermediaries from other Member States of the European Economic Area can operate on a FOS or branch basis in France, following notification by their home State authority to the French registration authority.

The Law makes no reference to French general good applicable to such foreign intermediaries⁵.

5. **Information to be provided by the intermediary**

The Law follows closely the provisions of the IMD⁶, by providing that, prior to the conclusion of any contract, the intermediary must:

1. Provide information regarding how the contract is being proposed:
 - a) if he is subject to a contractual obligation to work exclusively with one or more insurance undertakings, the intermediary must so inform the client; if the client so requests, the intermediary must also inform him that he will provide the names of those insurance undertakings;
 - b) if he is not under a contractual obligation to work exclusively with one or more insurance undertakings and is not able to base his analysis on a sufficient number of insurance contracts offered on the market, the intermediary must inform the client that, at the client's request, he will provide him with the name of the insurance undertakings with which he works;
 - c) if he is not under a contractual obligation to work exclusively with one or more insurance undertakings and if he is proposing advice based on an objective analysis of the market, he is bound to analyse a sufficient number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the client's needs;
2. Specify the demands and needs of the client as well as the underlying reasons for any advice on a given insurance product. These details which rely, in particular, on the information provided by the client, must be adapted according to the complexity of the insurance contract proposed⁷.

⁵ In other words, France has not (yet) implemented Article 6.3 of the IMD, "The competent authorities of the host Member State may take the necessary steps to ensure appropriate publication of the conditions under which, in the interest of the general good, the business concerned must be carried on in their territories."

⁶ Article 12, IMD.

⁷ The Law quite rightly uses the term "adapted", rather than "modulated" which is the vague term used in the IMD.

The intermediary must inform the policyholder of changes in the above information on renewal or when the policy is amended.

The duty of information is not required in two cases: large risks and reinsurance treaties; these are quintessentially “non-consumer”, so not within the scope of the duty.

Insurance undertakings therefore need to consider due diligence in these respects e.g. review of style “reasons why” letters used by intermediaries acting on their behalf. These are likely to be an innovation for many French intermediaries and insurance undertakings might find that they need to “educate” their distribution channels, using standard form specimens from more *anglo-saxon* markets. The above duties should also appear in terms and conditions and be regularly monitored. Otherwise, a policyholder could claim insufficient information as a basis for a recovery of premiums paid. At first sight, a claim against a broker should be restricted to the broker and based on the latter’s fault without spillover to the insurer. However, if the intermediary is allegedly, or in fact, acting in the name and on behalf of the insurer, i.e. as an agent, it is probable that the insurer would also face a liability claim.

6. **Supervision, sanctions, etc.**

The insurance supervisory authority, the *ACAM*⁸, includes insurance intermediaries within its remit and for these purposes, intermediary means:

- any person to whom an insurance undertaking has granted underwriting or management authority;
- any person taking out a group insurance contract; this suggests that, where the broker acts as policyholder in group contracts or, for example, where a company takes out a group policy as part of an employment benefits programme, these persons may become subject to supervision by the *ACAM*. Insurance undertakings may, therefore, need to consider appropriate due diligence and, if necessary, indemnity arrangements in relation to such products;
- any person pursuing a mediation activity.

Separate provisions implement the IMD insofar as certain providential and mutual institutions are concerned. In particular, subject to various conditions, mutual institutions can be intermediaries (and, therefore, as at present, constitute a separate distribution channel).

Sanctions vary under the Law. These range from deletion from the register, prohibition on carrying out certain mediation transactions or a prohibition on pursuit of a mediation activity. As noted above, criminal sanctions can also apply in various cases. Sanctions may also be published even before they have become definitive (so, aggravating “reputational” risk).

⁸ In recent years, the name of the supervisory authority has mutated from *Commission de contrôle des assurances (CCA)* to *Commission de contrôle des assurances, des mutuelles et des institutions de prévoyance (CCAMIP)* and now to the *Autorité de contrôle des assurances et des mutuelles (ACAM)*.

Lastly, transitional provisions apply for the duty to register noted above. Other provisions apply on publication of the Law.

7. Concluding remarks

At first sight, the Law appears to be a comprehensive and proportionate implementation. The Law must, however, be seen in context and that context dictates the scope of due diligence and terms and conditions with intermediaries, for example:

- recent changes in the professional associations governing the insurance intermediaries sector, specifically merger of certain broker federations;
- maintaining a clear distinction between operations on an FOS basis, as opposed to a branch basis, both from the regulatory perspective and tax perspective i.e. risk of a finding of a taxable “permanent establishment”;
- case law interpretation of the powers, rights and duties of insurance intermediaries, for example, acts carried out by an intermediary which create a “legitimate belief” (*croyance légitime*) in the mind of the policyholder that the intermediary is acting as an agent of the insurance undertaking;
- whether French general good will, in practice, be raised and constitute an obstacle for cross-border intermediary activity;
- the effects of a supervisory protocol on the IMD concluded among the EU Member State authorities (a draft protocol has circulated and the definitive version is expected very shortly); and
- the tax treatment of intermediaries, in particular, whether the exemption from VAT continues to apply to certain activities in the light of the European Court’s judgement in the *Arthur Andersen* case and French interpretation of that case law.

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