29 March 2013: Generalisation of Complementary Health Insurance

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The Autorité de la concurrence recommends that each company remain free to choose its complementary health insurance body.

> Version française

On 1 February 2013, the *Association pour la promotion de l'assurance collective* (APAC)[1] informed the Autorité de la concurrence of a request for an opinion concerning the effects of the plan to exercise competition in the generalisation of compulsory complementary health insurance provided by the inter-professional national agreement signed by the employer organisations and the trade unions (hereinafter "social partners" or "social partnership") on 11 January last; the draft law on employment security is about to enact this plan. In its opinion issued today, the Autorité de la concurrence issues several recommendations so that effective competition, between the various players involved in the sector of the collective complementary protection of healthcare costs[2], can be introduced.

The agreement signed between the employment and trades union organisations provides for all employees to benefit from complementary health insurance

The *Accord national interprofessionnel* (Inter-professional National Agreement – ANI) on employment security and businesses' competitiveness, signed on 11 January last between all the employer organisations and three out of five of the trade unions, provides, among other things, that branch negotiations must open

before 1 April 2013 on in order to allow employees not yet benefiting from compulsory collective coverage, in terms of additional reimbursement of healthcare costs, to gain access to this coverage.
Although the agreement provides for negotiations to be conducted in each professional industry branch by the social partners, it nevertheless specifies that companies should remain free to use whichever whatever entities they choose for the purpose.

The bill of 6 March 2013, which is due to be examined by the *Assemblée nationale* from 2 April 2013, is designed to enshrine the commitments undertaken by the social partners under the ANI. Yet, in its present state, it restricts the freedom to choose the insuring body to certain situations, namely where the industry sector cannot agree or where the agreements specifically provide for such a possibility. This means that an employer could be obliged, where an industry sector agreement exists that contains a clause designating an insurer, to enter into a contract with the insurer or one of the insurers specified by the industry sector.

Even if the designation clauses are not, in themselves, a breach of the rules of competition rules, their implementation should be regulated in order to maintain competition in the complementary health insurance market.

The designation clauses, whereby a professional sector designates one or more sole insurers, require the businesses operating in the professional sector to join one of the bodies chosen by their social partners in the negotiations, thus removing free choice from the employer.

National and European case law does not consider this situation in itself to be in breach of the rules of competition.

However, the designation clauses, especially when accompanied by so-called “migration” clauses, produce effects that are likely to significantly restrict free and fair competition. Indeed, these clauses constrain businesses that already have a collective insurance contract to subscribe to the entity designated in the industry sector agreement, and impose a restriction on the employees of an industry sector to pay for additional coverage even if they do not necessarily

need it. For instance, they may already be covered by an individual contract or through their spouse and benefit from more advantageous rates. As for the employers, they would lose any room for manœuvre when choosing the additional protection scheme that is best suited to their company.

Furthermore, these designation clauses give the chosen bodies a competitive advantage over their competitors. They can, in fact, exploit their position to offer other insurance products (life insurance, retirement insurance, etc.) to all the employees in the industry sector.

Finally, in the present state of the law, it would be difficult or even impossible, for an entity that had not been approached by the social partners to be made aware of the existence of negotiations and thus to be able to offer its services. This situation is likely to give an unfair advantage to the provident institutions, which are managed equally by the social partners themselves and already represent 90% of the designations to the detriment of the mutual funds and insurance companies.

Recommendations of the Autorité de la concurrence

At a time when the reform will lead to the transfer of 35.5 billion euros of contributions from individual contracts to collective contracts, the Autorité de la concurrence is concerned to ensure that this switchover is accompanied by genuine competition to the benefit of the social partners and has issued four recommendations in this respect.

- ***Guaranteeing equality between the various categories of collective insurance bodies***

The various types of insurers (provident institutions, mutual funds, insurance companies) may be subject to different legal and statutory requirements that could limit their ability to meet certain provisions of the social partnership specifications, even if they are otherwise capable of meeting all the other requirements. It is therefore necessary to plan for the harmonisation of the various schemes applicable to various types of bodies, especially the possibility

of financing social welfare and the creation of non-contributory rights (provision of services even if the business is not up-to-date with the payment of its contributions) which might be required, with the aim of solidarity, by the social partnership.

- ***Prioritising the employer's freedom to choose its collective insurance body***

This principle is, in fact, the best for enabling effective, undistorted competition between the various insurance bodies. For this reason it should be prioritised.

- ***The recommendation clauses or designation clauses, when justified, should necessarily propose several insurers***

The mutualisation of risks by the social partners, even though it may create risks for competition, also offers a certain number of advantages for businesses and should therefore be made possible. But the Autorité considers that the possibility for social partners to recommend or appoint such entities must necessarily involve several (at least two) insurers chosen after they have been subject to an invitation to tender. Employers will thus be free to choose between the proposals made by the selected insurers.

- ***Imposing competition on the entities likely to be recommended or designated***

Finally, the Autorité recommends that the law should impose effective competition between insurers likely to be designated or recommended. The competition procedure should be arranged and supervised by an ad hoc body consisting partly of independent members, from the definition of the specifications to the choice of the insurers with the best offer. Strict rules should be laid down concerning impartiality and the prevention of conflicts of interest. This creation of competition should cover the implementation of the clauses and their re-examination.

The Autorité also recommends reducing the maximum period for designation clauses as well as recommendation clauses to three years instead of five. This

arrangement should also cover agreements that are currently in place.

(1) APAC, The Association for the Promotion of Collective Insurance, was created in November 2011. Most of its 500 members are insurance brokers. It also includes insurance companies, including Swiss Life, and mutual funds.
(2) The risks covered are those involving maternity, sickness or accidents.

> Full text of Opinion no.13-A-11 of 29 March 2013 on the effects on competition of the generalisation of employee's collective complementary insurance in terms of social security (in French)

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