



OECD CONFERENCE - TERRORISM INSURANCE IN 2010 – PARIS 1-2 JUNE

TERRORISM INSURANCE IN BELGIUM

Marc Dierckx – Managing Director TRIP

Supporting solidity and stability in the insurance sector

As of 1 May 2008, the terms of Belgian policyholders' insurance contracts have been adapted to reflect the new legislation governing the way in which insurers are required to deal with the implications of potential terrorist attacks.

Under the solidarity-based system introduced by the legislation, the Act of 1 April 2007 on insurance against damage caused by terrorism (the Terrorism Act) serves as a guarantee in terms of the solidity and financial stability of the insurance sector.

Pursuant to the Terrorism Act, the Terrorism Reinsurance & Insurance Pool – TRIP - was created on 1 February 2008 to provide insurance and reinsurance coverage.

Although participation in the TRIP Pool is not compulsory, more than 90% of the insurance companies are members of the scheme. Only members of the TRIP pool will benefit from the solidarity and compensation system introduced by the law.

The legislation therefore brings Belgian provisions into line with similar initiatives both in other European countries and in countries further afield such as Australia and the United States.

The purpose of the Terrorism Act passed on 1 April 2007 and which entered into force on 1 May 2008 is twofold, namely to compensate in a timely manner all insured persons who may suffer damage as a result of a terrorist attack and to guarantee the stability and sustainability of the insurance sector.

The Act requires close cooperation between the public and private sectors as the key to addressing what is a significant challenge for society as a whole.

It sets out a comprehensive insurance solution to cover the damage caused by terrorism, whereby the insurers themselves continue to *manage* and *settle* the claims made by their insured parties.

However, only insurers who are members of the TRIP pool will be able to benefit from the solidarity-based system established by the Act, which makes provision for the distribution (compensation) of the members' contractual obligations in case of acts of terrorism amongst all members of the pool.

The Act is based on the Dutch system conceived by the *Nederlandse Herverzekeringsmaatschappij voor Terrorismeschaden* (Netherlands Reinsurance Company for Terrorism Losses - NHT).

The system works on three levels: the insurers are the first to act, followed by reinsurers and ultimately the government.

The total annual indemnity for claims made on the basis of terrorism acts is limited to €1 billion. This amount is indexed.

The definition of terrorism contained in Article 2 of the Act draws on various aspects of existing definitions used in the insurance sector, including in the Royal Decree of 24 December 1992 on insurance against fire and other hazards in respect of ordinary risks, the standard clause used for industrial risks, the NHT agreement (the Netherlands) and the definition recommended by the OECD.

In Belgian law, terrorism is "an act or threatened act organised in secret for ideological, political, ethnic or religious ends, performed individually or in groups and intended as an attempt on the lives of individuals or to either partially or completely destroy the economic value of tangible or intangible property, whether to impact on the public, create a climate of insecurity or put pressure on the authorities in a bid to impede the running and normal operation of a service or business".

The above definition is relatively broad given that terrorism can be totally unpredictable in nature.

The definition, like many, is open to interpretation. For this reason, Article 5 of the Act provides for the establishment of a Terrorism Advisory Committee whose main role (Article 6(1)) is to determine whether an event falls under the above definition of terrorism.

To ensure consistency, Article 2 of the Act refers to existing concepts and states that the Act should apply to all Belgian risks as detailed in Article 2(6)(8) of the Act of 9 July 1975 on the supervision of insurance companies.

Therefore, the Act concerns:

- ❖ policyholders normally residing in Belgium or, if the policyholder is a legal entity, the premises of the legal entity to which the contract applies in all cases not explicitly covered by one of the points below;
- ❖ property located in Belgium where the insurance policy in question covers buildings or buildings and its contents;
- ❖ vehicles registered in Belgium;
- ❖ contracts taken out in Belgium where a given contract lasts for less than four months and covers risks incurred during a trip or holiday, whatever the class in question.

The Terrorism Act makes provision for mandatory terrorism cover in so-called "mass" insurance policies held by virtually all citizens either as private individuals or as employees i.e. Motor TPL, Fire simple risks, strict liability for Public places, Workmen's Compensation insurance, life assurance (classes 21, 22 and 23), Personal accident (class 1) and Health (class 2).

Such cover is optional in other types of insurance contracts such as, for example, insurance against Industrial fire risks, Motor Car comprehensive insurance, Assistance and Legal expenses insurance.

However, the Act does not apply to certain fields such as third party liability in the area of nuclear energy, damage to nuclear facilities, railway rolling stock, aircraft and ships, third party liability in connection with such vehicles and specific terrorism-insurance policies.

Furthermore, the Act does not apply to the theoretical cash surrender value of life insurance policies (i.e. savings built up on life insurance contracts). In fact, it would make no sense to bring into question the savings amassed by insured parties.

With regard to the coverage of nuclear risks, the Act states that only "damage caused by weapons or devices that explode due to a change in the structure of the atomic nucleus can be excluded from the insurance contract." Specifically, this refers to damage caused by nuclear bombs. Bacteriological and chemical risks must also be covered as a matter of course.

The Terrorism Act stipulates the maximum amount available to cover all events classed as "acts of terrorism" during a calendar year as €1 billion (i.e. on an annual aggregate basis). This amount is linked to the consumer price index and equals €1,078,202,030 as at 1 January 2010. This amount may be amended by the King pursuant to a decree duly deliberated upon by the Belgian Council of Ministers.

The "market-level" solidarity described above applies to all TRIP members throughout all insurance classes whether or not they are directly affected by an attack.

In addition, the Act states that for damage to immovable property and/or its contents or for any damage resulting from said damage to immovable property and/or its contents, indemnity is limited to €75 million per insured party per insured site per year.

This is according to a provision which is specifically intended to cover fire insurance policies containing special risks (industrial risks) and which was introduced to the Act to avoid the entire €1 billion being claimed by either a single company or in connection with a single property belonging to a company.

However, companies may take out specific insurance policies against the risk of terrorism with a view to compensating for excess risks. The higher compensation payouts associated with such policies are obviously not covered by the solidarity-based system established by the Act.

The limit of €75 million does not apply to dwellings.

It should be stressed that the limit of €1 billion is not applicable to workmen's compensation insurance.

The insurer must *fully* indemnify the individuals harmed or their claimants but also has the right to appeal to the Workmen's compensation Fund (FAT/FAO) for amounts exceeding the percentage set by the Committee and the €1 billion.

Where an event is likely to be classed as terrorism, the Terrorism Claims Advisory Committee detailed in Article 5 of the Act is required to meet to determine whether or not the event falls under the definition of terrorism given in Article 2 of the Act.

This procedure can be initiated by the Committee itself, the Belgian Council of Ministers or one of the members of TRIP. The Committee meets monthly and must submit its decision within six months of the event potentially classed as an act of terrorism.

To ensure that claimants are compensated fairly (proportionally) and that the €1 billion threshold is not exceeded, the Committee is responsible for setting the compensation percentage rate to be applied to all payouts covered by members of TRIP following an act of terrorism. If necessary, the Committee will modify the percentage rate every six months. The decision on the final percentage will be taken by 31 December of the third year following the act of terrorism.

The contractual obligations made by members of the TRIP pool are limited to €1 billion per year. This means that, if the total calculated or estimated compensation exceeds that amount, the payouts will be limited to the ratio between €1 billion and the total amount of the payouts due for that calendar year.

In the event that the threshold is exceeded or there is not enough information to determine whether the available €1 billion will suffice to cover all payouts, compensation for damage to individuals will be prioritised. Compensation for moral damages will be awarded after all other payouts. In practical terms, this means that the Committee must set three percentages: one for personal injury, one for material damage and one for moral damage.

The Terrorism Claims Advisory Committee comprises representatives of the four ministers concerned, a representative of the Coordination Unit for Threat Analysis and two TRIP representatives (the Director - General Manager of Assuralia (the professional association for insurance companies) and the Managing Director of TRIP). It is chaired by the Chairman of the Insurance Commission. A representative of the Banking, Finance and Insurance Commission (CBFA) also sits on the Committee in an advisory capacity.

Terrorism Reinsurance & Insurance Pool - TRIP

The non-profit association TRIP was established on 1 February 2008 pursuant to Article 4 of the Terrorism Act passed on 1 April 2007.

Its Articles of Association were approved by a Royal Decree dated 14 January 2009 (published in the Belgian Official Gazette on 28 January 2009) authorising TRIP to perform the tasks incumbent upon the insurance sector in accordance with the provisions laid down in the aforementioned Act.

In addition, the Royal Decree of 31 January 2009 nominating two public-authority representatives to TRIP in accordance with the Terrorism Act was published in the Belgian Official Gazette on 9 February 2009.

Representatives of the Minister responsible for insurance and of the Secretary of State for the budget were duly appointed. Their job is to attend the Board of Directors and the General Assembly of TRIP, although they do not have the right to vote.

The purpose of the association is to assign and distribute to its members the respective commitments required in the wake of an event which the Terrorism Claims Advisory Committee detailed in Article 5 of the Terrorism Act has determined is an act of terrorism pursuant to the definition detailed in Article 2 of said Act.

It is also responsible for collecting information on such damage and for negotiating and taking out reinsurance cover on behalf of its members.

Accordingly, TRIP set up a *pool* for the purpose of compensating participating insurers providing cover against Belgian risks for the financial effects of damages caused by an act of terrorism within the meaning of the Act.

The system to protect insurance companies is three-layered.

The first layer makes provision for joint and several indemnity amongst TRIP members in respect of claims, said indemnity not to exceed €300 million annually (i.e. a market (insurers) retention of €300 million). The second layer provides stop-loss reinsurance cover of €400 million funded by TRIP members (€478 million for 2010 following index-linking) (i.e. a reinsurance layer excess of retention up to €700 million, indexed). A third layer offers surety from the Belgian State in the amount of €300 million (i.e. a State layer excess of €700 million up to €1 billion).

The fact that TRIP's main purpose is simply to distribute the burden of any claims arising amongst its members and to compensate the latter accordingly means that it is not required to hold technical reserves in the event of a claim. Insurers themselves are still required to handle and settle directly any claims made against them by their policyholders. Appropriate technical provisions are therefore held in insurers' own annual accounts.

The Articles of Association of TRIP make provision for the following deductibles per event :

- ❖ A deductible of 10% of damage costs paid for Special Risks (Industrial business);
- ❖ A deductible of 10% of damage costs paid caused by a nuclear bomb for risks other than Motor third party liability, Strict Liability for public places, Workmen's compensation insurance, Life assurance and Health insurance, with a view to informing insurers about the underwriting of such risks.

The deductibles will be included in the calculation of the ultimate net loss of the pool to feed the annual maximum limit and determine the impact on each layer.

The deductibles are not cumulative and cannot be charged to the insured.

To facilitate communication, TRIP set up a website comprising both a public-access area and a private section reserved for its members.

The members section can be used both to handle claims (i.e. determine the compensation for the burden of losses amongst member insurers) and to request and amend the contributions payable to cover the cost of reinsurance and the association's administrative expenses.

As at 1 January 2009, the association had over 70 members which, between them, represented over 90% of the insurance market. These members are both Belgian companies and companies operating in Belgium under the "freedom-of-services" (FOS) regime.

During its first financial year (2008) TRIP was notified by three of its members of a claim arising in connection with the attack of 26 November 2008 on the Taj Mahal Hotel in Mumbai, India in which a Belgian insured died.

The "market-level" joint-liability mechanism set up by TRIP making provision for distribution of the loss burden between all the association's members was enforced in 2009 after it was determined by the Terrorism Claims Advisory Committee that the attack in question was indeed an act of terrorism.

In 2009, TRIP was not notified of any claim arising from an act of terrorism.

The terrorist attack of 27 November 2009 on a Russian train, the *Nevski Express*, travelling between Moscow and St Petersburg resulted in numerous casualties. The two Belgian citizens on board suffered only minor injuries.

Following the failed attack on an Airbus 330 en route from Amsterdam to Detroit on 25 December 2009, security measures have been stepped up at airports.

The Terrorism Claims Advisory Committee determined that the attack in Mumbai on 26 November 2008 was indeed an act of terrorism within the meaning of Article 2 of the Terrorism Act. This decision was published in the Belgian Official Gazette. The Committee also set the compensation rate at 100%.

The Committee's Internal Rules of Procedure were also approved via a Royal Decree (Belgian Official Gazette dated 12 August 2009).

Pursuant to Article 13(2) of those rules, "decisions taken by the Terrorism Claims Advisory Committee are by a simple majority of votes cast by those members present or represented, excluding any abstentions. All decisions must be authorised by a [TRIP] representative and a ministerial representative.

If, following three votes taken at three different meetings, the aforementioned representatives have failed to approve the proposed decision, a decision shall be taken by a simple majority of votes cast by those members present or represented, excluding abstentions.

In the event of a tie, the request or proposal shall be rejected.

In calculating the majority, any vote cast in an advisory capacity by the CBFA representative shall be disregarded" (translation).

The loss burden arising from the attack on the Taj Mahal Hotel in Mumbai totalled nearly €2.4 million for three insurers belonging to TRIP and pertained solely to bodily injury.

The following classes were affected by the claim: Workmen's Compensation insurance (class 01B), Workmen's Compensation private complementary insurance and Personal accident (class 01A), Group life assurance (class 21B) and Legal expenses (class 17).

The claim was closed in all insurance classes with the exception of Legal expenses.

Details of total monthly claims and total quarterly claims as at the end of September 2009 together with those of financial compensation for damages were sent to the pool members via the TRIP website.

The TRIP Compensation Fund IT application underwent extensive testing and thorough checks during the course of the year to ascertain both how reliable it is and whether it meets the specifications approved by the General Meeting.

The details of financial compensation for *damages* and for *correction of reinsurance costs and TRIP operating expenses* sent to all TRIP members revealed no errors, thereby indicating that the system used is fully operational.

In accordance with the Articles of Association, debit notes in respect of financial compensation for damages are payable by TRIP members within one month of the date of issue. Debit notes outstanding after this time will be subject to the penalties detailed in Article 58 of the Articles of Association (interest on late payments charged at the statutory rate and the CBFA notified of debit notes still outstanding 15 days after a reminder has been sent). Members complied with the stated procedure.

Future outlook

With regard to the legal and regulatory framework, also of note was Assuralia's proposal to make a number of improvements to the Terrorism Act.

A draft bill amending the Terrorism Act has been submitted to the relevant authorities and includes the following priority amendments amongst others.

Group insurance: At present, employers do not benefit from the maximum limit of €1 billion and instead are still required to assume liability for the full supplementary-pension amount vis-à-vis their employees. The draft bill seeks to resolve this situation.

It also proposes requiring institutions for occupational retirement provision (IORPs) to cover the risk of terrorism to provide equal protection for affiliated persons, whether the pension scheme is managed either by an insurance company or by an IORP. It also guarantees a level playing field for IORPs and life-assurance providers.

The draft bill also details important clarifications as regards the Terrorism Act being applied automatically to current policies.

Finally, it also proposes that the maximum sum of €75 million per policyholder, per site and per year detailed in Article 8(2) of the Terrorism Act pertaining to special-risks fire insurance (goods and contents) also be index-linked in line with the consumer price index.

This proposal has not yet been adopted but Assuralia and TRIP approached the relevant authorities on this topic several times.

Quite recently the Royal Decree of 31 January 2010 "stipulating specific indemnity limits cited in the Act of 1 April 2007 on insurance against damage caused by terrorism (Terrorism Act)" was published in the Belgian Official Gazette dated 18 February 2010.

Article 1 of this Royal Decree lays down the indemnity limits below which the Terrorism Claims Advisory Committee is not required to meet. Article 2 also stipulates that the indemnity rate which TRIP members must assume following an act of terrorism may not reduce any compensation awarded pursuant to the Act of 21 November 1989 on mandatory third party liability motor insurance (excluding compensation paid to so-called "vulnerable road-users" who are victims of road-traffic accidents) to an amount less than €5,000,000 per claim, regardless of the number of persons injured, in respect of damage arising from bodily injury, and €1,000,000 per claim regardless of the number of persons injured, in the case of material damage.

In connection with Article 1, both Assuralia and TRIP had expressed to the Insurance Commission their opposition to the introduction of indemnity limits into the regulatory framework, arguing that such a move would a) undermine the very solidarity system provided for by law, the spirit of the latter being that said system should be implemented right from the outset, b) give rise to uncertainty on the part of victims themselves and c) discriminate between small and large insurance companies.

Insurers had also underscored the importance of the Terrorism Claims Advisory Committee issuing a statement at the end of each calendar year on all events occurring during the course of that year to enable insurers to determine whether or not an event should be deemed "unique" and to implement the solidarity mechanism. The sector had tabled a concrete proposal on this matter.

The fact that it is not a mandatory requirement for the Terrorism Claims Advisory Committee to take a decision therefore indicates that victims of such an act would not be protected under the Terrorism Act and that it would be the insurance companies concerned which would be called upon to settle the claim in accordance with the terms of their policies, i.e. outside the coverage and conditions provided for in the Terrorism Act.

In addition to the inherent uncertainty of such a situation, the latter could also give rise to disputes between insurers and insureds and might therefore slow down the process of compensating victims; such a scenario would fly in the face of the Terrorism Act, one purpose of which was to put in place a framework to ensure swift and effective compensation for victims of acts of terrorism.

TRIP is currently monitoring the situation as a whole.

CONCLUSION

The system for compensating acts of terrorism, established by the Act of 1 April 2007 and managed by TRIP, is undoubtedly a step forward.

Indeed, it makes possible the insurance and reinsurance of risks related to catastrophes while simultaneously reducing the economic vulnerability of the country faced with the terrorist threat by ensuring the stability of the insurance sector.

However, the very principles that underpin the compensation system also reveal certain weaknesses. Given that the process is based on an insurance contract that covers the prevailing terrorism risk at the time of the claim, it disregards those victims who have no insurance contract to fall back on. Such victims are forced to appeal to the Compensation Fund for Intentional Acts of Violence, which is not designed to cope with large claims.