

Are administrative fines insurable in Luxembourg?



03 December 2019 | Contributed by NautaDutilh Avocats Luxembourg S.à r.l.

Insurance, Luxembourg

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Introduction

Nemo auditur propriam turpitudinem allegans – in what way can parties invoke their own misconducts to claim rights?

Under Luxembourg insurance contract law, loss resulting from the misconduct of policyholders or insureds is insurable; Article 14(2) of the Insurance Contract Act⁽¹⁾ states that an insurer will cover even gross misconduct unless the contract provides otherwise.

Misconducts' insurance

Misconducts' insurance is a fundamental principle under Luxembourg insurance contract law and has proven to be an effective method of risk management with respect to professional liability incurred by companies and their executives. This is evidenced by the increasing popularity of directors' and officers' (D&O) liability insurance. D&O insurance is intended to cover pecuniary consequences of civil liability incurred as a result of professional misconduct, which becomes more likely as the responsibilities incumbent on economic actors and their managers increase.

Nonetheless, the Insurance Contract Act provides exceptions to the misconducts' insurance principle.

Wilful or malicious misconduct

Wilful or malicious misconduct is specifically excluded from the insurance cover pursuant to Article 14(1) of the Insurance Contract Act, as the intention to cause the claim removes the uncertainty that characterises an insurance contract.⁽²⁾ As an exception to this rule, if a person with life insurance were to commit suicide more than one year after the conclusion or reinstatement of the insurance contract, they would be covered by the contract.⁽³⁾

Fines and penal transactions

According to Article 97 of the Insurance Contract Act, no fine or penal transaction may be subject to an insurance contract, except in cases where such fines and penal transactions are borne by the person civilly liable.

Administrative fines

The Insurance Contract Act does not specifically provide for the regime applicable to fines imposed by administrative authorities. Should they be assimilated with criminal fines and prohibited as such? Or, are administrative fines another category for which insurance can be envisaged?

Criminal fines

The non-insurability of administrative fines is generally justified by their assimilation with criminal fines (among others) because of their punitive nature.

The parliamentary works of the former Belgian law of 25 June 1992, which inspired the Insurance Contract Act, specify that agreements that derogate from the public policy are void and, as regards criminal matters, "the preventive and repressive function of criminal sanctions as well as the principle of personality of penalties goes against that an insurer covers payment of criminal fines".**(4)**

The same reasoning prevailed in France until the Supreme Court issued a notable decision on 14 June 2012 raising doubts about the grounds on which administrative fines are insurable. Until such decision, the French courts had ruled against the insurance of administrative fines on the same grounds as in Belgium – that is, on the grounds of public policy. What is notable about the 2012 decision is that the Supreme Court denied insurance cover on the grounds of wilful misconduct by the insured.**(5)**

Some commentators see the above decision as sending a strong message on the insurability of administrative fines.**(6)**

As in France, there is doubt in Luxembourg as to the insurability of administrative fines. On 21 October 2010 the Luxembourg District Court ruled that administrative fines imposed by the Employment Authority qualify as administrative fines and not criminal fines.**(7)**

If the Insurance Contract Act does not specifically prohibit the insurance of administrative fines and they cannot be assimilated with criminal fines, the position of the regulators and the correlative reaction of the industry appear to show the opposite trend.

Regulators are generally against the insurance of administrative fines. Some foreign regulators have more or less officially expressed their hostility towards the insurance of fines imposed by administrative authorities, including themselves.**(8)**

The industry's correlative reluctance to offer insurance cover for administrative fines is thus understandable, as is the anticipated negative public opinion of this kind of insurance. After all, economic operators would largely be exempt from punishment and would likely be less conscious of economic public policy. In addition, the insurance of administrative fines would likely eliminate the dissuasive character of such fines.

The few insurance offerings available involve cautious wording which limits the insurance cover to "insurable administrative fines". This is a pragmatic and clever approach which can no longer be reasonably relied on insofar as it is legally unsatisfactory, subject to implementation issues, and does not address the discomfort generated by this issue.

Given the increasingly high penalties that can be imposed by administrative authorities (eg, the National Data Protection Commission following the entry into force of the EU General Data Protection Regulation)**(9)** and considering the increased international dimension of activities subject to administrative penalties, a legislative response would be appreciated at a supra-national level.

Comment

In the meantime, if administrative fines do not fall under the prohibition of insuring criminal fines, the admission of their insurability should be no more awkward than the insurance of civil liability misconducts, provided that this is exclusive to personal wilful and malicious misconducts and bearing in mind that the insurance of administrative fines may not remedy the reputational damage caused by such fines.

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Endnotes

(1) Law of 27 July 1997 on the Insurance Contract, as amended.

(2) According to Article 1A of the Insurance Contract Act, an 'insurance contract' is a contract under which, on payment of a fixed or variable premium, one party (ie, the insurer) commits to another party (ie, the policyholder) to provide a benefit stipulated in the contract when:

- an uncertain event occurs which negatively affects the insured (in case of damage insurance); or
- an uncertain event occurs that affects the insured's life, physical integrity or family situation (in case of life insurance).

(3) Article 103 of the Insurance Contract Act. Note that the condition of one year can be derogated from on the parties' agreement.

(4) Non-official translation, Belgium Chamber of Representatives, *Session Ordinaire 1990-1991, Projet de loi sur le Contrat d'assurance terrestre*.

(5) Cass Civ 2, 14 June 2012, 11-17367.

(6) For example, Professor Jérôme Kullman, *Amendes pénales et amendes administratives infligées au dirigeant: pour une assurance raisonnée*, JCPE 2009.

(7) Decision 3431/2010.

(8) For example, Section 6.1.5 of the UK Financial Conduct Authority Handbook provides that "no firm may enter into, arrange, claim on or make a payment under a contract of insurance that is intended to have, or has or would have, the effect of indemnifying any person against all or part of a financial penalty".

(9) The highest amounts imposed or announced by data protection regulators range from €50 million (imposed on Google by the French National Commission on Informatics and Liberty) to €183.39 million (the amount which the UK Information Commissioner's Office intends to impose on British Airways).

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