

Reflections of the French Section of the International Association of Legal Protection Insurance (RIAD) on legal protection insurance and the free choice of lawyer

The GSPJ (grouping of French insurance companies specialized in legal protection insurance) is part of RIAD, the international association of legal expenses insurers, which represents legal expenses insurance companies from 17 countries in Europe, Australia, Canada, South Africa and South America. The members of RIAD are all specialists in insurance and/or the services associated with legal expenses insurance, and the majority of these members are small businesses that offer a specific product. By means of an insurance policy they provide their clients with the necessary resources to obtain high-quality, easily accessible legal advice. In addition, they protect their clients against the financial risks entailed in using the services of legal experts or when involved in litigation. In March of last year RIAD commented on the 'Eschig' case C-199/08, in which the European Court of Justice ruled that article 4 (1) (a) of the Directive on legal expenses insurance¹ (hereafter referred to as "the Directive") prohibits legal expenses insurers, in cases in which a large number of policyholders have been victims of the same damages as a result of a single event, to reserve the right to choose the legal representative for all policyholders concerned.

Since then, further discussions concerning the interpretation of free choice of a lawyer have been ongoing, and RIAD, as representative of the first sector concerned by this Directive and this ruling, would like to contribute the following remarks.

The historical context of the Directive and the reality of its content:

In the 1970s, in the aim of establishing the free exchange of services within the EU, minimum legal pre-requirement concerning legal expenses insurance was implemented. Common to all member States, this pre-requirement made it possible to establish a balance between the different operating procedures in place within the various States.

It was necessary to allow the different models to continue to exist.

The aim of the directive was therefore to avoid conflicts of interest between insurers and policyholders. Within this framework, the independence of legal expenses insurers was defined as a necessary and sufficient condition to avoid these conflicts.

The free choice of a lawyer was therefore not an issue.

As such, in article 3, the Directive requires: that the company managing legal expenses insurance conflicts comply with one of the following three situations (alternative choice):

- a) The company must ensure that no member of its staff in charge of the management of claims in the "Legal Expenses Insurance" branch or of legal advice relative to said management perform a similar function at the same time:
 - in the case of multi-branch companies: for another branch in which the company has operations,
 - in the case of multi-branch or specialized companies: in another company having financial, commercial or administrative ties with the first company and operating in one or several other branches of the directive 73/239/CEE;
- b) The multi-branch insurance company entrusts the handling of claims from the "Legal Expenses Insurance" branch to a legally separate company. This company

¹ Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions for legal expenses insurance

is mentioned in the separate contract or separate chapter mentioned in paragraph 1. If said legally separate company is linked to another company operating in insurance in one or several other branches mentioned in point A of the appendix of directive 73/239/CEE, employees of this company handling claims or legal advice may not perform the same or a similar function concurrently for the other company. Furthermore, member states may impose the same requirements for members of the management organ;

- c) The insurance company sets out in the contract the right of policyholders to assign the defense of their interests to a lawyer of their choosing or, where permissible by national laws, **to any person gathering the necessary qualifications** from the time they are entitled, under the terms of the policy, to request the intervention of the insurance company.

The Directive states that every legal expenses insurance contract recognizes explicitly that:

- a) when the services of a lawyer are requested or those of any person gathering the qualifications required under national law to defend, represent or serve the interests of policyholders, in all legal proceedings, policyholders are free to choose said person;

- b) policyholders have the right to choose a lawyer or, if they prefer, where permissible by national laws, **any other person gathering the necessary qualifications to serve their interests each time a conflict of interest arises.**

Therefore the Directive considers the handling of a legal expenses insurance conflict by a lawyer as one of the options aimed at avoiding conflicts of interest; it gives priority to the independence of the legal expenses insurer in the management of the case.

It even indicates in article 3-3 that ***"regardless of the option chosen, the interests of policyholders covered by legal protection insurance are considered as being guaranteed in an equivalent manner by virtue of the present directive."***

In France, article 55 of law n. 71-1130 of 31 December 1971 states that:

All persons authorized to give legal consultations "must respect professional confidentiality in accordance with the terms of articles 226-13 and 226-14 of the Penal Code and must refrain from intervening if they have a direct or indirect interest relative to the matter at issue."

Legal expenses insurance jurists, the same as lawyers, are therefore subject to professional confidentiality which prohibits them, under penalty of criminal prosecution, from divulging information given by policyholders. This represents an important guarantee in ensuring the interests of clients, in addition to requirements in terms of diplomas. Indeed, a determining factor regarding the efficiency of customer service is the training and competence of jurists in charge of legal expenses insurance cases: two thirds of them have completed 5 or more years of university studies.²

Legal expenses insurance jurists are also bound by the duty of counsel and they engage the professional civil liability of the company where they are employed, in case of an omission or wrongful negligence resulting in a loss of opportunity, the same as lawyers who could be held liable.

²(source GSPJ: grouping of French insurance companies specialized in legal protection insurance).

All legal expenses insurers must give proof of a financial guarantee and their business activity is covered by professional civil liability insurance. This internal model constitutes a veritable guarantee of solvency required by the regulatory reform of 22 April 2009. Furthermore, the Directive specifies that when, under contractual and legal possibilities, the services of a lawyer are engaged, said lawyer must be chosen freely by the policyholder.

Legal expenses insurers recognize and respect the right of free choice of a lawyer as one of the tools implemented by the Directive in order to guarantee the interests of policyholders in certain specific cases and to protect the trust that that policyholders have placed in their legal representatives. This situation is clearly supported by the Directive itself, by the drafting process that preceded it and by the ruling of the European Court of Justice.

Consequently, the Directive is aimed, above all, at preventing, to the extent that it is possible, any appearance of conflict of interest caused by the fact that an insurer covers an individual at the same time for legal expenses as well as for other risks, particularly civil liability, or that the insurer covers another person at the same time. The European Court of Justice confirms this situation in the Eschig³ ruling.

It remains essential that insurers act in the best interest of their policyholders.

The interests of policyholders must be safeguarded regardless of whom the stakeholders in their litigation may be

The French law of February 2007 prohibits insurers from negotiating the fees of lawyers acting within the framework of a legal protection insurance contract. This law was transposed into the insurance code through L.127-5-1, which states that “the lawyer’s fees are determined between the latter and his or her client, without requiring the approval of the legal expenses insurer”.

In order to safeguard the interests of policyholders in light of this provision, insurers have developed contractual ceilings that had been introduced long before the law of February 2007.

Policyholders are now alone in negotiating fees with their lawyers.

For their part, lawyers remain free to set their fees without concern for the financial consequences for their clients.

Fees exceeding the contractual coverage are payable by the policyholder.

This situation is even more difficult for policyholders given that fee agreements between lawyers and clients are rare. When they exist, very often they stipulate a single hourly fee, leaving it up to policyholders to estimate the number of hours necessary for their defense, and therefore, to estimate the total amount that will be invoiced them.

The French law of February 2007 has very certainly resulted in an increase in the fees charged by lawyers, the number of whom has risen in recent years, given that the profession does not impose quotas for the title of lawyer. As of 1st January 2009, the number of lawyers in France was 50,314 for 179 bars (44% of which are grouped within the Paris Bar alone), the number of lawyers has risen by 33.33% in the last 8 years while, over the same period, ongoing civil cases in the *Tribunal de Grande Instance* have risen by 2.5%, 13.7% in the *Prud’hommes* (labor court) and dropped by nearly 20 % in the Court of Appeal.

³ Number 39 of the ruling

The increased freedom of choice in place since the transposition of the Directive must give way to the powers of free competition.

In accordance with the European Directive, the free choice of a lawyer had been practiced by all Legal Expenses Insurance companies long before the law of February 2007.

Moreover, this free choice, as well as the application thereof, appear very clearly in the contractual provisions of Legal Expenses Insurance contracts sold in the French market.

In addition, in compliance with contractual guarantees, insurers pay fees directly to lawyers intervening in a file. **Therefore, policyholders need not do so in advance.**

The directive does not assimilate the free choice of a lawyer to a monopoly by lawyers in the extrajudicial phase (see the latest legislative provisions establishing participative procedure in France).

In order to cope with the growing numbers within their ranks, have lawyers been tempted, in an effort to attract new clients, to establish a monopoly favorable to them, thereby ignoring the directive and denying the principle of free competition?

Indeed, certain of them put forward motives such as the defense of the interests of persons subject to trial, omitting the predominant drawbacks such as the reduction in the supply of services and the restriction of competition.

In opposition to the European logic and without concern for an economic reality that considers that all monopolies result in a significant increase in costs to the detriment of consumers, they take up arms against the practices of insurers who, in fact, offer citizens quality legal services at affordable process.

In particular, the mandatory intervention of a lawyer whenever a conflict is declared would necessarily lead to an increase in the costs of processing conflicts, as well as leaving much higher sums than at present to the expense of policyholders.

Consequently, policyholder clients of a lawyers would suffer a double penalty: their financial contribution to the management of the litigation and the increase in their insurance policies.

Today, clients are increasingly demanding and fully expect to reap the benefits of a competitive environment offering quality services at competitive prices.

So, let us allow Legal Expenses insurers to respond to this demand. Let us leave it up to consumers to exercise their freedom of choice.