This decision is currently challenged before the Conseil d'État

COMPANY C
As successor in interest to
COMPANY A
Procedure No. 2015-02
Fine of EUR 100,000

COMPANY B
Procedure No. 2015-03
Warning and fine
of EUR 100,000

Hearing of 19 February 2016
Decision handed down on 11 March 2016

AUTORITÉ DE CONTRÔLE PRUDENTIEL ET DE RÉSOLUTION
SANCTIONS COMMITTEE

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Having regard to the letters dated 2 March 2015 in which the Chairman of the Autorité de Contrôle Prudentiel et de Résolution (hereafter the ACPR) informed the Committee that the Supervisory College of the ACPR (hereafter the College), ruling through its Sub-College with responsibility for the insurance sector, had decided at its meeting of 12 February 2015 to open two sets of disciplinary procedures, one against Company A and one against Company B, under the numbers 2015-02 and 2015-03 respectively;

Having regard to the statements of objections dated 2 March 2015;

Having regard to the letters dated 12 June 2014 in which the College issued formal notices to:

- Company A (i) to comply with the provisions of Article R. 322-84 of the Insurance Code concerning the minimum number of members required for a mutual reinsurance company; (ii) to amend the clauses of its reinsurance membership treaties that were not in compliance with the requirements of Article R. 322-53-2 of the same code;

- Company B to amend several of its statutory provisions to comply with the requirements of (i) Articles R. 322-58, R. 322-82 and L. 322-26-2-1 of the Insurance Code concerning the operating procedures of its annual general meeting; (ii) Articles L. 322-26-2 and R. 322-55-2 of the same code concerning the operating procedures of its board of directors;

Having regard to the statements of defence dated 22 June 2015 and 10 September 2015, along with their accompanying documentation, whereby:

- Company A (i) challenged the objection concerning the minimum number of members required for a mutual reinsurance company; (ii) challenged the objection concerning the unlawful nature of certain clauses in its membership treaties; (iii) argued, as regards the objection concerning its failure to comply with the abovementioned formal notice, that it could not be punished for failing to comply with a formal notice based on a new interpretation of the provisions of the Insurance Code that broke with previous enforcement of these same provisions by the competent supervisory authorities;

- Company B argued (i) that it could not be punished for failing to comply with a formal notice based on a new interpretation of the provisions of the Insurance Code that broke with previous enforcement of these same provisions by the competent supervisory authorities; (ii) that it had adopted a new version of its articles of association in April 2015, which was accepted by the ACPR on 10 July 2015;

Having regard to the statements of reply dated 4 August 2015 in which Francis Assié, representing the College, upheld all the objections notified to Company A and Company B, with the exception, regarding the latter, of the objection concerning the board's ability to confer stakeholder status;

Having regard to the letter of 26 November 2015, in which the representative of the College advised the Sanctions Committee about the merger of Company A into Company C, which became final on (…);

Having regard to the reports of 15 January 2016 by Rapporteur Christian Lajoie, in which he found:

- in the procedure concerning Company A (No. 2015-02), (i) that the objection concerning the minimum number of members was established but needed to be substantially tempered in view of the earlier position adopted by the supervisors; (ii) that the objection concerning non-compliance of certain clauses of the reinsurance membership treaty with Article R. 323-53-2 of the Insurance Code should be dismissed based on application of the principle that offences and penalties must be defined by law; (iii) that the merger did not preclude an exclusively monetary sanction from being imposed on Company C because of the actions of Company A, provided that said fine was imposed on an anonymous basis on the acquiring company;

- in the procedure concerning Company B (No. 2015-03), (i) that the objection concerning the ability of Company B's board of directors to determine whether to accept legal entities ceding reinsurance as stakeholders, which was abandoned by the College representative, should be dismissed; (ii) that the objections concerning the operating procedures of the annual general meeting were materially established, but needed to be substantially tempered given the explicit previous acceptance of the statutory provisions now criticised by the supervisory authorities; (iii) that the objections concerning the operating procedures of the board of directors were also established but needed to be tempered, albeit to a lesser degree than the abovementioned objections, since the earlier position adopted by the supervisory authorities was less explicit;

- in both cases, that the objection concerning failure to comply with the formal notice was established;

Having regard to the letters dated 15 January 2016 summoning the parties to a Committee hearing on 19 February 2016 and informing them of the composition of the Committee for that hearing;

Having regard to the observations presented on 30 January 2016 by Company C and Company B on the rapporteur's reports, in which:

- Company C argued (i) that the principle of the individual nature of penalties meant that it could not be punished for breaches attributed to Company A, particularly since it became a respondent towards the end of the procedure and was not notified prior to the merger with Company A about what it might inherit as a result of this transaction; (ii) that in any event, the objections concerning Company A's governance should not be sanctioned, owing to the lack of clarity of the legal provisions on which these objections were based and in view of the authorities' actions; (iii) that it could not increase the number of members (objection 1), owing to a lack of candidates, and, given the irreversible effects of dissolution, it had to wait for the Conseil d'État's interpretation of the provisions; (iv) that the actions covered by the objections should not give rise to sanctions because they were not the cause of any risk to insured parties or the markets;

- Company B argued (i) that objections 4 to 8 as numbered below concerning certain of its statutory clauses could not give rise to sanctions because at the time of the events the regulator had come to a

diametrically opposed interpretation of the provisions that the company was now accused of failing to comply with; that, consequently, the rules in question were neither sufficiently clear nor reasonably predictable, owing to the lack of a judicial interpretation, to provide the basis for a sanction; (ii) that it was justified, given the irreversible nature of the measures required under the formal notice, in waiting for the Conseil d'État to rule on this matter; (iii) that the actions covered by the objections should not be sanctioned, considering the general background that led to the opening of this disciplinary procedure and the absence of risk resulting from the alleged breaches for the security of insured parties and the markets;

Having regard to the observations provided in reply and presented on 9 February 2016 by the representative of the College concerning the rapporteur's report, in which he found:

– in the first place, that the merger of Company A into Company C did not preclude a fine from being imposed on the latter in a decision showing only the identity of the former, and that, following this transaction, it was not necessary, pursuant to the principle of the economic and functional continuity of the undertaking, to notify the acquiring company of objections that had been notified to the merging company;

– in the second place, that all objections should be upheld, and that the actions of the authorities and issues in interpreting the applicable provisions did not offer grounds to dismiss those objections relating to Company A's governance, and that non-compliance with the formal notice had been demonstrated;

Having regard to the other case documents, and notably the audit reports signed on 7 August 2013 by insurance auditors Marie-Cybèle Israël-Andrea and Louis du Pasquier;

Having regard to the Declaration of the Rights of Man and of the Citizen dated 26 August 1789;

Having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950;

Having regard to the Insurance Code, notably Articles L. 322-26-2, L. 322-26-2-1, R. 322-53-2, R. 322-55-2, R. 322-58, R. 322-82 and R. 322-84;

Having regard to the Monetary and Financial Code (MFC) as worded at the time of the events, notably Articles L. 612-1, L. 612-31, L. 612-38, L. 612-39, and R. 612-35 to R. 612-51;

Having regard to the Sanctions Committee's rules of procedure;

The ACPR Sanctions Committee, comprising Jean-Pierre Jouguelet in the chair, Yves Breillat, Christine Meyer-Meuret and Élisabeth Pauly;

Having heard, at the public session held on 19 February 2016:

– Mr Lajoie, rapporteur, aided by his deputy, Fabien Patris;

– Aymeric Pontvianne, representing the Director General of the Treasury, who said that he had no comments to make;

– Mr Assié, representing the ACPR College, aided by Barbara Souverain-Dez, ACPR Deputy Director of Legal Affairs, Émilie Bailly and Pauline de la Bouillerie, both managers in the Institutional Affairs and Public Law department; Mr Assié proposed:

  • imposing on Company C a fine that should not be less than EUR 120,000, comprising EUR 100,000 for non-compliance with the formal notice and EUR 20,000 for the other objections, in

a decision published in a form that did not name Company C but made it possible to identify Company A, which the former acquired through a merger that became final on (…);

- imposing on Company B a warning and a fine that should not be less than EUR 150,000, comprising EUR 100,000 for non-compliance with the formal notice and EUR 50,000 for the other objections, in a decision published in a non-anonymous form;

– The chairman of Company C's board of directors and the chairman and chief executive officer of Company B, aided by the chief executive officer of Company C and the deputy chief executive officer of Company B, the deputy chief executive officers of Company B, and Patrice Spinosi, barrister at the Conseil d'État and the Cour de Cassation, and Yehudi Pelosi, barrister, SCP Spinosi & Sureau;

The representatives of Company C and Company B having the last word;

Having deliberated in the sole presence of Mr Jouguelet, Mr Breillat, Ms Meyer-Meuret, Ms Pauly and Jean-Manuel Clemmer, Chief Officer of the Sanctions Committee, who acted as meeting secretary;

I. On combining the cases

1. Whereas disciplinary procedures Nos 2015-02 and 2015-03 concern the organisation and governance of two entities belonging to the same group, including its central structure; whereas both sets of procedures were opened on the same day following parallel audits that led first to letters issued by the ACPR General Secretariat, and then to two formal notices, both of which were challenged; whereas both sets of procedures were reviewed on the same day by the Committee at a public hearing; whereas the respondent organisations are represented by the same individual, who chairs their respective boards of directors; whereas these procedures seek to rule on similar issues; whereas accordingly it is appropriate to combine the two cases;

II. On the facts and the procedure

2. Whereas (Companies A and B belonged to the same insurance group); whereas Company A, dissolved on (…) following its merger into Company C, was a mutual reinsurance company governed by Article R. 322-84 of the Insurance Code; whereas at the audit date, it was the central structure of this group (…);

3. Whereas Company B, (…) specialising (…) in reinsurance, did (adopt) the legal form of mutual insurance company (…);

4. Whereas two on-site audits were begun within this group on 19 January 2012; whereas the first, which covered Company A, looked at the consistency and governance of this group, while the second considered the governance of Company B; whereas following these audits, two draft reports were prepared in October 2012, to which replies were made on 12 December 2012 and 5 November 2012 respectively; whereas the final reports were issued on 7 August 2013;

5. Whereas on 24 December 2013, the ACPR General Secretariat sent an action letter to each of these entities, the second one being amended and reissued on 10 January 2014; whereas complaints were made:

– against Company A, firstly for having only three members, whereas the provisions of Article R. 322-84 state that a mutual reinsurance company shall not be duly constituted unless it has at least seven members, and secondly because the membership treaties gave Company A's chief executive officer powers that encroached on the rights of the boards of member companies, in breach of the provisions of Article R. 322-53-2 of the Insurance Code;

– against Company B, for failing to comply with several rules governing the operation of insurance undertakings; whereas the alleged breaches concerned the composition of the annual general meeting, the powers of the board of directors to admit ceding entities as stakeholders, the fact that the voting rights of mutual insurers admitted as stakeholders were subject to a minimum contribution requirement, and the assignment of special associate status whereby certain parties were allowed to (and did in practice) hold several votes; whereas deviations from the applicable legal provisions were also noted as regards the operating procedures of the board of Company B; in particular, mutual insurers admitted as stakeholders but not holding associate status could not be members, while chairmen of the boards of directors or supervisory boards of mutual insurers admitted as stakeholders and holding associate status were allowed to be members in a personal capacity without being stakeholders;

6. Whereas on 9 April 2014, the Vice-Chairman of the ACPR notified:

– Company A that he was planning to issue a formal notice to instruct it to comply with the obligations laid out in Articles R. 322-84 and R.322-53-2 of the Insurance Code before 31 December 2014; whereas Company A indicated in a reply dated 23 April 2014, firstly, that the process of amending the membership treaties had begun and secondly, on the matter of the minimum number of members required, that it was awaiting a response from the authorities on reforms to Article R. 322-84 of the Insurance Code, which would parallel the changes underway for public limited companies and that, if the position were maintained, it was ready to have Company A taken over or dissolved;

– Company B that he was planning to issue a formal notice instructing it to make the requested amendments to its articles of association; whereas on 25 April 2014, Company B sent a letter to the ACPR General Secretariat in which it challenged the issuance of formal notice and said that it was creating a working group within its board of directors that was tasked with submitting an interim report to the board on 19 June 2014 so that, subject to the agreement of the ACPR, the articles could be amended by an extraordinary general meeting in November 2014, ensuring, subject to its decision, that the requested changes could be made before the end of December 2014;

7. Whereas on 12 June 2014, Company A and Company B were issued formal notices instructing them to address the alleged deficiencies; whereas each of them challenged these decisions by submitting to the Conseil d'État an application for suspension and an application for cancellation on grounds of ultra vires; whereas the first applications were dismissed [in] September 2014 (…) and the second applications, aside from the portion of the application by Company B concerning the ability of its board to grant stakeholder status (cf. below, objection 3), [in] May 2015(…);

III. On the objections and sanctions

1. On the governance of Company A and Company B, and organisation of the insurance group (…) *(objections 1 to 8)*

8. Whereas Company C, as successor in interest to Company A, and Company B consider that, without a judicial precedent, the rules that they were accused of failing to comply with were insufficiently clear, prior to the abovementioned decisions [of] May 2015, to act as the basis for a sanction;

9. Whereas, for a sanction to be issued, the rule on which it is based must be sufficiently clear, such that affected entities may reasonably predict that the actions at issue constitute a breach of their professional obligations that may be sanctioned as such; whereas these entities may, however, gain relief from some or all liability by arguing that the authorities, notably during or following previous audits, either approved their application of this rule or did not draw the entities' attention to breaches that they noted; whereas consequently is it necessary to consider, in the case of each objection relating to the governance of Company

A and Company B and the organisation of the insurance group, (i) the materiality of the facts and the clarity of the applicable rule, making a sanction reasonably predictable with regard to the rules laying down the professional obligations and (ii) the actions of the authorities, particularly during or following previous audits;

1.1. Company A

1.1.1. On non-compliance with the minimum number of members required for a mutual reinsurance company

10. Whereas, according to **objection 1**, Company A had only three member companies, but it should have had at least seven pursuant to Article R. 322-84 of the Insurance Code;

11. Whereas Article R. 322-84 of the Insurance Code states that: "*Mutual insurance companies or their unions, or companies that are affiliated through an agreement with a specific group mutual insurance company, may create mutual reinsurance companies whose purpose is to reinsure the member companies. / These reinsurance companies are subject to the provisions of this section. However, they shall not be duly constituted unless they have at least seven member companies, this minimum not applying if they exclusively comprise companies belonging to the same group mutual insurance company; their articles of association shall establish the amount of their initial capital, there being no minimum requirement for this; the general meeting shall comprise all member companies.* ";

a) On the materiality of the objection and the clarity of the rule on which it is based

12. Whereas Company A, which had seven members when it was established in 2001, had only three members as at the audit date; whereas these facts are not contested; whereas, as ruled by the Conseil d'État in its abovementioned decision [of] May 2015 (cf. above recital No. 7), the minimum membership requirement is intended to ensure that the risks incurred by mutual reinsurance companies are shared; whereas satisfying this objective requires this threshold to be complied with not merely when the company is established but also at all other times, notwithstanding the fact that the Insurance Code does not require mutual reinsurance companies that fail to meet this requirement to be dissolved; whereas contrary to the arguments put forward by the company, this rule was sufficiently clear, without it being necessary to wait for the abovementioned decision (by the Conseil d'État), for failure by a mutual reinsurance company to meet this requirement to be deemed a breach of its professional obligations; whereas the absence of legal provisions providing for dissolution, as provided for by Article L. 225-47 of the Commercial Code for public limited companies, or nullity, which is not, unlike other obligations, covered by Article R. 322-90 of the Insurance Code, a consequence of non-compliance with this threshold, has no bearing on whether this breach may be subject to disciplinary sanctions, since this is a provision that the ACPR is responsible for supervising;

b) On positions taken previously by the authorities

13. Whereas the notice, in a report published in 2003 by the *Conseil national des assurances* (National Insurers' Council), that several groups […] had conducted portfolio transfers and mergers, could not, in itself, be interpreted as encouraging the entities in question to waive a legal provision; whereas, however, the *Comité des entreprises d'assurance* (CEA), which was the independent administrative authority responsible, prior to the establishment of the ACPR, for approving insurance undertakings and portfolio transfers between undertakings, approved, on 27 December 2004, portfolio transfers between different entities in the […] group, with the result that the number of its members was reduced from seven to four; whereas, according to Article L. 324-1 of the Insurance Code as worded at that time, the CEA approved the transaction only if it seemed to it "*that the transfer did not [interfere with] the interests of the creditors and insured parties*"; whereas, according to the same article, the CEA only approved the transfer "*if the supervisory authorities of the State in which the reinsurer was established [certified] that this undertaking had, in view of the transfer, the requisite solvency margin*"; whereas in addition, an audit report of February 2007 concerning the group

(of which two entities are covered by this procedure) stated that the number of Company A's members was below the legal minimum and indicated that the exemption provided for in the second sub-paragraph of Article R. 322-84 of the Insurance Code for mutual reinsurance companies belonging to a group mutual insurance company could be applied to Company A; whereas this question was not addressed in the follow-up to the report; whereas, moreover, in October 2010, the ACPR accepted a (new) merger that caused the number of members to be reduced to three;

14. Whereas because of the supervisor's approval of the transactions that led to the number of Company A's members to be reduced from seven to four and then three, the actions of the authorities relieve Company A of its responsibility for breaching its professional obligations up until the point at which the ACPR sent Company A an action letter reminding it of the requirements laid down by Article R. 322-84 of the Insurance Code; whereas, accordingly, objection 1 should be dismissed;

1.1.2. On the unlawful nature of certain clauses of Company A's membership treaties

15. Whereas, according to **objection 2**, Company A's reinsurance membership treaty contained clauses that granted the chief executive officer of the company or its board of directors powers that should have been attributed solely to the boards of directors of member companies;

16. Whereas Article R. 322-53-2 of the Insurance Code states that "*I. - The senior management of the company is conducted, under the supervision of the board of directors and in accordance with the guidelines laid down by the board, by an individual appointed by the board and bearing the title of chief executive officer. However, if the company's articles of association so provide, senior management may be conducted by the chairman of the board of directors. / Before being appointed, the person nominated to perform the duties of chief executive officer is required to disclose any professional activities and elective duties that he or she intends to continue to pursue. The board of directors shall rule on whether such activities or duties may be combined with the duties of chief executive officer. Subsequently, the board shall rule on other activities or duties that the chief executive officer wishes to pursue. / II. - The chief executive officer may be dismissed at any time by the board of directors. If dismissal is decided without proper grounds, it may give rise to compensation, unless the chief executive officer takes over the duties of chairman of the board of directors. If the chief executive officer has signed an employment contract with the company, dismissal shall not have the effect of terminating this contract.* ";

a) On the materiality of the objection and the clarity of the rule on which it is based

17. Whereas the reinsurance membership treaty of 13 December 2011 stipulated that "*The Chief Executive Officer of Company A may, if he deems it necessary, ask a Member's Board of Directors to appoint him Chief Executive Officer, which the Board of Directors may not refuse to do. / If the Member's Chief Executive Officer is not the Chief Executive Officer of Company A, he must receive, prior to taking up his duties, joint approval from the Chief Executive Officer and the Board of Directors of Company A. / The Board of Directors of Company A and its Chief Executive Officer may together, without being required to give reasons for their request, require the Member's Board of Directors to dismiss its Chief Executive Officer, which the Board of Directors may not refuse to do. ";* whereas the fact that the chief executive officer of Company A may ask a member's board of directors to appoint him chief executive officer of that member, without the said board having the option of refusing this request, was not in compliance with the legal provisions recalled above;

18. Whereas the provisions of Article R. 322-53-2 of the Insurance Code, which assign solely to the board of directors of a mutual insurance company the power to appoint and dismiss the chief executive officer, are clear; whereas Company A could have complied with these provisions without waiting for the abovementioned decision of the Conseil d'État (dated) May 2015, which merely reiterated this rule; whereas since this article does not provide exemptions for entities belonging to a group, it was up to Company A, in

the absence of other applicable provisions that would have allowed it to benefit from such a regime, to comply; whereas the requirement for mutual groups to have consistent management does not mean that the governing bodies of the central structure should be able to impose their will on members without members being entitled to challenge this; whereas although, in its defence, Company A said that a new version of the treaty mentioned that the appointment option granted to the chief executive officer was to be exercised "*with regard to the powers assigned to a Member's Board of Directors*", while the clause stating that the board of directors could not refuse such appointment had been deleted, this amendment, which took place after the audit, did not offer grounds to dismiss the objection;

b) On positions taken previously by the authorities

19. Whereas although, as the institution argues, (an) audit report dated February 2007 said that the chief executive officer of Company A appointed or approved the appointment of the chief executive officers of Company A's members, it did not deal specifically with the group's governance; whereas the fact that ongoing supervision never subsequently criticised these appointment methods is not sufficient to dismiss the objection; whereas, moreover, the membership treaties never received explicit approval from the supervisor; whereas the authorities did not give an express position on the procedures used to implement these provisions with regard to the need for consistent management of mutual insurance groups; whereas, for this reason, the argument based on the actions of the authorities must be dismissed; whereas accordingly, the objection is upheld;

1.2. On breaches resulting from the statutory provisions of Company B at the audit date

20. Whereas the action argued that several of Company B's statutory clauses as at the audit date had the effect of causing the organisation, composition and operating procedures of the general meeting and the board of directors to breach several legal provisions; whereas one objection was withdrawn from the action following the abovementioned decision (in) May 2015 (objection 3), while the others were upheld (objections 4 to 8);

1.2.1. On the complaint concerning the ability of the board of directors to grant stakeholder status

21. Whereas, according to **objection 3**, the board of directors of Company B may decide to grant stakeholder status to legal entities ceding reinsurance, but this power should come within the purview of the general meeting;

22. Whereas, however, in view of the decision (of) May 2015 by the Conseil d'État, the College decided to withdraw this objection; whereas this was duly noted;

1.2.2. On the other breaches concerning the governance of Company B

a) On the materiality of the objections and the clarity of the rule on which they are based

23. Whereas, according to objection **4**, the general meeting de Company B is comprised both of delegates representing companies holding direct insurance contracts and of legal entities reinsured by this entity, in breach of the provisions of first sub-paragraph of Article R. 322-58 of the Insurance Code;

24. Whereas, according to the first sub-paragraph of Article R. 322-58 of the Insurance Code, "*The articles of association determine the composition of the general meeting. This meeting is comprised either of all the stakeholders that have paid their contributions, or of delegates elected by those stakeholders. For the*

purpose of applying this second option, stakeholders may be divided into groups according to the nature of the contract taken out or according to regional or professional criteria. The number of these delegates may not be set at less than 50. ";

25. Whereas as at the audit date, Article 13 of Company B's articles of association stipulated that *"The general meeting represents all stakeholders and reinsured companies. / It shall comprise a) 50 delegate-stakeholders that have paid their insurance contributions, elected by regional groupings of stakeholders established in accordance with Article 6 above, as per the requirements laid down in the rules of procedure referred to in that article; each delegate may not be entitled to more than one vote. / b) associates that have paid their reinsurance contributions, each of which may have one vote, plus one additional vote per complete tranche of EUR 3,000,000 in ceded reinsurance contributions in respect of the year preceding the meeting, up to a maximum of ten votes. / This number may be increased so that the number of associates' votes is not less than 40. / c) reinsured mutual insurers with a current reinsurance treaty and that have paid their reinsurance contributions, with one vote per mutual insurer having ceded reinsurance contributions in respect of the year preceding the meeting representing at least 1% of total reinsurance contributions and premiums received by the company. The number of reinsured mutual insurers taking part in the meeting in this capacity shall not be less than ten. It shall be supplemented, as applicable, by mutual insurers that did not reach this percentage but that paid the largest reinsurance contributions.* ";

26. Whereas this article of the articles of association, as worded above, organised a combination of direct and indirect methods of stakeholder representation; whereas the provisions of Article R. 322-58, which provide for an option between two methods of composition for the general meeting, stating that either one or the other should be selected, are clear; whereas, contrary to the argument put forward by Company B, these provisions forbade the combination provided for in Article 13 of its articles of association, without it being necessary to wait for the Conseil d'État's ruling on this matter (in) May 2015;

27. Whereas, according to **objection 5**, the voting rights of non-associate mutual insurers admitted as stakeholders are subject to a minimum contribution amount requirement;

28. Whereas Article L. 322-26-1 of the Insurance Code states that "*Statutes that make attendance of members who are up to date with their contributions at the general meeting or make the appointment of members to the general meeting subject to the amount of the contribution shall be null and void with effect on 1 July 1991.* "; whereas these provisions are clear;

29. Whereas Article 13 c) of the articles of association as at the audit date made voting rights subject to a minimum contribution amount; whereas the materiality of the objection is not disputed by Company B, which pointed out that the wording of this passage had been amended;

30. Whereas, according to **objection 6**, mutual insurers admitted as stakeholders to which Company B has granted special associate status may hold (and do hold in practice) several votes at the general meeting;

31. Whereas the final sub-paragraph of Article R. 322-58 of the Insurance Code states that "*[...] Each stakeholder has the right to one vote and one vote only, and no exemption may be provided for this rule in the articles of association*"; whereas the third sub-paragraph of Article R. 322-82 of the code states that "*[...] However, the articles of association of companies whose sole purpose is reinsurance may assign to each of the reinsured companies a number of votes in the general meeting that is determined on the basis of ceded contributions or based on the number of members of the reinsured company. Each reinsured company shall however have at least one vote. The quorum required for decisions to be duly taken must then be reached both in terms of the number of reinsured companies and in terms of the votes that they hold.* ";

32. Whereas by granting one vote, "*plus one additional vote per complete tranche of EUR 3,000,000 in ceded [...] contributions*", the articles of association of Company B allowed, as at the audit date, more than one vote to be granted to some stakeholders; whereas because it carried on, even on a marginal basis, the business of direct insurance, it was not entitled to the abovementioned exemption contained in Article R.

322-82 of the Insurance Code; whereas the wording of Article R. 322-58 of the Insurance Code is clear; whereas it necessarily forbade such a clause, without it being necessary to wait for the Conseil d'État's ruling on the matter (in) May 2015; whereas the amendment to the articles of association after the audit has no bearing on the objection;

33. Whereas, according to **objection 7**, mutual insurers admitted as stakeholders but without associate status may not be members of the board of directors;

34. Whereas, according to the sixth sub-paragraph of Article L. 322-26-2 of the Insurance Code, "*[…] The articles of association may not subject to any other condition the appointment of members, who have paid their contributions, to the board of directors or supervisory board […]*";

35. Whereas Article 24 of Company B's articles of association, as worded in 2005, stipulated that "- *Composition and term of office. - Administration of the company is entrusted to a board of directors appointed by the ordinary general meeting. / The board is composed of eight to eighteen members chosen from among the associates, the Chairmen of the Boards of Directors or Supervisory Boards of associates, contract-holding stakeholders who have paid their contributions […]*";

36. Whereas as at the audit date, the articles of association of Company B did not permit mutual insurers admitted as stakeholders but without associate status to be members of the board of directors; whereas the rule laid down by Article L. 322-26-2 of the Insurance Code is clear; whereas this rule necessarily forbade a statutory clause restricting the ability of certain mutual insurers admitted as stakeholders to be members of the board of directors;

37. Whereas, according to **objection 8**, Article 24 of Company B's articles of association allowed the chairmen of the boards of directors or supervisory boards of associate mutual insurers to be elected to the board of directors of Company B on a personal basis without having to be stakeholders;

38. Whereas point I of Article R. 322-55-2 of the Insurance Code states that "*The directors or members of the supervisory board are selected from among the stakeholders that have paid their contributions, with the exception of those elected by employees[…]*" whereas the rule laid down by this article, which requires members of the board of directors to be chosen from among the stakeholders that have paid their contributions, is clear; whereas this rule necessarily forbade the clause set down by Article 24 of the articles of association;

b) On positions taken previously by the authorities

39. Whereas Article R. 310-6-1 of the Insurance Code, as worded at the time of the events, required supervised entities, "*before submitting amendments to their articles of association to the general meeting, [to] obtain the agreement [of the supervisor], which shall make its decision within three months following the submission of three samples of draft amendments to resolutions establishing articles of association. A copy of these documents is provided by the Committee to the Government commissioner. Once this period expires, if the Committee makes no observations, the amendments are deemed to be approved.* ";

40. Whereas the articles of association, containing the wording that led to the alleged breaches, were submitted to the *Commission de contrôle des assurances* (supervisory commission for the insurance sector) on 26 July 2001 and then 22 July 2005; whereas the new version of the articles was submitted for approval to, and was not challenged by, the supervisor; whereas discussions particularly concerned the wording of Articles 13 b) and 13 c); whereas despite the absence of discussion about the amended provisions of Article 24 (objections 7 and 8), this article was brought to the attention of the supervisor, which should, as for the other statutory provisions submitted for its review pursuant to the abovementioned Article R. 310-6-1, have expressed its disapproval; whereas because it did not do this, these amendments must be considered as having been approved;

41. Whereas consequently, in view of the actions of the authorities prior to the date of the on-site audit that began on 19 January 2012 and resulted in this disciplinary procedure, which relieve Company B of its responsibility for not complying with the applicable rules, objections 4 to 8 should be dismissed;

2. On non-compliance by Company A and Company B with the formal notices of 12 June 2014 *(objections 9 and 10)*

42. Whereas Article L. 612-31 of the MFC states that "*L'Autorité de Contrôle Prudentiel et de Résolution may order any entity subject to its supervision to take any measures necessary to achieve compliance with the obligations that the Autorité de Contrôle Prudentiel et de Résolution is responsible for supervising, and within a set timeframe*";

43. Whereas, according to **objection 9**, Company A did not obey the formal notice issued by the Vice-Chairman of the ACPR on 12 June 2014 to comply before 31 December 2014 with the provisions of Articles R. 322-84 and R. 322-53-2 of the Insurance Code, which the ACPR is responsible for supervising;

44. Whereas, according to **objection 10**, Company B did not obey the formal notice issued by the Vice-Chairman of the ACPR on 12 June 2014 to comply before 31 December 2014 with the provisions of Articles L. 322-26-2, L. 322-26-2-1, R. 322-55-2, R. 322-58 and R. 322-82 of the Insurance Code, which the ACPR is responsible for supervising;

45. Whereas these two formal notices related to clear provisions and set out detailed measures to be taken; whereas the predictability principle does not apply to administrative enforcement measures; whereas since (in) September 2014, the urgent applications judge of the Conseil d'État rejected their application to suspend the formal notices, Company A and Company B were bound to comply with the notices within the specified time; whereas both companies had sufficient time between receipt of the follow-up letters sent to them on 24 December 2013 and 10 January 2014 respectively, on the one hand, and the deadline of 31 December 2014 set by the formal notice, on the other hand, to make the changes requested by the supervisor;

46. Whereas, in the first place, while Company A argues that it was materially impossible for it to increase the number of its members in the short term, it had other ways to satisfy this portion of the formal notice, as noted by its board of directors in February 2014; whereas in the second place, it was not until 8 April 2015 that the board issued a notice that it was "*preparing to phase out the current operating procedures for the shared consultation bodies of Company A members.*"; whereas although, as mentioned above, it had enough time to make the changes requested before 31 December 2014, it was not until 31 July 2015 that merger plans for Company A to correct the insufficient number of members were filed with the ACPR; whereas, similarly, draft amendments to the membership treaties were not provided to the ACPR until January 2015 and approved by the general meeting of Company A on 25 June 2015; whereas objection 9 is upheld;

47. Whereas although Company B said on 5 February 2014 that it had set up a working group to make the changes to its articles of association that it deemed necessary to address the complaints that provided the basis for objections 3, 4, 7 and 8, this partial response was not completed and the proposed amendments were not, in contrast with the original plans, submitted to the board of directors at its meeting on 24 April 2014; whereas, conversely, the board decided explicitly on 25 September 2014 "*not to respond to the ACPR's formal notice*" and elected to wait for the end of the dispute procedure to submit the proposed statutory amendments to the general meeting; whereas it had enough time between receipt of the action letter of 10 January 2014 and the deadline of 31 December 2014 fixed by the formal notice to make the requested changes; whereas Company B's statutory provisions were not amended until 18 June 2015; whereas objection 10 is upheld;

3. On the consequences for this procedure of Company A's merger into Company C

48. Whereas, in its observations in response to the rapporteur's report, Company C argued that according to previous rulings by the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR), the principle of the individual nature of penalties prevented it from being sanctioned for breaches by Company A;

49. Whereas, however, a merger may not, in view of the ACPR's regulatory responsibilities, cause one legal entity having acquired another legal entity to avoid being sanctioned for breaches committed by the latter prior to the merger; whereas, however, the principle of personal responsibility and the individual nature of penalties means that following the merger of Company A into Company C a non-monetary sanction may not be imposed on the latter; whereas although Article L. 612-39 of the MFC makes the publication of sanction decisions the rule, the same principle requires arrangements to be made so that such publication does not cause objections based on breaches committed before the merger by Company A to be directly or indirectly attributed to Company C;

50. Whereas Company C also argued that it could not be sanctioned because it was not concerned by the notification of objections, was made a respondent during the course of the procedure, and was unable to present its written observations until after the rapporteur had filed his report;

51. Whereas, however, in the first place, the College was not bound by any legal provision to provide Company C with fresh notification of the objections made earlier to Company A; whereas, moreover, (the) chairman of the board of directors of Company C was previously the chairman and chief executive officer of Company A; whereas, in addition, Company C appointed, to assist in this procedure, the same lawyer who had aided Company A; whereas therefore the acquiring company could easily have obtained all the relevant information on the disciplinary procedure underway; whereas the entire file for the procedure was sent to it on 3 December 2015; whereas it did not submit a request to the Committee to postpone the hearing of 19 February 2016 and did produce a statement of defence;

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52. Whereas in view of the above the Committee is upholding objection 2 and dismissing objection 1 against Company C, as successor in interest to Company A; whereas the Committee authorises the College to cease the action taken in respect of the statutory clause granting the board of directors of Company B, rather than its general meeting, the power to confer stakeholder status on legal entities ceding reinsurance (objection 3) and dismisses objections 4 to 8;

53. Whereas non-compliance with a formal notice (objections 9 and 10) necessarily impinges on the conditions under which the ACPR performs its task of monitoring compliance by supervised entities with the provisions that apply to them, without it being necessary to demonstrate the existence of a risk to insured parties and the markets; whereas, as indicated, there is no justification for non-timely execution of the formal notices issued to Company A and Company B; whereas such actions are serious and must be sanctioned;

54. Whereas it is necessary in the first place, in determining the sanction to be imposed on Company C, as successor in interest to Company A, to take into account, as recalled (cf. above recital 52), the fact that non-compliance with the formal notice of 12 June 2014 is not the sole breach; whereas also, at 31 December 2014, Company C had EUR (…) million in equity and that while in 2014 Company A made net profit of EUR (…)

thousand, its equity totalled EUR (…) million at that date; whereas accordingly it is appropriate to impose a fine of EUR 100,000 on Company C, as successor in interest to Company A;

55. Whereas Company B had at 31 December 2014 EUR (…) million in equity and made net profit of EUR (…) million in that financial year; whereas a fine of EUR 100,000 is not disproportionate in the light of the charges;

56. Whereas the principle of the individual nature of penalties precludes a warning from being issued to Company C for breaches committed by Company A prior to its merger; whereas conversely, since Company B was not previously sanctioned, the charges, notably relating to the refusal to comply with the formal notice issued to it, should be punished with a warning;

57. Whereas as indicated (cf. above recital 49), the sanction decision will be published without giving the name of Company C; whereas in addition, because of the size and structure of the group and the public nature of the information concerning the merger of Company A into Company C, any publication naming the former would make it possible to identify the latter; whereas, furthermore, since Company B was at the time of the events the main structure of the group, accounting for 25% of its business, the need for Company C not to be mentioned by name means that this decision is being published in a form that makes it impossible to identify Company B; whereas this decision is therefore being published in a form that makes it impossible to directly or indirectly identify Company C, Company A or Company B;

FOR THE FOREGOING REASONS

DECIDES:

ARTICLE 1 – A fine of EUR 100,000 (one hundred thousand euros) shall be imposed on Company C.

ARTICLE 2 – A warning and a fine of EUR 100,000 (one hundred thousand euros) shall be imposed on Company C.

ARTICLE 3 – This decision will be published in the register of the ACPR in a form that makes it impossible to identify Company C, Company A or Company B and may be consulted in this form at the Committee secretariat.

Chairman of the
Sanctions Committee

[Jean-Pierre Jouguelet]

This decision may be appealed within a period of two months from its notification, in accordance with the requirements laid down by point IV of Article L. 612-16 of the Monetary and Financial Code.