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THREE LEGISLATIVE CHALLENGES FOR CLAIMS HANDLING IN THE FUTURE

In this briefing, we analyse three prospective pieces of legislation that, if implemented in the Spanish legal system, would significantly change the claims handling process by insurers: the Draft Bill on Litigation Efficiency Measures, the Directive on actions for the representation of consumers' collective interests and the creation of the Independent Authority for the Protection of Financial Customers.

1. The Draft Bill on Litigation Efficiency Measures

This draft bill includes most of the provisions of the former Draft Bill for the Promotion of Mediation. In January 2019, that legislation raised the need for mandatory mediation concerning liability for professional negligence, non-contractual civil liability claims not connected to traffic events, construction defects in construction leases or disputes with company management bodies. These are just four examples that are directly related to activities and situations where insurance is a factor. Despite its great *vacatio legis* (three years elapsed from its publication in the BOE until it entered into force), the act signified a total change of thinking in the Spanish legal system (and implicitly recognised the failure of Law 5/2012, of 6 July, on Mediation in Civil and Commercial Matters), establishing mandatory negotiation as a guiding principle in many areas of litigation. Now its principles are included in the Draft Bill on Litigation Efficiency Measures approved by the Council of Ministers on 15 December 2020[1].

This new Draft Bill on Litigation Efficiency Measures establishes the appropriate procedures for dispute resolution ("**ADR**"). These measures interrupt the statute of limitations, are confidential (except in certain cases, the parties may not use what was discussed in the pre-trial negotiations in the subsequent legal proceedings), and will be a prerequisite for litigation, i.e., they must be a prior step to any civil legal proceedings.

In short, conciliation is compulsory for civil, commercial and cross-border matters, which in turn could give rise to material inconveniences in view of the compulsory nature of resolving disputes, which *a priori* do not meet the necessary objective and procedural requirements.

In practice, this means that insurers will face a new preliminary step between the rejection of the claim and the claim they may receive in dispute of this rejection. In the words of the Government, the aim is to break "the dynamics of confrontation and tension that invade

[1] http://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/APL%20Eficiencia%20Procesal.pdf

social relations in our times" in an attempt to ensure that one in four sets of civil proceedings is resolved through ADR. Depending on the claimant's choice, there are different types of ADR, including private settlements and recourse to independent experts.

An important consequence of ADR is that when determining whether to impose costs or not, winning or losing the litigation will no longer be the most relevant factor. Rather, the behaviour of the litigant in relation to the ADR will be relevant. Consequently, a litigant who goes to court may not be awarded costs if he could have obtained the same result in a pre-trial settlement. In short, this draft bill replaces the traditional objective principle of expiration in the imposition of costs with the principle of cooperation or a cooperative attitude.

Furthermore, to achieve the intended streamlining of litigation, this legislation seeks to expand the scope of the oral hearing, both in terms of subject matter and quantum. Regarding the value of the claim, the financial threshold to classify proceedings as oral hearings increases from 6,000 to 15,000 euros; regarding the subject matter, individual actions by consumers and customers in matters of general contracting conditions are now included in the oral hearing.

New tools have also been included in oral hearings. These new tools are quite significant and include the "witness procedure", which seeks to provide an agile response to an infinite number of essentially identical claims. In addition, judges have been granted certain powers to organise these proceedings. These powers include the authority to decide on the need to hold a hearing even against the wishes of the parties, or issue an oral judgment where the judge considers it appropriate at the conclusion of the oral hearing. One potential benefit of this effort to expedite the delivery of judgments in oral hearings may be a reduction of the late payment interest charge of Article 20 of Law 50/1980 on Insurance Contract ("**LCS**").

However, the legislature has overlooked the proposed legislation's unfairness to insurance companies. It will create a comparative disadvantage with respect to banks, and another of the new features it introduces is a special penalty for bank litigation, specifically increasing the legal interest rate by eight (8) points, in contrast to the well-known 20% of Article 20 of the LCS, after two years from the occurrence of the loss.

Thus, if the legislation were to enter into force on 1 January 2022, and assuming that the legal interest rate remains stable at 3%, an interest rate of 9% will create an unjustified discrepancy between the penalisation of banks and that of insurers. A reasonable approach would be for the legislature to amend Article 20 of the LCS to bring the sanction for banks in line with that of insurers, although it could be feared that this will not be the outcome of the political debate.

2. Collective actions: Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC[2] ("Directive 2020/1828")

To protect consumers and facilitate their access to justice with regard to the damage caused by the same unlawful practice, this EU regulation aims to prevent the abuse of litigation with two mechanisms: (i) the collective action of representation (national or cross-border), in order to obtain injunctive relief and damages for consumers in respect of the breach of EU provisions; and (ii) the entities authorised to exercise it before the courts of European countries. Consequently, the qualified entities will aim, among other things, to maintain a balance between consumers and businesses, although it will be necessary to wait and see how the caseload and the procedural practice of its involvement develops.

As the name of the regulation itself implies, Directive 2020/1828 repeals Directive 2009/22/EC, which regulated collective actions. These have been adopted and reconfigured as the new legal actions for discontinuance.

The new feature in this case, due to the unquestionable impact it will have on the insurance world, is the regulation of collective actions for damages, which for the time being can be exercised in Spain exclusively by certain consumer and user associations, as well as by the Public Prosecutor's Office. The Directive will also affect the consumer protection, data protection, financial services, travel and tourism, energy and telecommunications sectors.

The new EU regulation seeks to ensure that the legal standing to bring collective actions for damages is granted to entities authorised and designated by each Member State. These entities must demonstrate adherence to certain requirements, such as their objective and non-profit interest, as well as their economic independence and independence of influence. Thus, the aim is to curb the commercialisation of large-scale legal claims by consumers and to channel them through the entities authorised at European level. However, to achieve greater transparency and legal certainty for businesses, the way in which it is integrated into the legal regulations will be crucial, as the scenario will vary, depending on whether the legal standing affects the individual or diffuse interests of national and foreign consumers.

The regulation also provides that these qualified entities may exercise the corresponding cross-border collective actions before the courts of another Member State. To this end, each country is required, when transposing Directive 2020/1828, to amend its legal system to allow the grouping of legal proceedings in defence of consumers and users, where said proceedings correspond to another State. Each Member State must also ensure a maximum

[2] Cfr. https://www.boe.es/buscar/doc.php?id=DOUE-L-2020-81785

period within which individual consumers may benefit from the compensatory measures imposed by a judgment and establish rules on *lis pendens* to avoid abuse by consumers, who, being able to act in several jurisdictions, may seek to obtain several awards against the same company or even a situation of forum shopping and the violation of the principle of foreseeability that underpins the EU legislation.

Last but not least, this legislation regulates the financing of collective actions for damages (litigation funding), and even opens the door to granting legal aid to qualified entities. However, it will not be easy to apply the criteria for access to legal aid when an indeterminate number of consumers are involved and the amounts of compensation are large. This reform will have to be viewed in the context of the growing rise of funds that finance litigation. This may encourage the proliferation of claims against insurers.

EU states must transpose Directive 2020/1828 into their respective legislation by 25 December 2022.

3. Creation of the Independent Administrative Authority for the Protection of Financial Customers

In March 2019, the Government, the architect of the third reform in question, drafted legislation to create the Independent Administrative Authority for the Protection of Financial Customers[3] (**"APCF"**) to (as stated in its Explanatory Memorandum) protect consumers against "the current situation of litigiousness in the financial sector, coupled with the judicialisation of disputes between customers and financial institutions". To this end, this legislation aims to create a mechanism for the resolution of disputes between customers and financial institutions, which is binding upon the latter, as opposed to the decision of the Bank of Spain, the CNMV and the DGSFP, which are not binding[4]. Its scope of application covers all claims relating to the provision of services by financial institutions even in the pre-contractual phase. This may involve pre-emptive protection barriers and, as it materialises in practice, could lead to a huge number of preventative claims.

It should be borne in mind that Law 2/2011 of 4 March, on Sustainable Economy, already established the obligation of financial and insurance companies to have an efficient customer care service to receive complaints on their behalf, and the role of the customer ombudsman, whose decisions were binding on the company in the event of a decision in favour of the customer. These elements will remain in force after the creation of the new administrative body and will serve as a prelude to its action: financial customers will have

[3] http://www.rdmf.es/wp-content/uploads/2019/06/Proyecto-de-ley-de-creaci%C3%B3n-de-la-Autoridad-Administrativa-Independiente-de-Protecci%C3%B3n-del-Cliente-Financiero.pdf

[4] In this case, the definition of financial customer provided by the Bill will not always coincide with that of consumer, since financial customers will be considered to be any natural or legal person (including entities without legal personality), whether national or foreign, who are users of the financial services provided by financial institutions (cf. Article 2 of the Bill). Any commercial enterprise in the exercise of its activity may use these services and be considered as such in the same way as a consumer protected by the TRLGDCU.

to go to them as a prior and necessary step before submitting their dispute to the new Authority, which will cause (as in the case of ADR) the interruption of the period for the exercise of legal actions.

The APCF, which will also be subject to parliamentary control, is intended to be the mechanism that will provide a solution to the massive claims of those customers against financial institutions or insurance companies, so that collective actions, such as those that have arisen in recent years as a result of judgments with a multitude of potentially affected parties, should be heard before this body before going to court.

The claims received will be resolved by panels of members, who will make legal decisions. Financial institutions and insurance companies must be aware that when the amount claimed by the client is less than 50,000 euros, the decision will be binding, will end administrative proceedings and will not be subject to appeal for reconsideration, but may be appealed before the contentious-administrative jurisdiction[5]. The recipient must comply with its decision within 30 working days of its notification. Otherwise, the client may request its enforcement.

It has recently come to light that the creation of the APCF, which will be submitted for public consultation shortly, will be delayed until at least 2022, and its implementation may be delayed until 2023, making this the longest timeframe among the reforms in question. Its implementation, if it is implemented at all, may be problematic for the insurance industry. The sector will be concerned that a body with such decision-making powers could decide on key issues such as, for example, the enforceability of unsigned limitation clauses against insurers, with a judicial control that also prioritises the contentious-administrative jurisdiction in matters that, in many cases, would have a purely civil background.

4. Conclusions

In short, the public authorities are determined to establish out-of-court settlements with binding decisions. Ostensibly, the aim is to reduce the caseload of the Spanish courts where legal disputes between clients and financial service providers pile up. These reforms have serious implications for the insurance sector and may restrict the right of insurers to effective legal protection. The proposed legislation replaces the role of the courts with administrative bodies. These entities, which are less well-prepared and do not have the same degree of impartiality, resolve claims filed by protected consumers with binding and enforceable decisions.

A further complication is that the three reforms seem to have been planned with no coordination between them, since they sometimes seem to overlap and even contradict each other in substantive and procedural matters. The three reforms in question seem to

[5] As provided for in Article 41.3 of the Draft Bill, which is very striking because it grants jurisdiction on appeal to the contentious-administrative jurisdiction, which will have to rule on a variety of private law matters such as insurance law.

have similar objectives, but follow separate paths to achieve them, and do not fit together well.

To alleviate the burden on the administration of justice and, at the same time, prevent backlogs in the courts from harming consumers, up to three different out-of-court methods of conflict resolution have been designed and there is confusion as to which of these instruments to use. In addition, there is even the problem that each party may end up using the option whose position or established doctrine is most similar to its own. An example of the potential conflicts that may arise between the new pieces of legislation is the fact that the claimant may, under the Law on Litigation Efficiency Measures, drag the company to an oral hearing (with diminished legal arguments, evidence, and ultimately defence), or decide to issue a claim before the APCF, which may give rise to a result as disparate and far removed from the previous one, as it may end up being resolved by the contentious-administrative jurisdiction.

In short, the combination of the three reforms is a concern on the horizon for insurers. We will have to wait to see how much of the proposed legislation finally becomes law, in what form, and if it is approved in the current terms, to see how to adapt more effectively to the new rules of the game.

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