# INSURANCE

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1. COVID-19 news
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## 1. COVID-19 NEWS

### Insurers' commitments to support policyholders and businesses affected by the COVID-19 crisis

In a press release dated 23 March 2020, the Ministry of Economy and Finance announced that it collected from the French Federation of Insurance ("**FFA**") commitments from insurers to support companies affected by the COVID-19 crisis.

The insurers have committed to:

- Contribute €200 million to the Solidarity Fund that was created by the Government to support companies facing a significant drop in their activity;

- Defer rental payments for VSBs and SMEs belonging to one of the sectors in which activity has been suspended under the order of 15 March 2020;

- Keep insurance covers in place for VSBs facing difficulties or late payments throughout the whole of the lockdown period;

- Take part in discussions on the creation of an insurance-type product for future major health crisis to improve the insurance coverage for businesses in the future.

During his televised speech on 13 April 2020, the French President stressed that he "*would be attentive*" to the participation of the insurance sector in the context of the epidemic, hoping that the latter would be "*at the rendez-vous of this economical mobilisation*".

In a press release dated 15 April 2020, the Ministry of the Economy and Finance announced that it collected additional commitments from insurers, in particular for the people most affected by the COVID-19 crisis (healthcare personnel, vulnerable people, small businesses and the self-employed workers).

The insurers have committed to:

- Increase their contribution to the Solidarity Fund created by the Government to support companies facing a significant drop in their activity, bringing the total contribution of the insurance sector to €400 million;

- Implement commercial gestures to their policyholders, particularly those most affected by the crisis. These commercial measures, specific to each insurer, will take the form, for example, of tariff reductions or extended insurance cover; they will concern small businesses and self-employed workers (€450 million), populations most at risk (€550 million), healthcare personnel (€150 million) and all households (€200 million);

- Mobilise their investment capacities to support the recovery of the French economy through a €1.5 billion investment program: invest in local funds, provide equity financing to SMEs, in order to support the economic recovery and the resumption of investment. Investment funds in the health sector will also be set up;

- Work, within the framework of a working group led by the Ministry of the Economy and Finance, to the setting up of a pandemic insurance scheme, which will submit initial recommendations before the end of June 2020.

## The French Prudential Supervision and Resolution Authority ("ACPR") ensures continuity of its missions and shows more flexibility regarding the reporting obligations of (re)insurers

Aware of the impact of the Covid-19 crisis on insurance actors and in order to foster convergence and consistent supervisory approaches across Europe, the European Insurance Regulator ("**EIOPA**") published on 20 March 2020 recommendations addressed to the national supervisory authorities, suggesting that additional delays could be granted to (re)insurers in order to meet their "European" reporting obligations (i.e., the reporting obligations that apply to all European (re)insurers under the provisions of the Solvency II Directive).

The ACPR has been quick in reacting and announced in a press release dated 25 March 2020 its compliance with the EIOPA's recommendations with regards to the additional delays temporarily granted to (re)insurers to meet prudential reporting and public disclosure requirements.

The ACPR not only granted an extension of the delay for "European" prudential reporting, but also indicated that (re)insurers would also be granted longer delays to meet additional national requirements, as well as to file their reports on unclaimed funds and unsettled rights ("*rapport sur la déshérence et les droits non réglés*").

To this end, the ACPR has published a table that specifies, for "European" reporting requirements as well as additional national reporting requirements, the additional delays available to insurance or reinsurance companies.

The ACPR first points out that the transmission of information to the competent authorities for the first quarter (Q1 2020) being of crucial importance in the current context, the additional delay is limited to one week (unless otherwise stated).

The ACPR specifies that an additional two months is granted for the submission of other information/reports (e.g. the Solvency and Financial Conditions Report (SFCR), the Regular Supervisory Report (RSR), or specific national statements (accounting, prudential and statistical statements).

In addition, the Own Risk and Solvency Assessment report (ORSA) may be submitted to the supervisor by 31 December 2020, which will allow "*to integrate, where appropriate, the consequences of the Covid-19 crisis in the assessment of the individual situation of the companies*".

On the matter of the "*other non-prudential reporting*", the ACPR has indicated that the submission of reports on unclaimed funds and unsettled rights was deferred to 30 June 2020.

Finally, the ACPR has pointed out in a press release published on the same day that it was ensuring the continuity of its missions during the lockdown period.

## The EIOPA calls on insurers and intermediaries to be more flexible towards policyholders and to ensure fair treatment of consumers

In a "Call to action" dated 1 April 2020 destined to insurers and intermediaries, the EIOPA points out that in the context of the epidemic, consumers may be unable to meet their contractual obligations or may be forced to change their habits: for example, not being able to make a claim within the required timeframe, not being able to carry out an inspection (a roadworthiness testing or a medical visit) or using their main residence as a place of work, in possible violation of their home insurance.

Considering that access to and continuity of insurance services are "*essential*" in the context of the epidemic, the EIOPA recommends that insurers as well as intermediaries act in the best interest of the policyholders, in accordance with applicable regulations (in particular the IDD and Solvency II).

In turn, the ACPR issued a press release dated 21 April 2020, whereby it encouraged insurers to take into account the current exceptional circumstances and not to penalize customers who were not reasonably able to meet some of their obligations in a timely manner.

It also reiterated that it remained vigilant concerning commercial practices, particularly with regard to old customers. It pointed out that distributors must be particularly careful not to offer new products or changes in contracts or

coverage unless they are relevant in view of their real needs, as assessed objectively after, among other things, an analysis of all insurance covers already taken out by the customer.

### The ACPR calls on insurers and reinsurers under its supervision to refrain from distributing dividends and to ensure prudent management of their own funds

In light of the COVID-19 epidemic affecting insurance and reinsurance undertakings, the ACPR stated in a press release dated 3 April 2020, that insurance and reinsurance undertakings should make the preservation of their own funds and, where possible, its strengthening, their priority. Consequently, insurance and reinsurance undertakings are invited to refrain from proposing the distribution of dividends, at least until 1 October 2020, and to exercise moderation in their variable remuneration policies.

The ACPR has concluded that the above-mentioned entities that would not be able to defer the distribution of dividends should immediately come forward and explain their reasons.

### The ACPR urges insures to prudent management

The ACPR issued a press release dated 21 April, 2020, in which it calls for prudent management of insurers given the extent of the commitments they must face in a context that is still uncertain and evolving.

Above all, it points out that the financial resources available to insurers to meet their commitments to their policyholders, thereby helping to absorb the economic shock caused by the epidemic, "*cannot, without putting them at risk, be used to cover events explicitly excluded from their contracts. In addition, a guarantee covering operating losses caused by a pandemic could only be generalized at a reasonable price in the framework of a compulsory scheme guaranteed by the State.*"

## 2. LEGISLATIVE AND REGULATORY NEWS

### A. Life Insurance

- **Profit Sharing**

As changes in interest rates have a negative impact on insurers' solvency ratios, an order dated 24 December 2019 relating to surplus funds in life insurance has just created a new article A. 132-16-1 in the Insurance Code.

This article sets out the possibility and conditions under which, after authorization by the ACPR and under its supervision, in exceptional situations, insurance undertakings may take over the profit sharing reserve set up for the benefit of policyholders in life assurance or capitalization contracts.

- **Euro-Growth fund**

Within the framework of articles 71 and 72 of law n° 2019-486 of 22 May 2019 relating to the growth and transformation of companies (known as the **"PACTE"** law), the Euro-Growth life insurance regime has been reformed.

The implementing decree n° 2019-1437 of 23 December 2019 relating to insurance or capitalisation contracts involving commitments giving rise to the creation of diversification provisions and adapting the operation of various insurance products, as well as the ordinance of 26 December 2019 adopted for its application, were published respectively in the Official Journal of 26 and 29 December 2019, for entry into force on 1 January 2020 (for most of its provisions).

It should be noted that the old contracts will continue to exist and can be taken out until 1 October 2020.

### B. Anti-Money Laundering

Article 203 of the PACTE law empowered the Government to legislate by ordinance to strengthen the national Anti-Money Laundering/Counter-Terrorist Financing system ("**AML/CTF**").

This is now done with the ordinance published in the Official Journal on 13 February 2020 (Ord. n°2020-115, 12 Feb. 2020). On the same day, two of the implementing decrees were also published (D. n°2020-118, 12 Feb. 2020 and D. n° 2020-119, 12 Feb. 2020).

The purpose of this ordinance is to transpose the Fifth Anti-Money Laundering Directive 2018/843. It completes the transposition of the Fourth Anti-Money Laundering Directive 2015/849 and streamlines and strengthens the consistency of the national AML/CTF system, according to the Report to the President of the Republic on this ordinance.

It should notably be noted Article 6 of the ordinance, which extends the exemption to the obligation to maintain internal organisation and procedures at group level, to groups whose parent company is a mixed group insurance company ("*société de groupe mixte d'assurance*").

## 3. PROCEDURES - COMMUNICATION FROM THE AUTHORITIES

### A. Life Insurance

- **ACPR recommendation on the duty to advise and personalized recommendation**

On 12 March 2020, the ACPR updated its Recommendation 2013-R-01 of 8 January 2013 on the collection of know your client information for the exercise of the duty to advise and the provision of a personalized life insurance recommendation service, which had already been substantially amended on 6 December 2019.

In particular, this latest update adds clarifications concerning the obligations relating to the nature of the information to be collected, as defined in Article L. 224-29 of the Monetary and Financial Code ("**MFC**"), when distributing an individual retirement savings plan.

- **ACPR press release on advertising life insurance contracts**

In a press release dated 30 January 2020, the ACPR called on insurance professionals to address the advertising of life insurance contracts involving unit of account investments and reminded them that their subscription must correspond to the needs expressed by investors.

In many of the advertisements that have been broadcasted, the ACPR has noted a shift in the marketing policies of life insurance professionals in favor of the unit-linked proposal. It points out that it is "*essential that investors should be able to immediately identify, in advertisements, the risks to which they are exposed in the event of subscription, by having a clear and balanced presentation of the offer*".

- **ACPR press release reminding that life insurance policies are long-term products**

After noting that, because of the low interest rate environment, customers were increasingly encouraged to focus all or part of their life insurance savings (new subscriptions or payments on old policies) to unit-linked products rather than to euro-fund products, the ACPR issued a press release on 10 March 2020 reminding customers that life insurance policies are long-term products which must be taken out in consideration of the objectives pursued and the intended holding period.

In this context, the ACPR draws attention to the fact that life insurance contracts are long-term products and that the choice of a contract cannot be made simply by looking at past performances or the remuneration offered over a one-year horizon.

### B. Duty to advice - Distance selling

- **ACPR Proceeding No. 2019-05 of 28 February 2020 against Viva Conseil (insurance broker)**

Viva Conseil was subject to an on-site inspection by the ACPR from 2 March to 2 October 2018, which led to the opening of disciplinary proceedings on 18 April 2019, at the end of which the ACPR's Sanctions Commission issued a reprimand, a ban on distributing insurance contracts for 2 months and the publication of the decision for a period of 5 years in nominative form.

This sanction illustrates the obligations of the intermediary in particular with regard to distance selling. In this case, Viva Conseil distributed pension policies in France via a telephone platform located in Morocco.

The ACPR notes three grievances:

- **failure to provide pre-contractual information in writing prior to the conclusion of a distance insurance contract**, in breach of Articles L. 112-2-1 of the Consumer Code and the new R. 521-2 of the Insurance Code. In particular, the ACPR observed that for all subscriptions made prior to July 2018, no information on a sustainable medium had been provided to the customer prior to the conclusion of the contract, even though the contract had not been concluded at the customer's request.

- **inaccuracy and insufficiency of the information communicated orally and in writing:** in particular, the ACPR found that, in the majority of cases, the reason for the call was an allegedly missing guarantee or a non-activated option, resulting in insufficient, inaccurate or imprecise information being provided to customers. For example, in some cases, the right of withdrawal, the claims handling procedure, the amount of the premium and the terms and conditions for concluding the contract were not mentioned. In all files, no information was given on the insurer, the duration, the law or the language of the contract.

- **failure to comply with the intermediary's duty to advise:** in particular, in violation of Articles L. 521-4, L. 521-6 and R. 521-2 of the Insurance Code, the ACPR pointed out that in a majority of cases, clients were not questioned about holding a similar contract, including when they reported the existence of such a contract, or about their financial situation, even when difficulties in this regard were raised. Furthermore, no questions were asked about their employment status or their sports practice, even though contracts may contain specific exclusions in this respect. Finally, the demands and needs of the clients were transcribed in a very incomplete manner.

It should be noted that the ACPR, in the context of the COVID-19 crisis, issued a press release on 21 April 2020, in which it stated that "*home confinement should not be the pretext for telephone marketing campaigns that do not comply with legal requirements and the recommendations of the Financial Sector Consultative Committee*". In this respect, reference is made to the advice of 19 November 2019 of the Financial Sector Consultative Committee ("**CCSF**") on telephone solicitation in insurance.

## C. Anti-Money Laundering

- **2018-2019 report published by TRACFIN**

The 2018-2019 report on AML/CTF trends and risk analysis was published on 10 December 2019 by TRACFIN, the French financial intelligence unit.

It highlights the different types of fraud, particularly in the insurance sector.

- **Updated guidelines on AML/CTF in the field of asset management for the banking and insurance sectors**

On 2 March 2020, the ACPR published updated guidelines to clarify its expectations regarding the implementation of AML/CTF due diligence measures in the area of wealth management for the banking and insurance industries.

The purpose of the guidelines is to clarify the texts currently in force concerning the asset management business and, in particular, to clarify the specific risks of this activity and the vigilance mechanisms to be implemented.

They take into account the case law of the ACPR's Sanctions Commission relating to compliance with AML/CTF obligations and the latest legislative and regulatory amendments made to the MFC as of 2 March 2020.

- **Publication of guidelines on the consolidated management of the AML/CTF system of insurance groups**

On 2 March 2020, the ACPR published guidelines presenting an analysis of the obligations of group parent companies having their registered office in France with regard to the management of the AML/CTF procedures within a group.

These guidelines take into account the MFC's legislative and regulatory provisions resulting from the transposition of the Fourth and Fifth Money Laundering Directives (see above).

In accordance with Article L. 561-33 of the MFC, the consolidated management of the AML/CTF system at group level means (i) the definition by the parent company of a system for identifying and assessing AML/CTF risks and (ii), based on this assessment, the implementation at group level of an organisation, procedures and internal control, in order to ensure the effectiveness of the AML/CTF system for the entire group (including subsidiaries and branches established in third countries), in particular with regard to the sharing of information necessary for vigilance.

This organisation and these procedures are declined by the group's branches and subsidiaries, taking into account their specific characteristics and the risks to which they are exposed. Parent companies should not substitute themselves for the group's subsidiaries and branches in order to fulfil their vigilance obligations under the MFC or equivalent local law provisions. Nonetheless, the parent company shall ensure the effective implementation of this system, in particular through effective internal control measures and, where appropriate, corrective measures.

These guidelines are an explanatory document of the ACPR, which reminds that it "*is not binding in itself".*

## 4. CASE LAW NEWS

### A. Civil liability

- **Court of Cassation, Plenary Assembly, 13 January 2020, n° 17-19.963, P+B+R+I**

Called upon to rule on the maintenance of the principle according to which "a *third party to a contract may invoke, on the basis of tortious liability, a breach of contract where that breach has caused him damage*"; (Plenary session., 6 October 2006, n° 05-13.255), in particular following certain decisions which could be interpreted as departing from that solution (Cass., Com., 18 January 2017, n° 14-18. 832; Cass., 3rd Civ., 18 May 2017, n°16-11. 203), the Court of Cassation, meeting again in plenary session, reaffirmed, in the same terms, its attachment to this principle.

### B. Limitation Period

- **Court of Cassation, 2nd civ., 6 February 2020, n° 18-17.868, P+B+I**

The Court of Cassation, called upon to consider the interruption of the action on the merits by a summary proceeding aiming at the communication of the insurance contract by the insurer and the broker under penalty, considered that, pursuant to Article 2241 of the Civil Code, a legal claim, even in summary proceedings, interrupts the statute of limitations of the victim's direct action against the insurer.

- **Court of Cassation, 3rd civ., 16 January 2020, n° 18-25.915, P+B+R+I**

The Court of Cassation states that the ten-year statute of limitation period of Article 1792-4-3 of the Civil Code only applies to liability actions brought by the client ("*maître de l'ouvrage*") against manufacturers or their subcontractors. Consequently, a manufacturer's recourse against another manufacturer or its subcontractor cannot be subject to this time limit, and therefore falls under the ordinary limitation period regime of Article 2224 of the Civil Code, which establishes a time limit of 5 years from the day on which he knew or should have known the facts allowing him to exercise it.

### C. Co-insurance

- **Court of Cassation, 2nd civ., 6 February 2020, n° 18-24.535, F-D**

A mandate given to the lead insurer to collect claims is not equivalent to a general mandate to represent other co-insurers. Moreover, such a mandate is not sufficient to establish solidarity between co-insurers. It follows that the action brought against the leading insurer does not have the effect of interrupting the limitation period with regard to the other co-insurers. Consequently, from the moment the policyholder has been notified by the leading insurer of a refusal of cover, it is up to the insured to take action against the entire co-insurance.

## D. Wilful misrepresentation

- **Court of Cassation, 2nd civ., 16 January 2020, n°18-23.381, P+B+I**

By this decision, the Court of Cassation, first of all, points out that the contract's nullity for wilful misrepresentation, as set out in Article L. 113-8 of the Insurance Code and interpreted in the light of European law, is not enforceable against the victims of a traffic accident or their rightful claimants. This solution had already been laid down by the Court of Cassation, in a decision handed down on 29 August 2019 (Cass., 2nd Civ., 29 August 2019, n°18-14.768), which was in line with the position adopted by the CJEU (CJEU, 20 July 2017, C-287/16). This position has been noted by the legislator in the PACTE law of 22 May 2019 with the insertion of a new Article L. 211-7-1 in the Insurance Code.

The Court of Cassation also points out that under the terms of article R. 421-18 of the same Code, the guarantee fund for non-life mandatory insurance ("**FGAO**") may only be called upon to compensate the victim or his beneficiaries in the event of nullity, suspension of the contract or guarantee, non-insurance or partial insurance, which may be invoked against the victim or his beneficiaries. This is precisely not applicable in the case of nullity of a contract caused by wilful misrepresentation, as it cannot be opposed to the victim. As a result, the nullity, for wilful misrepresentation, of the insurance contract entered into by the insured could not be invoked against the victim, the FGAO could not be called upon to pay all or part of the indemnity paid by the insurer and had rightly been exonerated in the proceedings brought by the latter against its insured.

## E. Freedom to provide services

- **CJEU, 27 February 2020, Corporis sp. z o. o. v. Gefion Insurance A/S, C-25/19**

The CJEU considers that Article 152(1) of the Solvency II Directive, read in conjunction with Article 151 and recital 8 of Regulation (EC) n°1393/2007, must be interpreted as meaning that the compulsory appointment of a representative by a non-life insurance undertaking, in the Member State in whose territory it intends to cover class 10 risks (MTPL) under the freedom to provide services, also includes the authorisation of said representative to receive a document filing proceedings for compensation in respect of a traffic accident.

The objective of these provisions is to ensure that victims of traffic accidents residing in a Member State in which a non-life insurance undertaking provides services are effectively compensated, even though it has no establishment there.

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