[FREE TRANSLATION]

OPINION N°2023-AO-04 DATED NOVEMBER 07, 2023
ON A DRAFT LAW AMENDING THE INSURANCE CODE APPLICABLE IN FRENCH POLYNESIA

The Polynesian Competition Authority,

In view of the letter dated October 05, 2023, registered on October 10, 2023 under number 23/0021 A, by which the President of French Polynesia referred to the Polynesian Competition Authority (hereinafter "the Authority") for an opinion on a draft law of the country amending the insurance code applicable in French Polynesia;

Having regard to the Polynesian Competition Code and in particular article LP. 620-1 ;

Having regard to the other documents in the file;

The Deputy General Reporter, the General Reporter and the representatives of the Directorate General for Economic Affairs heard on the basis of the provisions of article LP. 630-5 of the French Competition Code at the meeting of November 07, 2023;

Is of the opinion to respond to the request presented in the sense of the following observations:

INTRODUCTION

1. The draft text submitted for the Authority's consideration is intended to reform the insurance code applicable in French Polynesia. To this end, the draft law replaces the provisions of Books III and V of the Insurance Code, which deal respectively with the conditions for carrying on insurance business (Book III) and the conditions for carrying on the business of insurance distributors (Book V).

I. FINDINGS

A. THE INSURANCE CODE IN FRENCH POLYNESIA

1. APPLICABLE REGULATIONS

2. Since the organic law of February 27, 2004 on the status of autonomy[1] , French Polynesia has had jurisdiction over insurance law (article 13 of the organic law).

3. In accordance with article 11 of the organic law governing the statutes, the rules applicable in French Polynesia in the field of a transferred competence are those that governed it on the date of entry into force of the organic law governing the statutes. Applied to the field of insurance, this statutory principle implies that the law applicable in French Polynesia is that contained in the French Insurance Code in its version in force on February 27, 2004, together with any subsequent amendments made by the country. As a result, the laws and regulations of the French State relating to insurance enacted after February 27, 2004 are no longer applicable in French Polynesia. However, in accordance with the jurisprudence of the Conseil d'Etat, the transfer of jurisdiction in question is only effective once French Polynesia has effectively exercised its jurisdiction, subsequent to the statutory organic law. Otherwise, the legislation in force remains that of metropolitan France.

4. At present, the legislative part of Polynesian regulations relating to the insurance code is governed by Decree no. 76-666 of July 16, 1976 on the codification of legislative texts concerning insurance[2] . A number of legislative changes introduced in mainland France up to 2004 have been incorporated into the Polynesian insurance code[3] .

5. Since the Organic Law of 2004, the Polynesian Insurance Code has only been amended twice, by Country Law no. 2017-5 of June 8, 2017, amending Book I of the Insurance Code[4] and Country Law no. 2020-12 of April 21, 2020, introducing various emergency economic measures in response to the COVID-19 epidemic[5] . As a result, the Polynesian insurance code has remained largely unchanged since 2004.

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[1] Amended organic law n°2004-192 of February 27, 2004 on the autonomous status of French Polynesia.

[2] Promulgation order no. 4488 AA of August 4, 1976 JOPF of November 29, 1976, p. 850.

[3] See, for example, law no. 81-5 of January 7, 1981 relating to insurance contracts and capitalization operations (promulgation order no. 3955 AA of 9/03/81; JOPF of 31/03/81, p. 273) and law no. 83-453 of June 7, 1983 adapting the insurance code (legislative part) to directive no. 79-267 of the Council of the European Communities (promulgation order no. 3899 AA of 8/11/83; JOPF of 30/11/83, p. 1394).

[4] JOPF of 8/06/2017, p. 2834.

[5] JOPF of April 21, 2020, n° 49 NS, p. 3564.

2. L 'STATE OF PLAY

6. The insurance sector in French Polynesia is dominated by major European players such as Axa, Allianz, Gan and Generali. Most of these major groups operate in French Polynesia through local branches or authorized agents. The Direction Générale des Affaires Economiques (hereafter "DGAE"), bearer of the draft text submitted for examination, has indicated that only one company carrying out insurance operations in French Polynesia has established its head office in the territory. One of the specific features of the insurance sector in French Polynesia is therefore that virtually all the insurance companies operating in the territory have established their head offices outside the country.

7. Since the Organic Law of 2004, there has been a gradual disconnect between the legislation applicable in French Polynesia, inherited from the national insurance code of 2004, and the legislation applicable in France, which has undergone several major reforms, notably through the transposition of the European Solvency I & II directives[6] .

8. The absence of any far-reaching reform of the Polynesian insurance code for nearly twenty years may have weighed on the attractiveness of French Polynesia to foreign insurance companies. In particular, the DGAE stresses that it has been called on to reform the insurance code by both insurance companies and local businesses. In particular, it cited several examples of the difficulties facing the sector in French Polynesia:

   - some tourism companies are finding it difficult to obtain insurance solutions tailored to their activities. These difficulties are compounded by the fact that the major European insurance groups are unfamiliar with the local economic fabric, and that French Polynesia is a long way from mainland France;
   - private individuals sometimes have difficulty finding insurance for their land vehicles; and
   - the previous regulatory framework was complex and difficult for citizens to understand.

B. THE DRAFT LAW OF THE COUNTRY SUBMITTED FOR THE OPINION OF THE AUTHORITY

9. The government has undertaken to reform the insurance law applicable in French Polynesia, with the aim of gradually updating all the provisions of the five books of the Insurance Code applicable in French Polynesia.

10. The explanatory memorandum details the reasons behind the draft law submitted for this opinion. For the DGAE, reform of the Polynesian insurance code appears "*essential*", given that it has been "*mainly 'frozen'*" since the transfer of competence in insurance matters[7] . In particular, she points out that the code "is difficult to apply, and even contains legal loopholes in certain areas of insurance. Some of its provisions have become obsolete and unsuitable, particularly with regard to the supervision of companies"[8] .

11. According to the DGAE, the aim of the country's bill is to enable :

   - clarify and simplify licensing procedures for insurance and insurance distribution activities in French Polynesia, by bringing the legislation applicable in French Polynesia into line with that applicable in France; and

[6] Directive 2002/12/EC of the European Parliament and of the Council of March 5, 2002 (Solvency I) and Directive 2009/138/EC of the European Parliament and of the Council of November 25, 2009 (Solvency II).

[7] Explanatory memorandum, page 2.

[8] Explanatory memorandum, page 2.

- offer Polynesian economic operators a wider range of insurance services by making the territory more attractive for foreign insurance companies to offer their insurance services.

1. MAIN PROVISIONS OF THE REFORM OF THE INSURANCE CODE

12. The draft law of the country replaces the provisions of Book III of the Insurance Code applicable in French Polynesia, relating to the conditions for carrying on the business of insurers, and Book V, relating to the conditions for carrying on the business of insurance distributors.

13. The country's draft law will thus directly affect insurance companies and insurance intermediaries with whom it is possible to take out insurance. The DGAE has identified around one hundred insurance companies operating in French Polynesia, some of which have a branch office. Supervision of these activities is intended to ensure that insurance companies operate and remain solvent, with a view to protecting policyholders.

14. In practice, the reform incorporates the structure and principles of the insurance code currently applicable in mainland France, with specific features linked to its status as an autonomous overseas collectivity. In particular, the reform should ensure that the provisions of the Insurance Code applicable in French Polynesia comply with international standards for the regulation and supervision of the insurance sector.

15. Within Book III of the Insurance Code, the draft law introduces an article LP 300-1, which deals with agreements that may be concluded with the prudential control authority of a State in which an insurance company operating in French Polynesia has its head office. Such an agreement may only be entered into on condition that the level of supervision in the state or territory in which the company has its head office offers guarantees at least equivalent to those provided by the Polynesian insurance code. The aim is to ensure that the company is always licensed in the state where its head office is located.

16. The draft law of the country establishes the principle of compulsory approval for insurance companies, and identifies the different companies authorized to operate in French Polynesia according to their situation (article LP 310-2). Article LP 310-2 distinguishes three cases in which insurance companies are eligible for approval:

    - a company whose head office is located in French Polynesia;
    - a company whose head office is outside French Polynesia and which operates there through a branch managed by a general representative; and
    - a company whose head office is outside French Polynesia and which carries on business there without being established.

17. Article LP 310-1 stipulates that companies engaged in personal insurance (e.g. life insurance), property and casualty insurance (e.g. property and liability insurance), and mutual insurance companies carrying out insurance operations[9] , are considered to be insurance companies, and as such are subject to Polynesia's licensing requirements and general supervision of insurance companies**.** On the other hand, this same article excludes the Caisse de prévoyance sociale from being subject to the provisions of the Insurance Code[10] .

18. Article LP 300-2 provides for the conclusion of an assistance agreement with the Autorité de contrôle prudentiel et de résolution (hereinafter "ACPR"), which is responsible for supervising the insurance business in mainland France. The ACPR will be able to provide support for both the administrative approval process and the supervision of companies.

[9] Mutual societies within the meaning of local law no. 2008-4 of February 6, 2008 on the status of mutual societies in French Polynesia.

[10] Local law no. 2011-19 of July 19, 2011.

19. Only companies holding the authorization provided for in article LP 310-2 will be authorized to offer insurance in Polynesia (article LP 310-6 , 1er alinéa). However, the insurance of risks linked to maritime and air transport are expressly excluded from the scope of approval (article LP 310-6, 2ème paragraph). By way of exception, article LP 310-6 also admits the possibility of taking out insurance with a company that does not hold approval. This derogation may only be granted, by order of the President of French Polynesia, in the event that insurance cover for a risk cannot be obtained from an approved company.

2. LICENSING CONDITIONS FOR INSURANCE COMPANIES

20. Administrative approval for insurance companies is issued by order of the President of French Polynesia, and enables *a priori* control of the capacity of insurance companies (article LP 321-1). Insurance companies may not commence operations until they have obtained administrative approval .

21. For companies headquartered in French Polynesia, approval is subject to verification of various conditions, the content and procedures of which vary according to the company's situation (article LP 321-3). In particular, the President of French Polynesia must ensure that the company has "*sufficient and appropriate technical and financial resources (...) with regard to its program of activity*", that its directors "*are of good repute and have the competence and experience required*" for their duties, and that the company complies with the solvency margin stipulated in article LP 323-2. In practice, this is a very marginal situation, as only one insurance company is based in Polynesia.

22. For companies whose head office is located outside French Polynesia, article LP 321-2 provides for an approval procedure based on two cumulative conditions:

    - the level of control exercised by the State in which these companies are headquartered offers guarantees at least equivalent to those provided by the law of the country; and
    - the French Polynesian prudential supervisor has signed a cooperation agreement with the French Polynesian authorities.

23. A decree issued by the Council of Ministers is required to draw up a list of countries or territories offering guarantees at least equivalent to those provided by the French Insurance Code. This list may be drawn up with the technical support of the ACPR. This approval procedure will concern insurance companies whose head office is located outside French Polynesia, (i) which operate there through a branch in French Polynesia, or (ii) which operate there without being established. These two hypotheses concern virtually all insurance companies operating in French Polynesia.

24. In addition, article LP 321-2 provides for a derogation, allowing companies operating in French Polynesia through a branch[11] to obtain authorization without fulfilling the general provisions, on condition that these companies meet all the prudential obligations set out in 1° of I of article LP 310-2.

25. Article LP 321-4 stipulates that approval may be refused when the exercise of the company's supervisory mission "*is likely to be hindered either by the existence of direct or indirect capital or control links between the applicant company and other natural or legal persons, or by the existence of legislative, regulatory or administrative provisions of the State to which one or more of these persons belong*".

3. SUPERVISION OF INSURANCE COMPANIES

26. After approval has been granted, article LP 322-1 stipulates that French Polynesia will exercise "*permanent supervision over the financial situation and operating conditions of* insurance *companies*", in order to ensure that they are able to meet their commitments to policyholders at all times. This supervisory role extends to the insurance distributors covered by Book V of the Insurance Code.

[11] See **2°** of I of article 310-2 of the draft law of the country.

27. The draft law of the country stipulates that the exercise of this supervisory mission is accompanied by powers of investigation and observation (articles LP 322-1 to 322-8), the power to take administrative police measures (articles LP 322-9 to 322-13) and the power to impose administrative sanctions in the event of non-compliance by the company with the applicable regulations, up to and including withdrawal of approval (article LP 322-14). In emergencies, when a company's behavior is likely to jeopardize the fulfillment of its commitments to its policyholders, the President of French Polynesia may decide to take precautionary measures (article LP 322-12).

28. French Polynesia may obtain access to various documents and information, whether of a financial, contractual or advertising nature. Companies are also required to periodically communicate a series of information or documents, the form and content of which will be specified by decree issued by the Council of Ministers (article LP 322-4).

4. PRUDENTIAL RULES APPLICABLE TO INSURANCE COMPANIES

29. The draft law of the French Polynesia makes insurance companies subject to various prudential obligations, notably concerning the level of capital they must have (article LP 323-1). These obligations must be met at the approval stage, and then throughout the company's period of operation in French Polynesia. A decree issued by the Council of Ministers will specify how these prudential rules are to be applied.

30. Companies headquartered in French Polynesia are required to maintain at all times a solvency margin corresponding to the amount of shareholders' equity required for the company's current operations, plus security funds against various risks that may affect an insurance company (article LP 323-2). The methods for calculating this margin must be defined by decree issued by the Council of Ministers.

31. This obligation will also apply to companies operating through a branch in French Polynesia, but whose head office is located in a State whose level of supervision does not offer guarantees equivalent to those set by the Insurance Code applicable in French Polynesia (article LP 323-2 al. 3). On the other hand, for companies whose head office is located in a State whose level of supervision is satisfactory, the required solvency margin will be that stipulated by the legislation of that State (article LP 323-2 al. 2).

32. The explanatory memorandum stresses that the essential aim of these prudential rules is to protect policyholders against the risk of insurance company insolvency.

5. OPERATING CONDITIONS FOR INSURANCE DISTRIBUTORS (BOOK V)

33. Insurance intermediaries currently operate freely in French Polynesia, without any specific conditions. The draft law of the French Polynesia intends to provide a framework for insurance distribution, with professional requirements (training and good repute) and organizational requirements.

34. *Insurance distribution*" covers the activities of both insurance intermediaries and insurers when they market their policies directly (article LP 511-1). Subscription to a mutual insurance policy is treated as an insurance contract. Article LP 511-1 defines insurance distribution as "*the activity of providing recommendations on insurance contracts, presenting, proposing or helping to conclude such contracts or carrying out other work preparatory to their conclusion, or contributing to their management and execution, particularly in the event of a claim*", as well as "*the provision of information on one or more insurance contracts according to criteria chosen by the policyholder or member on a website or by other means of communication, and the establishment of a classification of insurance products including a comparison of prices and products, or a premium discount, when the policyholder or member can conclude the contract directly or indirectly by means of the website or by other means of communication*".

35. Article LP 512-1 introduces the obligation for insurance intermediaries and insurance intermediaries acting on an ancillary basis to be registered in a register that will be made public and available for consultation by policyholders. The explanatory memorandum states that this Polynesian register of insurance intermediaries will be delegated to the Organisme pour le Registre des Intermédiaires en Assurance, Banque et Finance ("ORIAS"), which already performs this function at national level. The draft law introduces a number of other conditions of practice, covering :

- good repute: article LP 511-6 imposes a requirement of good repute on individuals taking part in this activity. This condition is checked against a list of criminal convictions incompatible with the activity of insurance intermediary (article LP 331-3).
- professional competence: article LP 511-5 requires insurance product distributors to possess "*the appropriate knowledge and skills to enable them to carry out their missions and meet their obligations adequately*". A decree issued by the Council of Ministers will specify the application of this article.
- professional liability insurance (article LP 512-6); and
- compulsory subscription to a financial guarantee (article LP 512-7).

36. Compliance with these conditions will be verified as part of the registration process.

37. Article LP 511-3 lists the categories of persons who may carry out the remunerated activity of distribution as insurance intermediaries and insurance intermediaries on an ancillary basis (insurance brokers, general insurance agents, insurance representatives [...] and insurance intermediary representatives).

38. Insurance intermediaries are also obliged to present contracts only on behalf of insurance companies authorized to operate in French Polynesia, in accordance with the provisions of Book III. Failure to comply with this obligation, as with other conditions of practice, is punishable by law (Article LP 514-2).

39. Lastly, the country's bill lays down the general principle that all insurance distributors must act honestly, impartially and in a non-misleading manner, in accordance with the interests of their customers. To this end, the country's bill aims to guarantee pre-contractual information on the identity of the insurance intermediary, any links with the insurance company, the system for remunerating the intermediation service, complaints procedures and recourse to a mediation process. Insurance intermediaries must provide information enabling policyholders to appreciate the freedom they have in selecting offers on the market. For example, the intermediary must tell the policyholder whether he or she is subject to an exclusivity obligation vis-à-vis one or more insurance companies (Article LP 521-2).

40. The duty to provide advice is compulsory, regardless of how products are distributed, in order to ensure that the insurance offer made to customers is appropriate to the demand and needs of the potential policyholder (Article LP 521-4).

II. COMPETITIVE ANALYSIS

41. As part of its consultative role, article LP 620-2 of the French Competition Code stipulates that the Authority *must* be "*consulted by the President of French Polynesia on any draft law of the country or any draft deliberation (...) which institutes a new regime having the effect of : 1° subjecting the exercise of a profession or access to a market to quantitative and geographical restrictions, 2° establishing exclusive rights in certain areas or sectors of activity, 3° imposing uniform practices in terms of prices or conditions of sale.* "

42. While it is not for the Authority to rule on the relevance of the objectives pursued, nor on that of the measures chosen by the public decision-maker to achieve them, the Authority must nevertheless

examine whether the measures chosen, when they lead to restrictions or distortions of competition, are proportionate to the legitimate objective pursued, or whether the latter can be achieved by other, less restrictive means.

43. When it is asked to give an opinion on a draft text, the Authority assesses the extent to which the text's provisions restrict or improve the competitive operation of the sector. A competitive market optimally allocates available resources, maximizes consumer welfare and boosts the competitiveness of the sector concerned, by encouraging innovation, lower prices, diversification of supply and higher quality goods and services. Competition is a factor of productive and allocative efficiency[12] .

44. However, competition is not an end in itself. It is a tool for economic efficiency. In many cases, regulatory texts respond to concerns of general interest that go beyond competition, and reflect the intervention of public authorities in the functioning of the economy.

45. In these circumstances, the role of the Authority is to inform the Government and Assembly of French Polynesia of the effects on competition of the planned public intervention, and to recommend, where appropriate, the measures to be taken to reconcile the general interest objectives of economic efficiency.

46. **With regard to the present bill, the Authority notes firstly that almost all the provisions likely to have an impact on competition appear to be fully justified in terms of the general interest objectives pursued, and proportionate to achieving them**.

47. **The provisions relating to compulsory authorization of insurance companies in French Polynesia** (articles LP 310-1 and LP 310-6 paragraph 1er) have the effect of restricting the exercise of insurance activities to companies that have been granted administrative authorization to carry on this activity in French Polynesia. Nevertheless, this prior authorization system, which already existed in a similar form in the previous regulations, as well as the temporary or definitive withdrawal of authorization, appears fully justified by the general interest objectives pursued by this restriction of competition, aimed at ensuring the required quality of the services offered and protecting Polynesian policyholders against insurance company failures. Similar to the banking sector, the insurance industry requires special regulation of its players, given the sector's considerable importance for all those involved in economic and social life (individuals, businesses, public authorities). As the explanatory memorandum to the draft law points out, insurers sell promises: they collect premiums well before settling claims or other commitments. It is therefore essential for the public authorities to monitor the sector's professionals and ensure that they correctly assess their commitments, while maintaining secure assets and sufficient liquidity[13] . Furthermore, the administrative approval system set out in the draft law is based on the insurance code applicable in mainland France, and more widely in Europe via the Solvency I & II directives. This alignment of the Polynesian code with European standards should, on the one hand, guarantee the regulation and supervision of the insurance sector and, on the other, make the Polynesian insurance sector more transparent and attractive to companies based in Europe, by using legislation familiar to these companies.

48. Consequently, restricting access to the insurance business by means of compulsory approval constitutes a restriction of competition justified by the need to ensure the quality of the services offered and to protect Polynesian policyholders against the failure of insurance companies. Moreover, this restriction appears proportionate to the attainment of these objectives, as it enables the administration to prevent, or even revoke, access to the insurance business for any company that does not meet the conditions required to carry on this activity.

49. **The exclusion of marine and aviation risks from the scope of approval** (article LP 310-6, 2ème paragraph of the draft law of the country) appears *prima facie* likely to create a distortion of competition to the advantage of insurance companies operating in the marine and aviation sectors. However, this is

[12] https://www.autoritedelaconcurrence.fr/sites/default/files/2021-09/guide_conccurence_basse_definition.pdf.

[13] Explanatory memorandum, page 3.

a common exclusion which appears in both the French Insurance Code and the Code in force in French Polynesia.

50. This exclusion is explained by the fact that the risks associated with sea and air transport extend far beyond the Polynesian and national borders. Marine and aviation companies are insured by insurers that are distinct from the traditional insurance sector, whose financial stakes are international by nature.

51. This exclusion is therefore justified insofar as it concerns insurance activities that do not correspond to the type of insurance covered by the draft law of the country and defined in article LP 310-1.

52. **The conditions for prior approval of insurance companies headquartered outside French Polynesia** (article LP 321-1, reminder: (i) the level of supervision in the State where these companies have their head office must offer guarantees at least equivalent to those provided by the law of the country; and (ii) the prudential supervisory authority of this State must have concluded a cooperation agreement with French Polynesia), are inspired by the principle of "mutual recognition" of European Union legislation, which allows the administration of the territory to recognize the legislation of a third State as equivalent to its own, subject to the cumulative conditions set out in article LP 321-2.

53. With only one insurance company based in French Polynesia, the entire insurance offering for Polynesian economic operators is provided by insurers based mainly in mainland France and Europe (e.g. Axa, Generali, Allianz, etc.), and French Polynesia is faced with an insufficient range of insurance services tailored to the diversity of economic activities offered in the territory. Consequently, opening up the licensing process to insurance companies with no establishment in French Polynesia is likely to increase the insurance offer available in French Polynesia and encourage new players to enter the market.

54. On the other hand, the fact that approval is subject to two cumulative conditions has the effect of limiting the ability of insurance companies headquartered outside French Polynesia to offer their insurance services in the territory.

55. However, these conditions appear to be the corollary of the opening up of the territory to companies based outside the territory and for which French Polynesia does not have direct control powers, in particular over companies with no establishment in the territory. Furthermore, by ensuring an equivalent level of control by the States in which insurance companies have their head offices, the draft law does not create reverse discrimination against companies based in French Polynesia.

56. These restrictions therefore appear to be justified by the general interest objectives pursued (ensuring a sufficiently high quality of insurance services for policyholders in French Polynesia, and providing the public authorities with the resources they need to supervise insurance companies) and proportionate to the objective pursued, requiring only that the supervision of these companies be equivalent to that of companies based in French Polynesia.

57. **The provisions relating to the derogation procedure for companies operating in French Polynesia through a branch without meeting the conditions for approval, on condition that they meet the same prudential obligations as those required of companies based in French Polynesia** (article LP 321-2) introduce a possible distortion of competition between insurance companies due to the location of their head office. According to the DGAE, this derogation is intended to respond, for example, to a situation in which an insurance company is able to provide its services in French Polynesia, but is located in a country that does not have a prudential supervisory authority. In such a case, the insurance company would not meet the second criterion of article LP 321-2. This would typically be a situation in which an insurance company is based outside the European Union, and whose legislation does not provide for the existence of a prudential supervisory authority.

58. The principle of this waiver appears to be justified by the need to offer the most comprehensive range of insurance possible to Polynesian policyholders.

59. In addition, the Authority notes that the draft text provides safeguards for the application of this derogation: (i) only companies with a branch in French Polynesia will be eligible for this derogation; and (ii) insurance companies will have to meet all the prudential obligations required of companies

whose head office is based in French Polynesia. It therefore appears that the exemption is proportionate to the objective of guaranteeing the widest possible access to insurance services for Polynesian policyholders, while ensuring the quality of the services provided.

60. **The prudential rules applicable to insurance companies** (article LP 323-2) may have a restrictive effect on competition by reducing the number of insurance companies able to offer their services in French Polynesia. However, these solvency margin requirements appear to be in line with and proportionate to the general interest objective of ensuring that insurance companies are able to cope with the various risks that can affect the insurance sector. They also reflect an existing provision in the French Insurance Code.

61. **The conditions governing insurance distributors** (article LP 512-1) have the effect of restricting access to the business of insurance intermediary in French Polynesia, by making it subject to a registration procedure which requires persons wishing to carry on this business to meet a certain number of conditions relating to their good repute, professional capacity, third-party liability insurance and a financial guarantee.

62. In this respect, the Autorité emphasizes that these restrictions on the registration procedure and the associated conditions of practice appear justified. Indeed, the French Insurance Code and the conditions of good repute guarantee that individuals have not been convicted of criminal acts incompatible with their role as insurance intermediaries (such as corruption, money laundering, etc.), and the condition of professional competence guarantees the quality of services rendered by persons qualified to exercise the profession of insurance intermediary.

63. These restrictions appear to be proportionate to the general interest objectives, as they enable the authorities to prohibit access to the business of insurance intermediary to any person who does not have the good repute, qualities and skills appropriate to the exercise of the said profession. The same restrictions on the practice of insurance intermediation exist in the French Insurance Code.

64. The conditions relating to the requirement for third-party liability and financial guarantee cover are restrictions ancillary to the activity of insurance intermediaries, and appear fully justified by the need for insurance intermediaries to guarantee funds paid in by policyholders (financial guarantee) and the need to cover the intermediary against the pecuniary consequences of his third-party liability (third-party liability insurance).

65. **Secondly, the Authority notes that the bill contains a number of provisions that are justified by general interest objectives, but which could be amended:**

66. **On the possibility of underwriting, on an exceptional basis, insurance with an unlicensed company if the insurance in question covers a risk not covered by insurance companies licensed in French Polynesia** (article LP 310-6). While the aim is to allow a certain degree of flexibility in the insurance code[14] , the Autorité highlights a potential risk of distortion of competition, relating to the possibility for certain insurance companies to dispense with the system of prior administrative authorization in French Polynesia.

67. However, this provision introduces flexibility by offering a solution to Polynesian policyholders in cases where insurance does not seem to be available in the territory. It is also clear from oral statements made by the DGAE that Polynesian policyholders will have to prove that no suitable insurance is available from authorized insurance companies.

68. In this respect, in order to avoid distortion of competition with approved companies and to guarantee the quality of the services offered, it is proposed to include in the wording of article LP 310-6 the conditions for obtaining the exemption listed orally by the DGAE :

[14] The Autorité notes that a similar derogation exists in the insurance code applicable in New Caledonia.

- the insured will have to justify three refusals by insurance companies licensed in French Polynesia before being able to request the benefit of underwriting with a non-licensed insurance company; and
- the solvency of the non-licensed insurance company must be certified by the supervisory authority of the country in which the company's head office is located.

69. The Authority nevertheless questions the three-year limit on the duration of the derogation, which seems arbitrary and could be prejudicial to Polynesian policyholders who would find themselves, at the end of this period, without the possibility of insuring with companies licensed in Polynesia.

70. The Authority therefore proposes deleting the reference to the three-year limit on the duration of the waiver, or alternatively amending article LP 310-6 to state that the waiver is offered for a renewable period of three years.

Recommendations:

1. Include in the wording of article LP 310-6, the conditions for obtaining the exemption listed orally by the DGAE.
2. Delete the reference in article LP 310-6 to the three-year limit on the duration of the waiver, or alternatively amend article LP 310-6 to state that the waiver is renewable.

71. **With regard to the refusal of authorization in the event of obstacles to the exercise of control over insurance companies** (article LP 321-4), according to the DGAE, the aim of this article is to extend the administration's control over insurance companies, in the interest of policyholders, by being able to verify both (i) their capital links and (ii) the regulations of a State to which the insurance company concerned or one or more of the persons holding capital links with the insurance company are subject. For example, the Polynesian administration could decide to refuse approval in a situation where the legislative provisions of a state where the insurance company's head office is based would raise obstacles to the exercise of control over the company concerned.

The Autorité stresses the particularly broad scope of this provision (which, as a reminder, covers both the existence of capital links between the insurance company concerned and "*other natural or legal persons*", with or without a controlling interest, in the insurance company concerned ; and the existence of "*legislative, regulatory or administrative provisions*" of the State to which the insurance company concerned and/or the natural persons or legal entities holding a stake in the company concerned are subject), which gives the Polynesian administration a right of veto over all applications for approval, even if the insurance companies comply with the conditions for approval set out in article LP 321-2.

72. This reading of the article is reinforced by the fact that the current wording of article LP 321-4 simply refers to the establishment of capital links and/or legislative provisions "*likely to hinder*" the exercise of French Polynesia's supervisory mission, without further clarification as to how, for example, capital links, particularly in the case of non-controlling capital links, would be likely to hinder French Polynesia's supervisory mission of an insurance company.

73. It is also difficult to identify situations in which the legislation governing a natural or legal person with a non-controlling interest in the insurance company in question would be likely to prevent French Polynesia from exercising its supervisory role over the insurance company in question.

74. The Autorité also points out that article LP 321-2 already requires that the legislation of the State in which the insurance company has its head office "*offers guarantees at least equivalent*" to Polynesian legislation, in terms of the level of control exercised over insurance companies, as one of the conditions for obtaining authorization. In the case of legislation considered equivalent within the meaning of article LP 321-2, it would appear contradictory to then consider, at the stage of article LP 321-4, that certain provisions of this same State would nevertheless be "*likely to hinder*" the exercise of the supervisory mission of the company concerned.

75. All these considerations lead the Authority to fear that this article introduces a source of legal uncertainty for insurance companies that does not appear necessary to meet the legitimate objectives of controlling insurance companies whose head office is based outside French Polynesia. Given the limited supply of insurance services in French Polynesia, the risk of distortion of competition against an insurance company based outside French Polynesia appears increased.

76. In order to mitigate these risks, the Autorité proposes amending the current wording of article LP 321-4 to provide a framework for the refusal of approval.

Recommendation:

3. Amend the current wording of article LP 321-4 to specify that, when refusing approval on the basis of article LP 321-4, the administration must demonstrate in detail and with reasons why :

- a controlling/non-controlling interest in the insurance company in question could prevent the administration from fulfilling its supervisory role; and
- certain laws, regulations and administrative provisions would impede the administration's supervisory role.

CONCLUSION

77. The draft country law submitted for opinion aims to reform and clarify the licensing procedures required for insurance and insurance distribution activities in French Polynesia, by bringing the applicable legislation into line with the insurance code in mainland France. This draft law marks the beginning of a far-reaching reform of the Polynesian insurance code.

78. In a context marked by persistent difficulties on the part of Polynesian individuals and companies alike to obtain a range of insurance contracts tailored to their needs, this reform could help improve the supply of insurance services in French Polynesia by making the applicable legislative framework more attractive to insurance companies based outside the territory.

79. Based on its review, the Authority has reached the following conclusions:

- almost all the provisions likely to have an impact on competition are fully justified by the general interest objectives pursued by the public authorities and are proportionate to achieving these objectives; and
- some provisions, although justified by general interest objectives, could be amended with regard to articles LP 310-6 and LP 321-4 of the bill.

SUMMARY OF RECOMMENDATIONS

1. Include in the wording of article LP 310-6, the conditions for obtaining the exemption listed orally by the DGAE.

2. Delete the reference in article LP 310-6 to the three-year limit on the duration of the waiver, or alternatively amend article LP 310-6 to state that the waiver is renewable.

3. Amend the current wording of article LP 321-4 to specify that, when refusing approval on the basis of article LP 321-4, the administration will have to demonstrate in a detailed and reasoned manner the reasons why :

- a controlling/non-controlling interest in the insurance company in question could prevent the administration from fulfilling its supervisory role; and
- certain laws, regulations and administrative provisions would impede the administration's supervisory role.

Deliberated on the oral report by Frédéric Paillusson, Deputy General Rapporteur, with a contribution from Sophie Bresny, General Rapporteur, by Johanne Peyre, Chairman, Enzo Silvestro and Philippe Guesdon, members of the Board.

The President

Johanne Peyre