INSURANCE

This newsletter includes the following sections:

1. COVID-19 news
2. Legislative and regulatory news
3. Procedures - Communication from the authorities
4. Case law news

_____

1. COVID-19 NEWS

ACPR calls on insurers to comply with European Systemic Risk Board recommendation ESRB/2020/07 on dividend or variable compensation distributions and share buybacks

In the context of the COVID-19 pandemic, the European Systemic Risk Board ("**ESRB**") adopted a recommendation on 27 May 2020 addressing the vast majority of financial institutions (credit institutions and finance companies, investment firms, central counterparties, insurance and reinsurance companies) to refrain, until 1 January 2021, from paying dividends, buying back shares or granting new variable compensation to the main risk takers within their companies, in order to preserve their own funds and their ability to fully support the economy during the crisis.

In a press release dated 28 July 2020, the *Autorité de Contrôle Prudentiel et de Résolution* ("**ACPR**") called on the financial institutions under its supervision (including insurers) to follow this recommendation on the distribution of dividends or variable compensation and on shares buybacks. It indicates indeed that at its meeting of 8 July 2020, the ACPR Supervisory Board decided to comply with this ESRB recommendation, which is in line with its previous communications of 30 March (banking sector) and 3 April (insurance sector) on the distribution of dividends.

ACPR's state of play on the "business interruption" cover

After having sent a questionnaire to 21 insurers licensed in France in the miscellaneous pecuniary loss branch (branch 16 of Article R. 321-1 of the French Insurance Code ("**FIC**"), which includes business interruption cover), constituting "*a representative sample of the majority of the business interruption cover market which is underwritten in France by approximately one company out of two*", the ACPR published a press release on 23 June 2020, pursuant to which it presented an overview of the business interruption cover.

The 400 contractual documents analysed by the ACPR show first of all that there is a very wide variety of situations, that may in particular depend, including within the same insurance company, on the type of professional insured, the sector of activity or the method of distribution.

More specifically, as a matter of principle, the ACPR considers that "*it is clear that the consequences of an event as exceptional as the current pandemic are not, as a general rule, covered by existing contracts*".

In addition, the ACPR urges insurers to review the drafting of all ambiguous contract clauses in the future and to clarify the general architecture of contracts in order to clearly inform insureds of the exact scope of their coverage. With respect to existing contracts, the ACPR stresses that any additions or changes cannot be made without the express consent of the policyholder.

Finally, it reminds that insurance companies must ensure that they have a precise vision of the content of the guarantees which benefit their policyholders, including for older generations of contracts or where distribution is carried out by intermediaries. In the latter case, the insurance companies must formalize the extent of the exemptions granted to their distributors and reinforce the control of the delegations granted.

EIOPA calls on insurers to review their product oversight and governance measures

In a statement dated 8 July 2020, the European Insurance and Occupational Pensions Authority ("**EIOPA**") called on insurance companies to review their product supervision and governance ("**POG**") measures in light of the potential impact of the COVID-19 pandemic on insurance products, reminding that it is "*vitally important that insurance companies put the fair treatment of customers at the heart of their response to the COVID-19 pandemic*".

As such, EIOPA indicated that it expects insurance manufacturers to identify insurance products whose key features, coverage or warranties have been materially affected by COVID-19.

When identifying products that are no longer sufficiently aligned with the target market, they should assess whether this may result in possible unfair treatment of insureds, by considering whether reductions in coverage mean that the products no longer provide sufficient utility to the target market. EIOPA expects action to be taken where unfair treatment arises, also taking into account the relevant legal requirements of national civil and insurance law.

In line with the requirements of the POG, remedial action can take many forms and insurance companies are recommended to consider a wide range of actions, including adjustments to coverage and benefits, extension of existing guarantees by "tailor-made" clauses, provision of additional services and cover, improvement of the clarity of the description of product features, risks covered and exclusions and, in specific circumstances, proportional discounts or premium refunds.

Launch of the public reinsurance program for credit insurance risks

In a press release dated 11 June 2020, the Ministry of Economy and Finance announced the conclusion of a new agreement with credit insurers to strengthen support to credit insurance in the context of the COVID-19 crisis.

The government initially introduced four public credit insurance products, CAP, CAP+, Cap Francexport and Cap Francexport +, last April, designed to maintain or strengthen individual credit insurance coverage.

In order to strengthen the effectiveness of these measures, it was decided to implement the "CAP Relais" program. This new program provides temporary public reinsurance of all outstanding credit insurance. It will initially cover the domestic market and risks relating to SMEs and ETIs.

It is based on a proportional reinsurance scheme in which credit insurers will retain a share of the reinsured risks. It will be implemented by the Caisse Centrale de Réassurance, acting with the guarantee of the State.

Exceptional and Pandemic Risk Insurance: a Report and a Public Consultation

In a press release dated 16 July 2020, the Ministry of Economy and Finance indicated that the working group launched in April 2020 by the Minister of Economy and Finance to study the opportunity and feasibility of a compensation scheme for companies in the event of future exceptional events, such as the occurrence of a major epidemic, had transmitted its conclusions to the Minister. These conclusions are the subject of a report published on 16 July 2020 on the website of the French Treasury.

This report notes that, to date, neither in France nor abroad are there any measures in place to deal with the decline in business activity in the event of the occurrence of these exceptional risks.

It identifies several possible orientations to define the contours of the future system, both in terms of its scope (epidemic risk or broader) and its scope of application (compulsory membership of companies or optional), the nature of the coverage offered (full compensation or lump-sum compensation), and the terms of risk sharing and financing between the various stakeholders.

On this basis, the report identifies several categories of possible solutions, some of which are based on an insurance scheme that allows risk to be shared among all companies, while others are based on individual and flexible management of exceptional risks.

In light of these conclusions, the Minister announced the launch of a public consultation, the results of which should enable the government to finalize a coverage scheme by the end of the year.

2. LEGISLATIVE AND REGULATORY NEWS

Telephone canvassing and fight against fraudulent calls

After two years of negotiations and parliamentary rounds, the law aimed at regulating telephone canvassing and fighting against fraudulent calls was published on Saturday, July 25 in the Official Journal (Law n° 2020-901 of 24 July 2020). As a reminder, the bill was initially presented to the French Parliament on 3 October 2018 by deputy Christophe Naegelen.

- **The law provides a stricter framework for telephone canvassing.**

The new Article L. 221-16 of the French Consumer Code ("**FCC**") now provides that a professional who contacts a consumer by phone with a view to concluding a contract for the sale of a good or the provision of a service (such as an insurance contract) must also indicate to the consumer, at the beginning of the conversation, that he or she may register free of charge on the list of opposition to telephone canvassing (Bloctel) if he or she does not wish to be the subject of commercial canvassing by this means.

The new provisions also oblige all professionals to ensure that their canvassing files comply with the Bloctel list by contacting the organization responsible for managing the list at least once a month if they regularly engage in telephone canvassing, or before any telephone canvassing campaign in other cases.

- **The law narrows the exemption for existing contracts.**

Until now, a professional had the right to canvass a consumer, even though he was on the Bloctel opposition list, "*in case of pre-existing contractual relations*".

The new wording of Article L. 223-1 al. 2 of the FCC narrows the scope of this exemption. Professionals (including those in the insurance sector) who wish to solicit by telephone customers registered on the Bloctel list, having a contract in force, will have to show that it consists in "*solicitations occurring within the framework of the execution [of this] contract in force and having a connection with the object of this contract, including when it is a question of proposing to the consumer products or services related or complementary to the object of the contract in force or likely to improve its performance or quality*".

A decree, issued upon the advice of the National Consumer Council, will determine the days and times as well as the frequency at which unsolicited commercial canvassing by telephone may take place, when it is authorized in application of the second paragraph of the aforementioned Article.

- **The law requires professionals to comply with a Code of Good Conduct.**

Article L. 223-1 para. 6 of the FCC provides that professionals must comply with a code of good conduct determining the ethical rules applicable to telephone canvassing, drawn up by professionals working in the sector of commercial prospecting by telephone and made public.

In this respect, reference is made to the press release dated 26 November 2019, whereby the ACPR called on all insurance professionals to implement as soon as possible and by the end of the first half of 2020 at the latest, the best practices recommended by the opinion of 19 November 2019 of the Consultative Committee of the Financial Sector ("**CCSF**") on telephone canvassing in insurance.

- **The law provides for a presumption of liability of the professional**

Henceforth, any professional who has benefited from commercial canvassing of consumers by telephone in violation of the provisions of the aforementioned Article L. 223-1 is presumed liable for non-compliance with these provisions, unless he demonstrates that he is not at the source of their violation.

Thus, an insurance company which would benefit from the illicit canvassing carried out by one of its service providers, partners or distributors, by profiting, for instance, from the collection of insurance premiums or commissions, might possibly be held liable. A strict control of the latter will thus have to be set up by the insurance company.

- **The law increases the penalties for non-compliance**

The new law provides for the nullity of "*any contract*" (including therefore the insurance contract) that would be concluded with a consumer following a telephone canvassing carried out in violation of the aforementioned Article L. 223-1.

Finally, the law provides that in the event of non-compliance by companies with the system of opposition to telephone canvassing provided for in the new Article L. 221-16 of the FCC, the persons concerned (such as insurers or intermediaries) are now liable to administrative fines of EUR 75,000 (individuals) and EUR 375,000 (legal entities), compared to respectively EUR 3,000 and EUR 15,000 before.

3. PROCEDURES - COMMUNICATION FROM THE AUTHORITIES

Implementation by the ACPR of EIOPA's guidelines on outsourcing to cloud service providers

In an opinion dated 22 July 2020, the ACPR declared itself compliant with EIOPA's guidance on outsourcing to cloud service providers (EIOPA-BoS-20-002), adopted on 6 February 2020.

ACPR reminds that these guidelines are applicable to insurance and reinsurance companies and participating and parent companies (Article L. 356-2 al. 2 and al. 3 of the FIC), subject to the supervision of ACPR, "*which must make every effort to comply with them*".

The guidelines will be applicable as of 1 January 2021 to all cloud services outsourcing agreements entered into or modified on or after that date.

Accordingly, the companies concerned should review and amend existing cloud services outsourcing agreements related to important or critical operational activities or functions to ensure compliance with these guidelines by 31 December 2022.

Also, in cases where the revision of cloud services outsourcing agreements related to important or critical operational activities or functions is not completed by December 31, 2022, the company should inform its supervisory authority, indicating the measures planned to achieve the revision or the possible exit strategy.

It should be noted that in order to meet the new EIOPA requirements, the ACPR adopted on 8 July 2020 a new Instruction n° 2020-I-09 amending Instruction n° 2019-I-06 of 15 March 2019 relating to the prior information of the ACPR in the event of outsourcing of important or critical activities or functions and significant changes thereto.

The purpose of the new instruction, which will come into force on 1 January 2021, is to adapt the notification form for the outsourcing of an important or critical activity or function or a significant change concerning such outsourcing, by adding new specific details for outsourcing to cloud service providers.

ACPR Discussion Paper on implementing new governance rules in the insurance sector

A few months after the publication of a first discussion paper on governance in the banking sector, the ACPR published a second discussion paper on 15 July 2020 concerning the implementation of new governance rules in the insurance sector.

The purpose of this publication is to review the legislative and regulatory changes that have taken place in terms of governance since 2015 (entry into force on 1 January 2016 of the Solvency II Directive, publication by the European regulatory authorities of guidelines/texts) and the conclusions that the ACPR draws from them.

Three points are more specifically developed by ACPR in this context, namely (i) the role and composition of the supervisory body (i.e., board of directors, supervisory board or other body with similar functions), (ii) a more precise definition of executive functions, and (iii) a strengthening of internal control and risk management functions.

With regard to these various points, ACPR firstly recalls, in a non-exhaustive manner, the applicable regulations, and then sets out the main conclusions it has drawn from its controls (findings and expected improvements) carried out within the supervised companies. In this regard, the following points are of interest:

- Role and composition of the supervisory body

  The functioning of the supervisory bodies can be further improved in the following aspects:

  - the body must formalize the roles assigned to it, its operating rules, particularly with regard to conflict of interest rules, and the powers it delegates to operational managers;

  - the companies must regularly assess the collective competence of the bodies and set up appropriate training programs;

  - the individual good repute of each body member must also be regularly assessed, in accordance with the conditions set out in ACPR's position 2019-P-01.

  With regard to the decision-making process, documentation sent to body members must be made available sufficiently in advance of meetings to enable them to familiarize themselves with the issues. The clarity of the information that are provided to the body at the time of decision-making should also be improved, particularly on the most technical subjects.

  The body should also become more involved in the ORSA review in accordance with the regulations set out in the ACPR's notice of 2 November 2016.

- More precise definition of executive functions

  The ACPR considers it necessary to enhance the principle of a clear and precise separation of executive and oversight functions by recalling the following principles:

  - the dissociation of the executive and oversight functions is a principle of good governance. It should be preferred; conversely, non-separation ("*PCA-DE*" or "*P-DG*") should be the exception and the company should justify the reasons for this choice;

  - non-dissociation seems particularly unacceptable in certain cases (group heads, listed companies), given the major impact on risks;

  - while non-dissociation may be envisaged in certain cases for reasons of proportionality, these situations will have to be accompanied by measures guaranteeing the independence of the supervisory bodies.

- Reinforcement of internal control and risk management functions

  The positioning and role of key function leaders remains an important issue for the ACPR. The quality of conflict of interest management mechanisms must also be a focus of attention within companies that maintain situations of combination, in accordance with the principle of proportionality.

  Moreover, the availability and size of the resources made available to key function managers to carry out their control mission remains an issue, particularly within groups, which tend to appoint a common key function manager for all group entities.

  The companies need to better assimilate the ORSA arrangement as a tool for strategic decision-making by the supervisory body. In addition, the elaboration of hypotheses and stress test scenarios must also be improved in order to better take into account the risk profile of the companies.

  Outsourcing needs to be given more attention by the companies, from its conclusion to its management and control. Companies should aim at categorizing their outsourced activities and reporting critical and important outsourced activities in accordance with ACPR's instructions. As such, better documentation and implementation of the monitoring of subcontractors throughout the outsourcing process is expected by ACPR.

4. CASE LAW NEWS

Wilful misconduct ("*faute dolosive*") and intentional misconduct ("*faute intentionnelle*")

- **Court of Cassation, 2nd civil court, 20 May 2020, n° 19-14.306 and n° 19-11.538, P+B+ I**

In this case, two people committed suicide, one by throwing himself under a train when it arrived at the station (n° 19-14.306), the other by causing a fire in his apartment, causing significant damage to the condominium building (n° 19-11.538).

The SNCF, for its material and immaterial damages, and the building's insurer, who took over the property damage, summoned the civil liability insurers of these two persons for compensation. In order to exonerate themselves, the insurers argue that their insureds committed a wilful misconduct, within the meaning of Article L. 113-1 of the FIC, for having, by their deliberate behavior, made the occurrence of the damage unavoidable and removed the random nature of the risk covered, inherent to the insurance contract.

In the first case, the Court of Appeal did not uphold the wilful misconduct of the insured, because he had not voluntarily created the damage as it had occurred. Indeed, by throwing himself under the train, his "*intention was to end his life and (...) there was nothing to conclude that he was aware of the harmful consequences of his act for the SNCF, from which it could be deduced that the insurance had not lost all randomness*".
In the second case, on the contrary, the Court of Appeal upheld the wilful misconduct of the insured and exonerated his insurer from any guarantee. Indeed, the means used (the installation of a gas stove and two gas bottles in the living room), "*greatly exceeded what was necessary to commit suicide*" and showed the will to provoke a strong explosion. Thus, if the fire was not primarily motivated by the destruction of equipment or all or part of the building, it was inevitable and could not be ignored by the arsonist, even if it was difficult to assess its real and definitive importance, thus removing any randomness from the insurance operation.

The appeal also cast doubt on the fact that wilful misconduct and intentional misconduct are two distinct concepts. However, for the Cour de cassation, the Court of Appeal "*exactly stated that intentional fault and wilful misconduct, within the meaning of article L. 113-1 of the FIC, are autonomous, each justifying the exclusion of coverage as soon as it causes the insurance operation to lose its random nature*".

Life Insurance

- **Court of Cassation, 2nd civil court, 16 July 2020, n° 19-16.922, P+B+I**

In this case, an individual, through his broker, had purchased a unit-linked life insurance policy from an insurer in 1997. In 2016, he had arbitrated all the sums invested on a single support, a structured product indexed on a basket of reference shares, issued by a subsidiary of a banking group and listed on the Luxembourg Stock Exchange. Following the poor performance of this support, arguing that it was not eligible for life insurance and blaming the insurer and the broker for failing to meet their obligation of information and advice, the insured had sued them for damages. It was dismissed by the Court of Cassation.

According to Article L. 131-1 of the FIC, in the version applicable to the dispute, in matters of life insurance or capitalization transactions, the guaranteed capital or annuity may be expressed in units of account made up of securities or assets offering sufficient protection for the savings invested and appearing on a list drawn up by decree of the *Conseil d'Etat*.

It follows from this text, interpreted in the light of the preparatory work of Law n° 92-665 of 16 July 1992, that the securities and assets referred to in Article R. 131-1 of the FIC meet the condition of sufficient protection of savings provided for by this text. According to this article, in the wording applicable to the dispute, the units of account referred to in article L. 131-1 of the FIC include the assets listed in 1, 2, 2 bis, 2 ter, 3, 4, 5 and 8 of article R. 332-2 of the FIC, which include bonds traded on a recognized market.

Having determined that the product was a bond within the meaning of Article L. 213-5 of the French Monetary and Financial Code ("**FMFC**"), i.e. a negotiable security conferring the same debt rights for the same nominal value in the same issuance, despite the absence of a guarantee of full repayment of the capital, and having noted that it had been officially listed on the Luxembourg Stock Exchange, "*a regulated market included in the list drawn up by the European Commission and recognized within the meaning of Article R. 232-2 2° of the FMFC*" and that its effective liquidity had been established, the court of appeal deduced exactly from this that it was eligible as a unit of account in a life insurance contract.

Theft without breaking ("*sans effraction*") and exclusion of the insurer's coverage

- **Court of Cassation, 2nd civil court, 20 May 2020, n° 19-12.239, F-D**

Following the theft of a vehicle acquired by means of a loan, an insurer pays a bank, as a secured creditor, an insurance indemnity corresponding to the expert's assessment value, less deductible, of the insured vehicle. The vehicle being found intact and without any sign of tampering, the insurer asks the insured to reimburse the indemnity, on the basis of the insurance contract which provided that "*in the case of a stolen insured vehicle found after payment of our indemnity, and if it appears that there has been no tampering with the vehicle, you undertake to reimburse us the amount of the indemnity received [...]*".

In view of the insureds refusal, the insurer summons it in payment on the basis of this contractual clause and, subsidiarily, on the basis of recovery of undue payment ("*répétition de l'indu*") and unjust enrichment ("*enrichissement sans cause*"). The Court of Appeal refused to uphold the claim because the indemnity had been paid to the bank, without it being established that the bank would have had paid it to the insured. The decision is overturned for violation of former article 1371 of the Civil Code.

The Court of Cassation considered that by considering that the insurer did not owe its guarantee and stating that the bank, in whose hands it had paid the insurance indemnity, was a creditor of the insured, so that it had indeed paid, by mistake, the debt of its insured, to whom it was, therefore, entitled to claim restitution of this payment, the Court of Appeal violated the above-mentioned text.

Mediation and legal expenses insurance

- **Court of Justice of the European Union ("*CJEU*"), 3rd ch., 14 May 2020, aff. C-667/18**

Referred to for a preliminary ruling, the CJEU ruled on the conformity of the Belgian law of 9 April 2017 with Article 201 of the Solvency II Directive 2009/138/EC, which states that any legal expenses insurance contract explicitly provides that, when a lawyer or any other person with appropriate qualifications under national law is called upon to defend, represent or serve the interests of the insured in judicial or administrative proceedings, the insured is free to choose that lawyer or other person.

The question arose as to the scope of application of Article 201 of the aforementioned Directive and more precisely the scope of the concept of "*judicial proceedings*".

The CJEU considers that this notion includes both a judicial or extrajudicial mediation procedure in which a court is involved or likely to be involved, either when the procedure is initiated or after its closure.

Consequently, the insured who has recourse to mediation, including out-of-court mediation, should therefore be allowed to be assisted by a lawyer of his choice, covered by his legal expenses insurance.

◆ ❖ ◆

CONTACTS

Capucine Bernier
Partner
T +33 (0)1 40 75 29 19
capucine.bernier@gide.com

Richard Ghueldre
Partner
T +33 (0)1 40 75 22 55
ghueldre@gide.com

Charles-Eric Delamare-Deboutteville
Counsel
T +33 (0)1 40 75 29 66
delamare-deboutteville@gide.com