



# **Do tradition and innovation mix? Benefits and risks for consumers of peer-to-peer insurance**

**RESEARCH REPORT**

Report produced by Option Consommateurs  
and submitted to Innovation, Science and Economic Development Canada's  
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# Option consommateurs

## MISSION

Option consommateurs is a non-profit organization whose mission is to promote and defend the rights and interests of consumers and ensure that they are respected.

## HISTORY

Option consommateurs has been in existence since 1983, when it arose from the Associations coopératives d'économie familiale movement, more specifically, the Montreal ACEF. In 1999, it joined forces with the Association des consommateurs du Québec (ACQ), which had already pursued a similar mission for over 50 years.

## PRINCIPAL ACTIVITIES

Option consommateurs helps consumers experiencing difficulties, by offering them budget consultation and information sessions on budgeting, debt, consumer law and the protection of privacy.

Each year we produce research reports on important consumer issues. We also work with policy makers and the media to denounce unacceptable situations. When necessary, we institute class action suits against merchants.

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## MEMBERSHIP

In its quest to bring about change, Option consommateurs is active on many fronts: conducting research, organizing class action suits, and applying pressure on companies and government authorities. You can help us do more for you by becoming a member of Option consommateurs [www.option-consommateurs.org](http://www.option-consommateurs.org).

## Acknowledgments

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- Moab Fahmi, Director, Fintech and Innovation, AMF
- Andrea Chow, Senior Director, and Trevor McKillop, business intelligence specialist at the Ontario Financial Services Commission
- David Sorensen, Deputy Superintendent of Insurance, at Government of Alberta

### Representatives of self-regulatory organizations:

- Maya Raic, President and CEO, and Jannick Desforges, Director of Institutional Affairs and Compliance, Chambre de l'assurance de dommages

Legal experts:

- André Bélanger, professor in the Faculty of Law at Université Laval
- Jacques St-Amant, lecturer in consumer law at Université de Québec à Montréal
- Matthew Dugas, a partner in the firm McCague Borlack

Insurance experts:

- Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries (CIA)
- Thomas Nguema Evie, doctoral student and consultant in group insurance

Industry representatives:

- Ms. Lyne Duhaine, CLHIA-Québec President and Senior Vice-President Distribution, Canadian Association of Health Insurance
- The Canada Insurance Bureau, which gave written answers to our questions

U.S. experts:

- Birny Birnbaum, CEO, the Center for Economic Justice
- Robert Hunter, Director of Insurance for the Consumer Federation of America and former Insurance Commissioner for the State of Texas
- Ira Rheingold, Executive Director of the National Association of Consumer Advocates

## Summary

Digital peer-to-peer (P2P) insurance platforms already exist, especially abroad. They are divided into three categories. Those in the first act like brokers, those in the second, like insurance companies, and those in the third follow a self-governance model. Apart from the platform itself, the latter are composed entirely of consumers. It is they who make all the decisions, from the formation of the group to the payment of compensation, with all the risks this can entail.

There are admittedly some advantages to P2P insurance platforms. The products are inexpensive, service is rapid (both in terms of obtaining insurance and compensation) and the consumers are relatively autonomous. In addition, the way these platforms operate promotes transparency. They also, however, involve some significant risks. For example, consumers might misunderstand the product they are being offered, be tempted to make choices too quickly, or subscribe to a product that is not suited to their needs. In addition, there is always the risk of fraud.

These risks are magnified when the P2P insurance platform is not registered with the regulator and is not subject to oversight by insurance professionals, which is the case with the platforms that follow the self-governance model. With this kind of platform, consumers may have little recourse if problems arise and may not be compensated if the group opposes the claim. All this is particularly worrying in the context of insurance, where consumers are vulnerable and the consequences of an error can be catastrophic for their finances.

The regulation of workers in the insurance domain has three objectives: to ensure the stability of the financial system, to oversee certified representatives, and to ensure that consumers are protected by providing them with numerous rights and remedies. These objectives are considered essential in this domain. Our study reveals, however, that P2P insurance platforms perform actions reserved for professionals in the insurance industry. Consequently, if these platforms wish to do business in Canada, they will have to register with the regulator and be subject to regulation.

In Canada, regulators find themselves at a crossroads. They need to be proactive in order to protect consumers before P2P insurance platforms become available to a large number of Canadian consumers.

Option consommateurs recommends that regulators closely monitor the situation to ensure that no P2P insurance platform operates without the necessary permits and identify the best ways to protect consumers. It also invites the platforms to respect guidelines. Finally, it recommends that consumers exercise a high degree of caution with regard to these platforms.

## Section 1. Introduction

As early as 1200 BC., the Phoenicians, had already devised a common mechanism that would compensate them in the event of loss or damage.<sup>1</sup> This was developed to a higher level of sophistication during the great Empire of Rhodes (between 1000 and 600 BC.), which originated the system of maritime law known as *Lex Rhodia*. But the principle of insurance as we understand it today more truly originated in the 14th century Italian city-states. The word “insurance” is etymologically related to the word “security,”<sup>2</sup> which is closely linked to confidence, trust in the insurer. In the event of misfortune, the insured will be compensated.

Since the 2008 economic crisis especially, a good many consumers have lost confidence in traditional companies and public institutions. Many these days seem to put more confidence in individuals, even ones they do not know. What they want is service that is focused on their needs and they do not want to pay a lot for it, which is what they feel the shared economy does for them.<sup>3</sup>

Aided by technology, the so-called new economy<sup>4</sup> allows thousands, even millions of individuals who have services to offer to contact people seeking such services. It has already considerably disrupted sectors such as transportation and accommodation. Many experts believe that it will soon revolutionize the financial sector, insurance included.

One of the innovations in the area of financial services is peer-to-peer (P2P) insurance. The Competition Bureau of Canada has labelled this innovation a “disruption,” that introduces a new business model, a new way of providing services. According to expert Rachel Botsman, a theoretician of the collaborative economy, for a sector to be disrupted by innovations, it must experience complex changes that sever

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<sup>1</sup> Léonie Gagné, Lavery, L’assurance “pair à pair”: un retour aux sources... révolutionnaire ?”

<sup>2</sup> <https://www.etymonline.com/word/insurance> and Option consommateurs: *An Act mainly to improve regulation of the financial sector, the protection of deposits of money and the operation of financial institutions*, Bill 141, p. 6.

<sup>3</sup> Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada* 2017, pp. 17 and 18, and Annik Bélanger-Krams, Option consommateurs, *Sharing economy: the Canadian perspective*, June 2017, pp. 17 et seq. Note, the Insurance Institute is a non-profit organization founded in 1989. It provides training and information on a number of issues to the Canadian casualty insurance industry,

<sup>4</sup> Mowat Center, “The rise of the sharing economy,” 2017.

the bonds of trust with traditional institutions to the point that the presence of an intermediary becomes redundant and access to it is limited<sup>5</sup>.

There are startup companies that use technological innovation to launch new business models and products in the field of insurance; they are known as Insurtechs. In 2016, \$1.7 billion was invested in this kind of startup, and this does not include the huge sums that traditional insurers had to spend in order to stay competitive. Insurtechs penetrate the insurance market more typically in sectors that are not well served by traditional networks. Also, they offer various innovations, such as telematics, insurance on demand and peer-to-peer insurance. They promise quick, easy solutions thanks to the use of technology.

New technologies and innovation are bringing about profound changes in the field of insurance. Traditionally, the insurance distribution network operated via the intervention of certified representatives or through distribution without a representative (DWR). It should be noted that in some jurisdictions, DWR is an exceptional regime, one example of this being credit balance insurance offered by a financial institution. P2P insurance platforms seem to offer new ways of distributing insurance.

According to the Institute of International Finance, P2P insurance platforms could seriously disrupt the insurance industry since they offer such personalized, efficient services. Some authors even say that North America is on the verge of becoming a major market for P2P insurance products.

## **1.1. Methodology**

In our study, we focus on a variety of P2P insurance platforms. We will present an overview of the situation and propose relevant lines of inquiry. Specifically, we will identify the benefits and pitfalls of using P2P insurance platforms and point out the issues in this area that are relevant to consumer protection.

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<sup>5</sup> Rachel Botsman et Roo Rogers, *What's Mine is Yours : The Rise of collaborative consumption*, HarperCollins Publishers, 2010,

To do this, we began by conducting a literature review. We also interviewed experts in the field of insurance, new technologies and consumer protection as well as three provincial regulators and representatives of a self-regulatory organization and of the insurance industry.<sup>6</sup>

In addition, we conducted a study of the legal framework in four Canadian provinces, Québec,<sup>7</sup> Ontario, Alberta and British Columbia (see Section 4). We also studied foreign laws and the interventions of public authorities in Australia, the U.S., France, New Zealand, the UK and the European Union, with a view to identifying avenues of reflection with regard to potential best practices (see Section 5).

Finally, we studied the websites of nine platforms accessible to consumers in the jurisdictions being studied. Our sample consisted of platforms accessed online that included information in English or French. We paid close attention to the information posted on the websites, including the terms of the agreement (see Section 6). On the other hand, since practically all of the platforms in our sample were situated overseas and since it was generally impossible for us to become members, we were only able to gain access to two policies,<sup>8 9</sup> This fact will not alter the findings of our research, since our study of the documents that were available clearly reveals that there are significant risks for consumers in using P2P insurance platforms, if the latter are not registered with, and regulated by the regulator.

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<sup>6</sup> The list of experts interviewed appears in the Acknowledgments section of this report.

<sup>7</sup> It is important to remember that at the time of this research, Bill 141 was under consideration in this province (it was introduced in October 2017 and adopted on June 13, 2018). In our research, we took into account what was stated in it and the amendments made thereto from February to June 2018.

<sup>8</sup> The policy is the document that spells out the terms of the contract.

<sup>9</sup> One of them was for any group doing business with a given platform (an insurance policy for bicycles) and the other was for a specific group of consumers (consumers with an 64 GB iPhone 8).

*It is in the shelter of each other that the people live*

Irish proverb

## Section 2. Peer-to-peer insurance platforms

Peer-to-peer (P2P) insurance platforms – the name given to shared economy platforms that provide insurance products - exist already, especially abroad.<sup>10 11</sup> They are characterized by a business model that, in principle, allows individuals to insure each other without the intervention of an insurer or an intermediary.<sup>12</sup> And they are predicted to become ever more popular over time.<sup>13</sup>

Consumers' interest in P2P insurance platforms may be partly ascribable to a reaction to the demutualization of insurance,<sup>14</sup> a symptom of a desire to re-appropriate insurance. Consumers are dissatisfied with the current system;<sup>15</sup> they feel that they pay premiums and receive nothing in return.<sup>16</sup> Others feel that the interest in P2P insurance platforms demonstrates that chains of human solidarity still exist;<sup>17</sup> that we are witnessing a return to mutuality as a basic principle.

P2P insurance platforms have one thing in common: they allow consumers to unite and form a group to contract insurance in a different way. The result is increased empowerment and a certain degree of disintermediation.

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<sup>10</sup> Insurance Institute, CIP Society, *“Les modèles d’assurance collaborative : économie du partage, nouvelles technologies et mise en commun des risques,”* page 5 et seq. and Léonie Gagné, Lavery, *“L’assurance pair à pair” : un retour aux sources... révolutionnaire ?”*

<sup>11</sup> In Canada, there is only one P2P insurance platform; Besure.

<sup>12</sup> Michel Turcotte, *“L’assurance sans assureur ou le P2P,”* *Assurances et gestion des risques*. Vol. 84 (1-2), pages 80-81.

<sup>13</sup> Insurance Institute, *“Sharing Economy: Implications for the Insurance Industry in Canada,”* 2017, p. 29, and Russ Banham *“Peer Pressure: Is Peer-to-Peer Insurance a fad or the future?”* March 2017

<sup>14</sup> Interview with André Bélanger, professor at the Faculty of Law at Université Laval.

<sup>15</sup> Interview with Jacques St-Amant, lecturer in consumer law at the Université du Québec à Montréal.

<sup>16</sup> Interview with André Bélanger, professor at the Faculty of Law at Université Laval.

<sup>17</sup> Interview with Jacques St-Amant, lecturer in consumer law at the Université du Québec à Montréal.

The majority of peer peer-to-peer insurance platforms (P2P) present similar characteristics. They only offer insurance online; they allow consumers to join a group quickly and at any time;<sup>18</sup> and they use social networks to promote their services, convey information and recruit new members.

There are three categories of P2P insurance platforms. In the first, called the distribution model, the platform acts as a broker. A portion of the premium goes to the consumer group while another goes to a traditional insurer. It is expected that compensation for large claims will be paid by the insurer while claims of lesser value (for a bicycle, for example), will be paid by the group.<sup>19</sup>

The second category is the insurance model. When it comes to compensation, it is the platform that acts as the insurer. On the other hand, the group that the consumer joins is affiliated with a social cause (environment or animal welfare, for example). When a group ends the year with a surplus, it is paid to an organization linked to the cause chosen by the group.

The third category is the self-governance model. Apart from the platform itself, this is composed entirely of consumers. It is they who make the decisions, all the way from the formation of the group to paying compensation, with all the risks this implies. In the opinion of some, only platforms in this category can truly be considered to provide P2P insurance.

Michel Turcotte, author of the article “L’assurance sans assureur ou le P2P” (P2Ps or insurerless insurance) gives an example of the way a typical P2P insurance platform operates. Ten cyclists form a group to ensure their bikes against theft. At the start, they do not have to pay a premium. But if the bike of one of the group members is stolen, all of them help to compensate the victim. So if the bike is worth \$1000, each member will pay \$100, or 10% of the value of the bike.

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<sup>18</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 202.

<sup>19</sup> Léonie Gagné of Lavery identifies two groups. There are platforms that act like brokers and others that offer insurance without going through an insurer. Birny Birnbaum, of the Center for Economic Justice, brought up another type of platform: those that act like insurers. Our analysis of the Lemonade platform and the doctrine on the Prvni Klubova platform, convinced us that this indeed constitutes a 3rd category.

This model P2P of insurance is most applicable when the insured goods are of low value, but it is extremely risky in other contexts such as accident or personal insurance, particularly when the claims can involve considerable amounts.<sup>20</sup>

## 2.1 Advantages of P2P insurance platforms

There are several advantages to P2P insurance platforms. Generally, they are less expensive for consumers than traditional insurance companies. For example, the platform Friendsurance says that consumers who choose to do business with it save 33% on their annual premium. This can be explained by the fact that P2P insurance platforms have a leaner administrative structure than traditional insurance companies: they do not offer an incentive scheme for certified professionals to distribute their products and their business model is not always geared to generating profits. Also, P2P insurance platforms often allow consumers to obtain a rebate at the end of the fiscal year, if there are enough funds remaining in the group or there were few claims.<sup>21</sup>

These platforms give consumers a high degree of autonomy by, for example, offering them products “à la carte”. In addition, they adapt to the characteristics of each user by offering very specific products, including ones that are not usually available through traditional insurers. For example, Bought By Many provided travel insurance for a group of consumers suffering from heart disease.<sup>22</sup> However, not all platforms offer the same degree of autonomy. On the one hand, there are platforms that only allow consumers to choose from among groups that the platform itself chooses to do business with – in such cases, the platform is acting like a broker (Friendsurance) or an insurer (Lemonade). On the other hand, there are platforms that allow consumers to make the decisions throughout the contractual relationship – these platforms (such as Teambrella) are based on a model of self-governance (see section 6).

In the field of general insurance, when the product offered is relatively simple and the risks covered are of low value, peer-to-peer insurance platforms may also provide consumers with insurance that they will

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<sup>20</sup> This problem was pointed out by many experts interviewed for this study.

<sup>21</sup> European Commission *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance, Final Report*, 2016, p. 202 and Insurance Institute, CIP Society, “*Les modèles d’assurance collaborative : économie du partage, nouvelles technologies et mise en commun des risques.*”

<sup>22</sup> Insurance Institute, CIP Society, “*Les modèles d’assurance collaborative : économie du partage, nouvelles technologies et mise en commun des risques.*” p. 1.

not find (or will not find at the same cost) elsewhere.<sup>23</sup> For example, through a P2P insurance platform, a professional musician can insure just his guitar, the dog owner, just his pet<sup>24</sup> and the student, just his laptop.

Another feature of P2P insurance platforms is that they favour a certain transparency because consumers are able to learn about other members of the group, which helps to increase trust between people who do not know each other. To facilitate this, many use social networks such as Facebook or Telegram. Others, far fewer in number, use blockchain technology. Blockchains are defined by Canada's National Research Council (NRC) as “public ledgers that record transactions shared among many users.” They also help to increase the safety and efficiency of transactions. As the NRC explains: “Once data is entered on a Blockchain, it is secure and unalterable, and provides a permanent record.”<sup>25 26</sup>

P2P insurance platforms also optimize the “customer experience”:<sup>27</sup> Via these platforms, consumers can join a group quickly and at any time.<sup>28</sup> For example, the Lemonade platform says it offers the ability to obtain insurance in 90 seconds and get an answer to a claim request in three minutes.<sup>29</sup> Furthermore, the use of blockchain technology<sup>30</sup> could speed up the process even more<sup>31</sup> especially for contracts with “multisignatures.”<sup>32</sup> This is particularly apparent when a “smart contract” is used,<sup>33 34</sup> verification by an intermediary being unnecessary in this context.

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<sup>23</sup> IAIS *FinTech Developments in the Insurance Industry*, February 21, 2017, p. 6, and Insurance Institute, CIP Society, “*Les modèles d’assurance collaborative : économie du partage, nouvelles technologies et mise en commun des risques*,” p. 3 NAIC, “Insurance and Technology CIPR Event Recap,” June 7, 2016. This advantage was identified by Matthew Dugas, a partner in the firm McCague Borlack LLP, Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84 (1-2), page 80, *World Market Intelligence News*, “InsurTech, and the emergence of Peer-to-Peer insurance” 2016.

<sup>24</sup> This is particularly true of Besure and Teambrella, see section 6.

<sup>25</sup> <https://www.nrc-cnrc.gc.ca/eng/stories/2017/blockchain.html>

<sup>26</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* pp. 6-7 and <https://www.nrc-cnrc.gc.ca/eng/stories/2017/blockchain.html>

<sup>27</sup> This advantage is discussed by many authors of doctrines as well as in an interview with an expert who wanted to remain anonymous.

<sup>28</sup> This was addressed by US experts and also during an interview with a Canadian expert, who wanted to remain anonymous.

<sup>29</sup> <https://www.lemonade.com>

<sup>30</sup> <http://www.agcs.allianz.com/about-us/news/blockchain-prototype-captive-insurance-press-release/>

<sup>31</sup> Valentina Gatteschi et al. *Blockchain and Smart Contracts for Insurance : is the Technology Mature Enough?* 2018, page 6.

<sup>32</sup> Contracts with several intermediaries, each having a key to start a process, e.g. compensation.

<sup>33</sup> The smart contract is governed by a computer code. This is automatically triggered when its conditions are met. It does not have to go through an intermediary (notary or adjuster, for example).

<sup>34</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* pp. 6-7, and <sup>34</sup> Valentina Gatteschi et al. *Blockchain and Smart Contracts for Insurance: Is the Technology Mature Enough?* 2018, page 6.

P2P insurance platforms say that most of the consumers they attract act prudently. In the same vein, some authors claim that peer pressure will help prevent reckless behaviour that might increase the risk of a loss or accident, since users do not want to get kicked off of the platform. One writer compares this type of influence to the pressure put on borrowers by Rotating Savings and Credit Associations, (ROSCAs), which provide microcredit in certain countries, especially in Latin America.<sup>35</sup> We believe that this comparison is inadequate, because ROSCAs include only a small number of people who know each other well and there is enormous pressure to repay the loan,<sup>36</sup> while P2P platforms include a large number of people who barely know each other and there is less pressure.

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<sup>35</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* p. 3.

<sup>36</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* pp. 6-7 Valentina Gatteschi et al. *Blockchain and Smart Contracts for Insurance: is the Technology Mature Enough?* 2018, p. 6.

## 2.2 Disadvantages of P2P insurance platforms

### 2.2.1 High risk for consumers

Several P2P insurance platforms claim that they need neither be registered with the regulator nor be regulated, as they are not insurers.<sup>37</sup> As justification, they describe their services very creatively and avoid using vocabulary that might persuade the regulator or the public to believe that they offer insurance.<sup>38 39</sup> However, several of our experts think that it is the activity of the platform that needs to be considered, not the name or the description attributed to it.<sup>40</sup> When new platforms hit the market, regulators will analyze them case by case to determine whether or not their activities constitute acts that are reserved for registered insurers or firms.<sup>41</sup>

When P2P insurance platforms are not registered with the regulator, they are not subject to the same supervision as insurers in traditional practices and therefore do not have the same obligations, and this represents a risk for consumers.<sup>42</sup> In fact, those who deal with P2P insurance platforms do so at their own risk – unregulated platforms pose a significant danger for their property.<sup>43</sup>

Several experts and authors fear that consumers who consider doing business with such platforms do not really understand the type of products and services they offer and, after they have contracted for the insurance, they cannot be absolutely sure of being compensated. They also fear that such platforms do not offer the same guarantees as an insurer and that only people who know the insurance field are able to judge what can be insured via a platform and what they should have insured by a traditional insurer.

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<sup>37</sup> Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 39.

<sup>38</sup> Insurance Institute, CIP Society, *Les modèles d'assurance collaborative : économie du partage, nouvelles technologies et mise en commun des risques*, pp. 6-7.

<sup>39</sup> Note, however, that some P2P insurance platforms have chosen to register with the regulator – this is the case with Guevara, Gather, Lemonade and Friendsurance.

<sup>40</sup> Only one expert interviewed did not agree with this.

<sup>41</sup> A very large majority of experts agreed with this.

<sup>42</sup> Interview with Jannick Desforges, Director of Institutional Affairs and Compliance at the Chambre de l'assurance de dommages, Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries, and an expert who wished to remain anonymous.

<sup>43</sup> Interview with André Bélanger, Professor of the Faculty of Law at Université Laval, Matthew Dugas, Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries, as well as many experts who wished to remain anonymous.

There is also a risk that the technology used by P2P insurance platforms could lead consumers toward products which, although superficially attractive, do not meet their needs, or that some platforms may give the impression of offering insurance and being officially registered, when this is not the case.<sup>44</sup>

Some P2P insurance platforms probably do not have the necessary funds to comply with the same solvency obligations as traditional insurers. Consumers may not be compensated simply because the group does not have the financial means. This is especially dangerous when there is no insurer involved in the process.

These risks are magnified on a platform that allows members themselves to manage the group's finances. This involves the members setting the value of the premium based on the insurable risk, which they may not have the skill to do.<sup>45</sup> Insurers themselves use underwriters who are highly skilled in determining premiums based on the risk. When it is the members who do this, the risks associated with the solvency of the fund are increased.

Similarly, it will be the members who decide who is accepted into the group and who is not. This decision, which has to be made on the basis of the insurable risk, is no easy task for the uninitiated. Insurers use questionnaires and implement precise administrative measures to ensure that the risk is properly assessed. If the risk is higher, the amount of the premium is proportionally higher or the risk is simply not accepted.<sup>46</sup>

There is also a higher risk of not being compensated. When a P2P insurance platform allows members to decide the validity of a claim, the decision-making process may not be very objective. In such cases, group members are acting as both judge and jury, resulting in an equity problem. There is also a risk of conflict of interest: if the platform allows remaining amounts to be refunded, group members will have an interest in not accepting many claims. In contrast, the insurer will decide to indemnify according to precise objective criteria, notably, is the risk covered by the contract? Is the claim valid? What is the value of the damage? Etc. If the claim qualifies, the insurer will pay. In their business, there is very little room for subjectivity and volatility in the decision-making process. The people who make the decisions

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<sup>44</sup> Interview with Birny Birnbaum, CEO of the Center for Economic Justice.

<sup>45</sup> Ibid. and Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries

are objective; they follow the criteria established by the insurer. Moreover, they have no personal financial interest in the process.<sup>47</sup>

In the same vein, we note that some groups are partly formed by people who know each other (this is especially true when the platform encourages referencing). For such groups, it can be tempting to encourage the settlement of certain claims, whether valid or not, or unreasonably refuse a request from a claimant one does not know. This increases the risk of decisions being based on irrelevant, subjective criteria.<sup>48</sup>

In addition, some platforms allow their members to determine the value of the award. In simple cases, with few variables to consider, this is no doubt possible, such as for a cell phone or a computer, but things are different when it comes to more complex general insurance claims or personal insurance.

In their WhitePaper, the Teambrella and Lexi platforms give examples of strategic voting, proposing scenarios such as “you accept all claims” or “you refuse all claims” or “you accept certain claims.” They explain how a member could receive remuneration for being a deciding member and even suggest strategies for getting paid.<sup>49</sup> These situations are even further removed from the predictable decisions that one finds with an insurer.

Moreover, contrary to the claims made by these platforms, there is a significant risk of adverse selection.<sup>50</sup> For example, people who cannot get insurance because their risk is very high might be tempted to join this type of group. One could think of the person who has just received a diagnosis of terminal cancer and decides to take out life insurance. Group members generally have neither the qualifications nor the tools that insurers possess to identify such cases, which is a problem for the financial stability of the group's funds.<sup>51</sup>

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<sup>47</sup> Interview with Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries, and an expert who wished to remain anonymous.

<sup>48</sup> Interview with Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries, and Matthew Dugas, a partner in the firm McCague Borlack, as well as experts who wished to remain anonymous.

<sup>49</sup> Teambrella, white papers, “ Teambrella: A Peer-to-peer Coverage System”

<sup>50</sup> <https://www.universalis.fr/encyclopedie/insurance-economie-de-l-insurance/3-antiselection/>

<sup>51</sup> Interview with Jacques St-Amant, a lecturer at the Université du Québec à Montréal and analyst for Coalition des associations de consommateurs du Québec, and Micheline Dionne, actuary and former president of the Canadian Institute of Actuaries.

One does not have to appeal to situations as extreme as the last examples to realize that there is a risk that these platforms could attract a large number of high-risk consumers who have been unable to find traditional insurance at reasonable cost. These consumers may well end up in the same group, which could result in substantial financial losses. It is also difficult for the group to evaluate its insurable risk, especially if it is large and subscription takes place exclusively online.<sup>52</sup>

All these factors markedly increase the likelihood that a consumer will not be compensated for a claim, even if it is valid. This situation is much less likely to occur with a traditional insurer, which has many obligations to fulfill and has monitoring mechanisms in place (see section 4.3).

Another disadvantage of P2P insurance platforms is that they increase the risk of fraud, although certain platforms and authors would disagree.<sup>53</sup> In fact, insurers are equipped with administrative systems and monitoring mechanisms that make it easier for them to detect a fraud. They also deal with professionals trained to detect irregularities. Conversely, digital platforms of the self-governance model type have a barebones administrative structure and are often managed by individuals. Because of this, members may take a long time to detect a fraud ... if indeed they ever do! If the group is very large, this period may be particularly long due to the factor known as mass inertia, which can result in heavy financial losses by significantly reducing the equity of the group. The smaller the group, the more quickly fraud can be detected, but the financial impact will inevitably be proportionally heavier.<sup>54</sup> In addition, P2P insurance platforms can attract potential criminals, who have less chance of getting caught than with a traditional insurer.<sup>55</sup>

Also, since they are online, P2P insurance platforms are more likely to be victims of a "Sybil attack"<sup>56</sup> than a traditional insurer. However, the platforms can reduce their risk by ensuring, over the phone, that each new member is a real person. At this moment in time, voice-assisted applications do not pass

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<sup>52</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance Final Report*, 2016, p. 202. This problem has also been identified by many experts.

<sup>53</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* p. 3; Valentina Gatteschi et al. *Blockchain and Smart Contracts for Insurance : is the Technology Mature Enough?* 2018, p. 6.

<sup>54</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* p. 3

<sup>55</sup> Valentina Gatteschi et al. *Blockchain and Smart Contracts for Insurance : is the Technology Mature Enough?* 2018, p. 6..

<sup>56</sup> This is a computer attack on a reputation system through the creation and use of numerous fake profiles. The attack was carried out on private networks. The fake profiles posed as real people and could be used in the context of fraud.

the Turing test.<sup>57</sup> Consequently, any fraudster wanting to launch a “Sybil attack” will have to deal with real people, which can make attempts at such fraud less attractive.<sup>58</sup>

In addition, the use of blockchain technology by P2P insurance platforms should reduce the risk of fraud and increase transparency and trust among members and should also reduce the risk of conflict of interest, because the transaction history is stored indefinitely and members can access it. However, history has already shown that the blockchain technology is not always infallible, as was seen in the cyber-attack against a Decentralized Autonomous Organization (DAO).<sup>59 60</sup>

These platforms nevertheless participate in risk management and the collection of premiums, which goes beyond the activities of a firm. Nevertheless, they are registered as firms, not as insurers.<sup>61</sup> It will be important to carefully define the insurance business to see whether these activities fall within the scope of this domain of activity or not.<sup>62</sup> It should be remembered that the Canadian rules governing the obligations of firms and other intermediaries were adopted at a time when this type of business model was undreamt of.<sup>63</sup>

### 2.2.2 Uses of the “peer-to-peer” label

Another problem is that the term “peer-to-peer insurance” is a misnomer that gives consumers the false impression that P2P platforms offer collaborative insurance. These platforms present their business model as that of an association between individuals, an association based on the values of caring, sharing, transparency and democracy, whereas in fact, it is run by large companies that use technology to make insurance more accessible.<sup>64</sup> Some call themselves this as a pretext to avoid being subject to insurance regulations.<sup>65</sup>

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<sup>57</sup> This means that the fraudster wishing to use a “Sybil attack “ must engage with individuals, which requires greater resources for committing the fraud and can help reduce its attractiveness for criminals. Note, the Turing test is an artificial intelligence test based on the ability of a machine to accurately mimic human conversation. <http://www.artificiel.net/test-de-turing>

<sup>58</sup> Joshua Davis, *Peer-to-peer Insurance on the Ethereum Blockchain: General considerations of the fundamentals of peer-to-peer insurance* p. 6

<sup>59</sup> Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84. Vol. 84 (1-2), p. 86. Rachel Botsman, “Who Can You Trust?: How Technology Brought us Together and Why it Might Drive Us Apart.”

<sup>60</sup> A DAO is a decentralized organization whose governance rules are automated and recorded permanently and transparently in a blockchain. <https://blockchainfrance.net/2016/05/12/qu-est-ce-qu-une-dao/>.

<sup>61</sup> Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84 (1-2), p. 85.

<sup>62</sup> This item has been reported by a number of experts interviewed for this study.

<sup>63</sup> *Ibid.*

<sup>64</sup> Interview with Birny Birnbaum, Executive Director, Center for Economic Justice.

<sup>65</sup> This item has been identified by many experts interviewed.

The size of the platform and the group can also be a double-edged sword. On the one hand, the bigger the group, the more the financial risk will be shared between the members, which is an advantage. On the other, in a large group or on a platform with considerable financial means, the financial, economic and informational asymmetry between the parties is wide, which is the opposite of what a consumer thinking of participating in the collaborative economy is looking for.

But it gets worse: although the platform is acting like an insurer or an insurance agent, it will not be regulated accordingly.<sup>66</sup> Consumers may not be aware of this, but should a conflict occur, they will be confronted with a large group of people or with a digital platform that is equipped with considerable financial and legal resources. Furthermore, consumers will not benefit from any of the safeguards set in place by the regulatory regime for their protection.<sup>67</sup>

If the platform is not registered, there is also a significant risk that the consumers will lose their redress. In Québec, recourse to the compensation fund is available only if the consumer does business with a registered insurer.<sup>68</sup>

Such grey areas related to the status of the platform and its responsibility in the event of problems are worrisome.<sup>69</sup> In cases of dispute against a traditional insurer, consumers have recourse to dispute settlement mechanisms and complaint processing or can initiate legal proceedings. The situation is quite different if a dispute arises with a P2P insurance platform. In this case, the nature of the organization behind the platform, the status of the platform and the content of the contract will all have an impact on the applicable remedies.<sup>70</sup>

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

<sup>68</sup> AMF Media Centre: “AMF urges caution about peer-to-peer risk sharing platform,” April 19, 2016. This item has also been addressed by many experts interviewed in Québec. <https://lautorite.qc.ca/en/general-public/media-centre/news/fiche-dactualites/amf-urges-caution-about-peer-to-peer-risk-sharing-platforms/> This item has also been addressed by many experts interviewed in Québec.

<sup>69</sup> This item has been identified by several experts.

<sup>70</sup> This item has been identified by experts who are jurists

In addition, there is uncertainty about the extent of the members' liability. Is this limited to the down-payment or can the platform access the consumer's other assets? Are members of the group jointly and severally liable?<sup>71</sup>

There is also an issue with regard to protection of consumer privacy. Platforms such as these are likely to collect large amounts of sensitive personal information. If they are not subject to the same rules as insurers and firms with regard to the collection and sharing of such information, they may not be able to offer as much protection.<sup>72</sup> Also, hackers would find the personal information collected for the purposes of joining the group very interesting, which therefore raises significant cybersecurity issues.<sup>73</sup>

Finally, there is the issue of unfair competition between P2P insurance platforms and insurers. As we have seen, P2P insurance platforms act like insurers, yet do not have the same obligations they do. Some P2P insurance platforms are neither registered with the regulator nor subject to the same supervision as insurers. Consumers benefit when protected by appropriate oversight. Conversely, if the regulatory framework imposes too many constraints, new players will be prevented from entering the market, which will have an adverse impact on competition. There is a delicate balance involved.<sup>74</sup> In addition, due to the complexity of insurance products, the same players could end up collaborating with several P2P insurance platforms in various categories, which would hurt healthy competition.<sup>75</sup>

According to many experts, it is important to remember that regulation is already technologically neutral. Accordingly, if a P2P platform carries on an insurance activity that is a reserved activity requiring a permit and compliance with insurance sector regulations, it must be registered with the regulator. Determining whether a platform indeed performs such an activity needs to be analyzed on a case-by-case basis. Several experts have assured us that if platforms engage in insurance activities without being registered as insurers under the current legislative framework, regulators in Québec, Ontario and Alberta<sup>76</sup> will intervene.

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<sup>71</sup> Interview with Jacques St-Amant, lecturer in consumer law at Université du Québec à Montréal and analyst for Coalition des associations de consommateurs du Québec.

<sup>72</sup> This item has been identified by several experts.

<sup>73</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance, Final Report*, 2016, p. 202.

<sup>74</sup> Interview with several experts including Jacques St-Amant, lecturer in consumer law at Université du Québec à Montréal and financial services analyst for the Coalition des associations de consommateurs du Québec.

<sup>75</sup> IAIS *FinTech Developments in the Insurance Industry*, February 21, 2017, p. 28.

<sup>76</sup> This does not mean that other provincial regulators will not intervene, rather that the Canadian experts come from these three provinces and that they are hopeful that their regulator will intervene.

### 2.2.3 Issues specific to the digital nature of P2P insurance platforms

Even if a P2P insurance platform is registered with the regulator, there could still be risks in terms of consumer protection. These risks are similar to those related to the online distribution of insurance products without the involvement of a representative.

For instance, due to the informational asymmetry inherent in insurance, it may be difficult for consumers who wish to purchase a traditional insurance product to be able to properly compare products and understand the differences between them. This increases the risk of their being sold a product that does not suit their needs, whether by underinsuring or because it not cover all the risks they want it to cover, especially when such protection is only available as an option.<sup>77</sup> This difficulty is exacerbated when the consumer buys insurance online without going through a certified representative. On top of this is the risk of not disclosing all the relevant information to the insurer, which can lead to the claim being refused or to a proportional reduction in the insurer's obligations.<sup>78</sup>

Certain features of P2P insurance platforms may increase such risks. For example, digital platforms use technology to speed up the process considerably, which can be an attractive feature. However, this very speed increases the danger of consumers making a wrong decision and of subscribing to an insurance product that does not meet their needs. In addition, these platforms present collaborative insurance as a simple consumer product, which it is not.<sup>79</sup> It is crucial that these platforms use the same tools as insurers in order to properly assess the needs of consumers and offer a product that is suited to them, otherwise the stability of contracts will be affected and result in undue risk to consumers.<sup>80</sup>

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<sup>77</sup> Brief by the Chambre de l'assurance de dommages, "An Act to enhance the regulation of the financial sector, the protection of deposits of money and financial institutions operating regime" Bill 141, p. 23, and the Chambre de l'assurance de dommages, "An Act to enhance the regulation of the financial sector, the protection of deposits of money and functioning system of financial institutions," Bill 141, January 17, 2018, p. 7 et seq. and Option consommateurs, "An Act to enhance the regulation of the financial sector, the protection of deposits of money and functioning system of financial institutions," Bill 141, January 18, 2018, pp. 5 and 6.

<sup>78</sup>*Ibid.* and Patrice Deslauriers, "Deslauriers, "L'impact de l'Internet sur l'offre de services par les représentants en assurance de dommages," September 2017, p. 33.

<sup>79</sup> Interview with André Bélanger, Professor of the Faculty of Law at Université Laval, and an expert who wishes to remain anonymous.

<sup>80</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance – Final Report*. This item has been addressed by the majority of experts.

## Section 3. The insurance contract

Although Québec has a different legal regime than other provinces,<sup>81</sup> the characteristics of the insurance contract are essentially the same across Canada.<sup>82</sup> “A contract of insurance is a contract whereby the insurer undertakes, for a premium or assessment, to make a payment to the client or a third person if a risk covered by the insurance occurs.”<sup>83</sup>

The insurance contract is formed by the willing consent of the parties; this includes consent to the terms, the risk, the premium and the benefits.<sup>84</sup> Specifically, the contract should include the nature of the risk, the items insured (goods or persons), the duration of the insurance coverage, the amount of coverage and the amount of the premiums to be paid.<sup>85</sup> It is acknowledged that an insurance contract is formed as soon as the insured or the insurer knowingly makes an offer containing all the elements of the insurance contract, and the other party accepts.<sup>86</sup>

The application represents the willingness of the insured; this is done through the declaration of risk made by the insured, who wants to obtain insurance protection. Even when the written proposal is made by the insurer, according to law, it comes from the insured. The insurer may accept or refuse it; when it is accepted, the contract is formed.<sup>87</sup> Note, there is no formality with regard to the insurance application; it can be made either in writing or verbally.<sup>88</sup>

The document evidencing the insurance contract and setting out its terms is the insurance policy.<sup>89</sup> In non-marine insurance, this includes both general insurance and personal insurance. Some experts

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<sup>81</sup> Québec has a civil law system, unlike the other provinces, which have a common law system.

<sup>82</sup> This can be explained by the historical origins of insurance, including maritime law.

<sup>83</sup> Article 2389 *Civil Code of Québec*, RLRQ c CCQ-1991 JuriClasseur Québec, André Bélanger Annick Guérard-Kerhulu and Sébastien Lanctôt, *Assurance de Personnes*, LexisNexis, 2013, p. 1 | 3, and Didier Lluelles, “Précis des assurances terrestres” Éditions Thémis, 5th edition, 2009, p. 23 et seq.

<sup>84</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, p. 243, and Didier Lluelles, *Précis des assurances terrestres*, Éditions Thémis, 5th Edition, 2009, pp. 23 and 243.

<sup>85</sup> *McCunn Estate v. Canadian Imperial Bank of Commerce*, 2001 CanLII 24162 (ON CA).

<sup>86</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, p. 245, and *McCunn Estate v. Canadian Imperial Bank of Commerce*, 2001 CanLII 24162 (ON CA).

<sup>87</sup> JuriClasseur Québec, André Bélanger Annick Guérard-Kerhulu and Sébastien Lanctôt, *Assurance de Personnes*, LexisNexis, 2013, p. 1 | 5.

<sup>88</sup> *AirMac System Ltée. v. Continental Insurance Co. of Canada*, 1990 RRA 200 (CS) and JuriClasseur Québec, André Bélanger Annick Guérard-Kerhulu and Sébastien Lanctôt, *Assurance de personnes*, LexisNexis, 2013, p. 1 | 5.

<sup>89</sup> Art. 2399 *Civil Code of Québec*, RLRQ c CCQ-1991.

interviewed said that groups formed on the platforms offer group insurance. If that is the case, the policy should not be given to each of the group members, but to the insured, who will receive the insurance certificates and a summary document.<sup>90</sup> On the other hand, all members have the right to consult the policy.<sup>91</sup>

There are also specific obligations related to the extent of the guarantee. These apply to certain types of personal insurance such as health insurance and disability insurance.<sup>92</sup> The contract may be amended through a written amendment, issued with the consent of the parties.

The insurance contract is usually a contract of adhesion. Policyholders cannot usually negotiate the terms that it imposes on them.<sup>93</sup> It will be noted that the insurance contract is excluded from the application of certain sections of the *Consumer Protection Act*.<sup>94</sup> However, the section respecting prohibited practices is applicable.

The purpose of insurance is to mitigate the adverse economic consequences ensuing from certain events that are the result of chance. The risk of such an event occurring (called the contingency) weighs on each one of us.<sup>95</sup> The heart of the insurance contract is based on the randomness of the contingency, and the principle of mutuality.<sup>96</sup> Accordingly, insurance is defined by the fact of bringing together people, namely, all the insured, so that they can protect themselves against the consequences of the contingency; in return, the insured individual must pay a certain amount of money (the premium). The purpose of the insurance policy is to protect and secure the client, his property or his dependents.<sup>97</sup>

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<sup>90</sup> Art. 2401 *Civil Code of Québec*, RLRQ c CCQ-1991 and Didier Lluelles, *Précis des assurances terrestres*, 4th Ed André Bélanger, « Le contrat d'assurance contemporain et la réification des parties », *Revue de droit McGill*, (2010-2011) 56 R.D. McGill 317-348, page 323ition, Éditions Thémis, 2009, p. 63.

<sup>91</sup> Art. 2401 para. 2 *Civil Code of Québec*, RLRQ c CCQ-1991 and Didier Lluelles, *Précis des assurances terrestres*, 4th Edition, Éditions Thémis, 2009, p. 64.

<sup>92</sup> JuriClasseur Québec, André Bélanger Annick Guérard-Kerhulu and Sébastien Lanctôt, *Assurance de Personnes*, LexisNexis, 2013, p. 2 | 4.

<sup>93</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 29.

<sup>94</sup> Article 5 a) the Consumer Protection Act, RLRQ c. P-40.1.

<sup>95</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 12.

<sup>96</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 23.

<sup>97</sup> André Bélanger, "Le contrat d'assurance contemporain et la réification des parties", *McGill Law Review*, (2010-2011) 56 R.D. McGill 317-348, p. 323.

A major characteristic of insurance is mutuality. This involves the pooling of multiple risks in exchange for a proportional contribution from each. Thus, [TRANSLATION]“it is the insured themselves, who as a group, contribute to the settlement of claims, the insurer being only an intermediary who manages the pooling of contributions.”<sup>98</sup> The collective dimension of insurance, mutuality, is invisible in the strict contractual relationship; the policyholders do not see it, yet it is essential to the insurance relationship.<sup>99</sup> Accordingly, in *Royal Bank of Canada v. La Fédération compagnie d’assurance*, Justice Frenette wrote: “The nature and role of an insurance contract is, generally, an indemnity contract that provides security to the insured and other parties interested in the object of the contract.”<sup>100</sup>

Another feature of the insurance contract is that it costs money. In other words, no insurance is ever free. The payment of the premium is a fundamental part of the insurance contract. The insured pays a premium to the insurer, who in return, will compensate them if the contingency in the contract materializes. Thus, the amount of the premium is proportional to the value of the insurable risk related to the mutuality.<sup>101 102</sup> N.B.: mutuality is present both in mutual insurance groups, where the policyholders are members, and among insurers with share capital, where the insured are clients.<sup>103</sup>

As mentioned above, the insurance contract is formed between two parties: the policyholder (or the insured) and the insurer. But it is still necessary to know what is meant by “insurer.” The definition is given under Section 1a) of the *Insurance Act*<sup>104</sup> which states:

a) “insurer”: any person who directly or indirectly advertises or acts as an insurer, issues or undertakes to issue an insurance contract, receives premiums, assessments or other amounts under such a contract or to pay mutual benefits, or undertakes to pay insurance benefits or mutual benefits, excluding any professional syndicate authorized to exercise the powers provided in subparagraph 1 of section 9 of the Professional Syndicates Act (chapter S-40) or any person who, in the field of insurance, offers or enters into only contracts of additional warranty under which he binds himself towards

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<sup>98</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 12.

<sup>99</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 36.

<sup>100</sup> *Royal Bank of Canada v. Federation Insurance Company*, 500-05-001619-892.

<sup>101</sup> Mutuality in insurance means involves the pooling of several risks against a proportional contribution from each member of the group. Mutuality is not only practiced by mutuals, who are insured members, but also by insurance companies with share capital, where the clients are consumers. Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 4.

<sup>102</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 12.

<sup>103</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 12.

<sup>104</sup> *Insurance Act*, RLRQ c A-32. This will become the *Insurers’ Act* when Bill 141 is adopted. This definition will not be affected by this change.

another person to assume directly or indirectly, wholly or partly, the cost of repair or replacement of property or part of any property in case of defect or malfunction;

Moreover, Section 6 of the Insurers Act, which will replace the *Insurance Act*, describes Québec insurers as:<sup>105</sup>

1. insurance companies regulated by Title III and any legal person that the law considers to be such a company;
2. if they establish an insurance fund, self-regulatory organizations governed by an Act of Québec, including the professional orders;
3. legal persons constituted under a private Act of Québec that authorizes them to carry on insurer activities; and
4. any reciprocal union, if the mandatary referred to in subparagraph 3 of the first paragraph of section 188 is domiciled in Québec.

However, a party may be an insurer within the meaning of the Civil Code of Québec, without necessarily being one in the meaning of Article 1a) of the *Insurance Act*. Conversely, an insurer under the *Insurance Act* may also conclude other types of contracts, such as a guarantee contract.<sup>106</sup> Thus, it will be the substance of the contract, rather than its form, that will determine its nature.<sup>107</sup>

An insurance contract is a contract based on the utmost good faith. This is recognized in Québec and in the common law provinces. For the insured, this implies that the insurer must be able to properly assess the risk. Since it is usually the insured who possesses the information necessary for this assessment, the latter must disclose all relevant material to the insurer.<sup>108</sup> This rule has been tempered by the Civil Code of Québec, case law and doctrine,<sup>109</sup> especially since the courts recognize that this is no

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<sup>105</sup> After the writing of this report, but before it was submitted, Bill 141 was adopted, on 13 June 2018. The sections of the *Insurers' Act* that form part of Bill 141 will take effect July 13, 2018.

<sup>106</sup> Didier Lluelles writes: [TRANSLATION] "The insurer referred to in s. 2389 is not necessarily the one defined in s. 1 of the *Insurance Act*. Accordingly, the merchant who offers additional guarantees of the efficiency of a product manufactured or sold by a 3rd party is not an insurer within the meaning of this definition, and is not subject to the control set in place by the *Insurance Act* (but subject to that of the *Consumer Protection Act*), even if he is an insurer within the meaning of the *Civil Code*, insofar as the contract would satisfy the criteria of the definition of an insurance contract." See Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 25.

<sup>107</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 25, and *Camron Inc. v. Fidelity Insurance Co. of Canada*, SC 1984, para. 12, and *Inter-Park Management Inc. v. Optimatech Inc.*, 2005 CanLII 19507 (QC CQ) para 35.

<sup>108</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2009, p. 325.

<sup>109</sup> Art. 2409 *Civil Code of Québec*, RLRQ c CCQ-1991. Didier Lluelles *Précis des assurances terrestres*, 6th Edition., Montréal, Éditions Thémis, 2017, p. 237, Patrice Deslauriers, *L'impact de l'Internet sur l'offre de services par les représentants en assurance de dommages*, September 2017, p. 33, *Bergeron v. Lloyd's Non-Marine Underwriters*, 2005 JQ 20, and *GMAC Rental Ltd. v. Caisses Desjardins General Insurance*.

longer always the case due to technological advancements.<sup>110</sup> In addition, both civil law and common law recognize that the insurer has a duty to inform and that the insured has the right to expect to deal with a competent insurer.<sup>111</sup>

The jurisprudence recognizes that the insured is usually the vulnerable party to the contract, which is particularly apparent at the stage of the claim. From a certain point of view, the insurance policy can also be seen as a kind of peace-of-mind contract that is formed as soon as the contract is concluded. The consumer expects to be compensated in the event that the contingency defined in the contract materializes.<sup>112</sup> The courts do not allow the insurer to oblige the insured to bear the consequences of the insurer's errors and omissions and will not tolerate any arbitrary behaviour.<sup>113</sup> In the event of negligence on the part of the insurer, the latter may incur liability and be required to indemnify the insured for damages suffered as a result of his negligence.<sup>114</sup>

At the stage of the complaint, it is up to the insured to demonstrate that the risk specified in the contract has materialized; he is also bound to respect disclosures and deadlines. Moreover, no more than what is covered by the insurance contract may be indemnified.<sup>115</sup> Once the preceding has been shown, it will be the insurer's turn to act within a reasonable time<sup>116</sup> and make its decision known to the insured. Throughout the claims process, the insurer has a duty to act in good faith. This implies that it will do so based on its interpretation of the obligations set forth in the insurance contract.<sup>117</sup> If it does not, the insurer could be ordered to pay costs and damages to the insured.<sup>118</sup>

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<sup>110</sup> *Jarry v. Industrial Alliance Auto and Home Insurance inc.* 2010 QCCQ 12088, paras. 68-70.

<sup>111</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 25, Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, p. 248 and Michael J. Bailey, *Alberta Insurance Law and Commentary*, LexisNexis, p. 23.

<sup>112</sup> This does not mean that there are no problems or disputes especially with regard to what is covered by the contract, but generally there will be enough funds to indemnify and numerous safeguards to reduce the risk of deviation.

<sup>113</sup> Didier Lluelles, *Précis des assurances terrestres*, 5th Edition, Éditions Thémis, 2014, p. 29.

<sup>114</sup> *CF Plaze Fibreglas Manufacturing Ltd. c. Cardinal Insurance* (1990) 68 DLR (4TH) 586 t of the *City Financial Bank SA v. Westgate Insurance* (1990) 2 All ER 947, Didier Lluelles "terrestrial insurance Accurate" 5th Edition, Éditions Thémis, 2014, p. 32, and *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 SCR 549.

<sup>115</sup> "Commentaire sur le droit des assurances," *Textes législatifs et réglementaires*, 2nd Edition, LexisNexis, 2011, p. 103.

<sup>116</sup> "Commentaire sur le droit des assurances," *Textes législatifs et réglementaires*, 2nd Edition, LexisNexis, 2011, p. 103, and Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, pp. 382-384 and *Whiten v. Pilot Insurance Co.* [2002] 1 SCR 595

<sup>118</sup> *Whiten v. Pilot Insurance Co.* [2002] 1 SCR 595.

## Section 4. Legal framework in four Canadian provinces

### 4.1 Preliminary remarks

In Canada, players in the field of insurance are governed by both levels of government in accordance with their respective jurisdictions. The federal government has jurisdiction over federally chartered insurance companies<sup>119</sup> via the Office of the Superintendent of Financial Institutions (OSFI), while provincial governments regulate insurance companies incorporated under provincial legislation. Some provinces are involved in supervising Canadian insurers in collaboration with the OSFI. The Provinces regulate the terms of the insurance contract, the business practices of insurers and solvency requirements.<sup>120</sup> They also have jurisdiction over the supervision of intermediaries and professionals in the insurance sector.

Some insurance plans are public and others are private. Notable among public insurance schemes are health insurance and automobile insurance, the latter being governed by the Société d'assurance automobile du Québec and the Insurance Corporation of British Columbia. Accordingly, almost 43% of the population of Canada benefits from some protection provided by public auto insurance.<sup>121</sup>

There are also self-insurers, which are generally large companies with a large number of operations spread over several industries and many locations. They set aside money in the event of a contingency in order to mitigate the risk. This money corresponds to the amounts paid in premiums. They internalize their risks rather than transfer them to an insurer.<sup>122</sup>

Finally, there is private insurance, which covers both marine insurance and terrestrial insurance<sup>123</sup> and includes general damage insurance and personal insurance.<sup>124</sup>

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<sup>119</sup> *Insurance Companies Act* (SC 1991, c. 47).

<sup>120</sup> Some provinces allow the OSFI to exercise this power in matters of solvency, but not Québec or BC, even for insurance companies with provincial charters.

<sup>121</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, pp. 4-5.

<sup>122</sup> They are not subject to the supervision of insurers. On Insurance Law in Ontario, see Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, 2015, pp. 3 and 4.

<sup>123</sup> Art. 2389 para. 2 *Civil Code of Québec*, RLRQ c CCQ-1991.

<sup>124</sup> Art. 2391 *Civil Code of Québec*, RLRQ c CCQ-1991.

In this section, we will be looking at the regulation of private insurers in order to highlight the rights of consumers and the remedies available to them. Certain P2P insurance platforms are registered as insurers and others as firms. Firms do business with insurers. However, a number of P2P insurance platforms are not registered, meaning that the consumers do not benefit from several rights and remedies available to registered insurers.

In Canada, we focused on the regulatory framework in Québec, Ontario, Alberta and British Columbia. We examined in detail some of the protections offered as well as some of the best practices in the sector. The focus here was to determine what consumers stand to lose by doing business with an unregistered P2P digital insurance platform, rather than a traditional insurer.

It should be noted that the regulation of intermediaries, such as firms, is also important for the protection of consumers and that it differs in some respects from that of insurers. This is particularly the case with respect to capital requirements. It is also important for representatives to be regulated. Nevertheless, in this section, we will discuss these points only briefly, because when the consumer purchases an insurance product through a certified representative, the latter is connected to a firm that does business with insurers. The consumer will be protected under the plans of both the firm and the insurers. It is certain that the insurer will have enough money to compensate any claims. In the event of a dispute, the consumer will have access to various remedies. In some cases, there could also be shared responsibility between the firm and the insurer.

Supervision of the insurance sector has three objectives. The first is to ensure the stability of the financial sector - the insurer must have sufficient funds to pay a large claim. This is done through very precise interaction of laws, regulations, guidelines, customs and codes of conduct that are applied by many professionals, all under the watchful eye of the regulator.<sup>125</sup>

The second objective is to ensure that the various certified representatives are honest and competent.<sup>126</sup>

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<sup>125</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, LexisNexis, 2015, p. 61.

<sup>126</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, LexisNexis, 2015, p. 63.

The third objective is to protect consumers by imposing limits on contractual freedom. This is necessary because of the economic and informational asymmetry between the insurer and the insured, and also because the contract between the parties is usually a contract of adhesion. This type of contract imposes pre-contractual disclosure obligations on the insurer, particularly with regard to coverage and exclusions.<sup>127</sup>

## 4.2 The regulators in the provinces studied

The various financial services sectors, including insurance, are supervised by several agencies and regulated by several authorities, at both the federal and the provincial level.

In Québec, the Autorité des Marchés Financiers (AMF) is the regulator in the field of financial products and services. Among this body's primary tasks are protecting the public, ensuring the solvency of companies and administering the compensation fund.<sup>128</sup> This fund allows fraud victims to be compensated (discussed further in Section 4.3.5). The AMF supports the application of many legal and regulatory obligations as well as guidelines. In addition, it issues licenses in the insurance sector, to insurers and firms. In addition, there are two self-regulating bodies that supervise certified representatives: the Chambre de l'Assurance de dommages,<sup>129</sup> which, as its name suggests, covers damage insurance, and the Chambre de la sécurité financière,<sup>130</sup> which is primarily active in the field of personal insurance. These bodies both have the mission to protect the public.

The Financial Services Commission of Ontario (FSCO), created by the *Financial Services Commission of Ontario Act, 1997*,<sup>131</sup> regulates the insurance industry in that province. Its mission is to protect the public and to bolster public confidence in the various sectors that it regulates, including insurance.<sup>132</sup>

In British Columbia, it is the Financial Institutions Commission (FICOM), established in 1989 by the *Financial Institutions Act (FIA)*,<sup>133</sup> that regulates the insurance sector. FICOM's mandate, similar to that

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<sup>127</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Law*, LexisNexis, 2015, p. 65.

<sup>128</sup> <https://lautorite.qc.ca/grand-public/a-propos-de-lautorite/mission/>

<sup>129</sup> <http://www.chad.ca/fr/a-propos> <http://www.chad.ca/fr/a-propos>

<sup>130</sup> <http://www.chad.ca/en/about-us>

<sup>131</sup> *Financial Services Commission of Ontario Act*, SO 1997, c. 28.

<sup>132</sup> <http://www.fSCO.gov.on.ca/en/about/pages/regulatory-framework.aspx>

<sup>133</sup> *Financial Institutions Act*, RSBC 1996 Ch. 141.

of FSCO, is to protect consumers and oversee the practices of insurers.<sup>134</sup> In disciplinary matters, FICOM and the Insurance Council of British Columbia supervise the conduct of agents.<sup>135</sup>

FSCO and FICOM ensure legislative compliance by administering the laws and regulations applicable to the insurance industry and developing guidelines and policies.<sup>136</sup> The role of these two regulatory bodies is to supervise and oversee all the actors in the sector.<sup>137</sup> It is also they who issue the insurance licenses.

In Alberta, the Office of the Superintendent of Insurance (OSI) has the mandate of regulating business practices, monitoring the effectiveness of the market, and ensuring consumer protection.<sup>138</sup> The office also issues permits to insurers. In addition, Alberta has four Insurance Councils,<sup>139</sup> to which OSI delegates the authority to supervise certified representatives.<sup>140</sup> These four agencies deal with complaints against insurance agents, firms or adjusters, while OSI itself handles complaints against insurers.<sup>141</sup> Insurance agents must be associated with a firm that is registered and holds a certificate.<sup>142</sup> They must also be registered with the regulator and obtain a valid license.<sup>143</sup> They have proficiency requirements and must undergo continuous education.<sup>144</sup> The Insurance Councils have the power to investigate and make decisions in the event of disciplinary infractions.<sup>145</sup>

Through cooperation and information sharing, the various Canadian regulators promote uniformity and consistency in practices, definitions and intervention strategies throughout the insurance industry. Several national organizations are working toward this end, including the Canadian Council of Insurance Regulators (hereinafter, CCIR), an intergovernmental organization created in 1914, that brings together various federal and provincial insurance regulatory agencies.<sup>146</sup> The CCIR also carries out numerous

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<sup>134</sup> [https://www.fic.gov.bc.ca/index.aspx?p=about\\_us/index](https://www.fic.gov.bc.ca/index.aspx?p=about_us/index)

<sup>135</sup> <https://www.insurancecouncilofbc.com/PublicWeb/Home.html>

<sup>136</sup> [https://www.fic.gov.bc.ca/index.aspx?p=about\\_us/index](https://www.fic.gov.bc.ca/index.aspx?p=about_us/index), *Financial Institutions Act*, RSBC 1996.

<sup>137</sup> See s. 3 FSCO.

<sup>138</sup> <http://www.finance.alberta.ca/business/insurance/index.html>

<sup>139</sup> The Alberta Insurance Council, the Insurance Adjusters' Council, General Insurance Council and the Life Insurance Council.

<sup>140</sup> <http://www.abcouncil.ab.ca/who-we-are/our-mission/>

<sup>141</sup> <http://www.finance.alberta.ca/business/insurance/index.html>

<sup>142</sup> <http://www.abcouncil.ab.ca/problem-with-an-agent/> and

<http://www.finance.alberta.ca/publications/insurance/consumers/insurance-complaints.html>

<sup>143</sup> S. 452 *Insurance Act*, RSA 2000 C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, 2009, LexisNexis, p. 277.

<sup>144</sup> <http://www.abcouncil.ab.ca/ongoing-education-requirements/>

[https://decisions.cisro-ocra.com/ins/abic/en/nav\\_date.do](https://decisions.cisro-ocra.com/ins/abic/en/nav_date.do) [https://decisions.cisro-ocra.com/ins/abic/en/nav\\_date.do](https://decisions.cisro-ocra.com/ins/abic/en/nav_date.do)

<sup>146</sup> <https://www.ccir-ccrra.org/fr/about/> and CCIR, "Strategic Plan 2017-2020".

consultations on issues such as online insurance, travel insurance and fair treatment of consumers.<sup>147</sup> Finally, the industry publishes codes of conduct relating to disclosing information about the various features of insurance products.<sup>148</sup>

### 4.3 A highly regulated sector

The insurance industry is highly regulated in every Canadian province. In Québec, the primary legislation governing the sector are the *Insurance Act* (IAO)<sup>149</sup> and the *Act Respecting the Distribution of Financial Products and Services (Distribution Act)* with their various related regulations. There are also the many AMF guidelines that set forth how insurers are expected to conduct themselves. The guidelines focus on the interpretation, implementation and application of these obligations. The AMF recommends an approach based on these principles. They allow insurers to determine their own strategies, policies and procedures to follow in order to be able to implement and apply rules of sound management that reflect the nature and complexity of their activities and their risk profile.<sup>150</sup>

The other three provinces studied have their own *Insurance Acts* and related regulations as well as other guidelines on issues associated with the supervision of insurance. These will be addressed in the following sections, by subject.

As regards the obligations of agents in the common law provinces, agents are considered to be representatives of the insurer, yet must act in the best interest of the insured by offering products that are suited to their needs.<sup>151</sup> Accordingly, an agent will be liable if the coverage is found not to be appropriate to the needs of the insured.<sup>152</sup>

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<sup>147</sup> [https://www.ccir-ccra.org/fr/init/Elec\\_Commerce/ECC%20issues%20paper%20%20FR2.pdf](https://www.ccir-ccra.org/fr/init/Elec_Commerce/ECC%20issues%20paper%20%20FR2.pdf) [https://www.ccir-ccra.org/fr/init/Travel\\_Insurance/Final%20French%20Version%20of%20Travel%20Issues%20Paper.pdf](https://www.ccir-ccra.org/fr/init/Travel_Insurance/Final%20French%20Version%20of%20Travel%20Issues%20Paper.pdf) and [https://www.ccir-ccra.org/fr/about/1802-034\\_FTCGuidance\\_Stakeholder%20Version\\_FINAL\\_F.pdf](https://www.ccir-ccra.org/fr/about/1802-034_FTCGuidance_Stakeholder%20Version_FINAL_F.pdf)

<sup>148</sup> <http://www.ibc.ca/on/resources/consumer-resources/code-of-consumer-rights-and-responsibilities>

<sup>149</sup> It is important to note that at the time of writing this research report, Bill 141 was still under consideration in Québec. (It was introduced in October 2017 and adopted on June 13, 2018). In our research, we took into account what was already provided in the Act and the amendments thereto that were made from February to June 2018.

<sup>150</sup> [https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/ld\\_gestion\\_risques\\_final.pdf](https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/ld_gestion_risques_final.pdf)

<sup>151</sup> *Fine's Flowers Ltd. et al. v. General Accident Insurance Co. of Canada et al.* 1977 CanLII 1182 and McMillan, p. 11.

<sup>152</sup> *Ibid.*

In Ontario, there is a distinction between agents and brokers, who are governed by different laws.<sup>153</sup> Brokers are governed by the RIBO Code of Conduct. They must act with competence, diligence, efficiency and honesty. They are required to protect consumer privacy. They also have an obligation of integrity, independence and disclosure of information towards their clients.<sup>154</sup>

In British Columbia, the term used is “commissioned sales representative”; they must also be registered. N.B. There are different types of permits.<sup>155</sup>

### 4.3.1 Disclosure obligations

In all the provinces studied, insurers have significant obligations with regard to disclosure of information. For example, they are prohibited from being unfair, deceptive or dishonest, and from making false representations, particularly about the conditions of the contract. There is a required minimum of information that insurers must disclose to consumers.

There are some differences worth noting between one province and another. In Québec, insurers must comply with the obligations set forth in the *Insurance Act*. Section 3 of Bill 141 introduces the *Insurers’ Act*, Section 62 of which describes the disclosure obligation as follows:

[TRANSLATION] An authorized insurer must ensure that the client, or as applicable, the member, is informed in due time of the information that it needs to make informed decisions and execution of the contract, in the following cases:

1. if, in the cases provided for in section 59, the insurer deals with the client otherwise than through an insurance representative or firm; or
2. if the insurer has underwritten a group insurance of persons contract in which a person may enroll as a participant without dealing with an insurance representative.

Such information includes:

1. the extent of the coverage considered and the exclusions;
2. the time limits, in accordance with the Civil Code, within which a loss must be reported and within which the insurer is required to pay the sums insured or the indemnity provided for; and

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<sup>153</sup> Agents are supervised by the IAO and related regulations; brokers are supervised by the *Insurance Act* and the *Registered Insurance Brokers Act* and related regulations. The regulator for brokers is the Registered Insurance Brokers of Ontario, which oversees the practices of brokers with the aim of protecting the public.

<sup>154</sup> S.14 *Registered Insurance Brokers Act, RRO 1990, Reg. 991, RIBO Code of Conduct and RIBO 2016 Marketing Guidelines*.

<sup>155</sup> *Insurance Licensing Exemption Regulation 328 BC Reg 90*.

3. the information required to communicate to the insurer a complaint to be registered in the complaints register provided for in subparagraph 3 of the second paragraph of section 50, including the time limit within which a complaint must be communicated.

The *Act Respecting the Distribution of Financial Products and Services* (the *Distribution Act*) also provides informational obligations and advice for certified representatives. For example, the new Section 27 of the *Distribution Act*, introduced by Section 479 of Bill 141 sets forth a new duty to advise:

Insurance representatives must inquire into their clients' situation to assess their needs.

They must be sure to appropriately advise their clients regarding matters that fall within the sectors in which they are authorized to act; if they can, they shall offer their clients a product that meets their needs

In addition, the AMF imposes numerous disclosure obligations aimed at ensuring fair treatment of consumers and promoting informed decision-making (see Section 4.3.2).

Generally, the *Distribution Act* imposes considerable obligations on certified representatives, including those related to competence and loyalty, advising the consumer correctly, and not placing themselves in situations of conflict of interest. Both agents and brokers are governed by the *Distribution Act*.<sup>156</sup>

Furthermore, in 2007, the CCIR released a report recommending that the industry disclose to consumers relevant information about incentive schemes<sup>157</sup> that influence the amount of remuneration representatives may receive, that they explain the characteristics of the product and recommend that they set in place a tool capable of recommending a suitable product for the consumer.<sup>158</sup>

In the Ontario law, in addition to prohibited practices (e.g. making false or misleading representations or leading the consumer into error), the formalities relative to disclosure are set forth in the section on life

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<sup>156</sup> Ss. 16 and 27, *Act Respecting the Distribution of Financial Products and Services*, RLRQ c D-9.2, Code de déontologie des représentants en assurance de dommages et Code de déontologie de la Chambre de la sécurité financière.

<sup>157</sup> By incentives are meant primarily bonuses, commissions, salaries, refunds, fees that are found in the compensation programs and other benefits such as gifts, promotions and contests.

<sup>158</sup> <https://www.ccir-ccra.org/fr/init/iprc/iprc%20-%20report%20on%20the%20action%20by%20industry%20associations%20fr.pdf> <https://www.ccir-ccra.org/fr/init/iprc/iprc%20-%20report%20on%20the%20action%20by%20industry%20associations%20fr.pdf>

insurance.<sup>159</sup> However, there are additional obligations in the regulations that must be respected with regard to information disclosure.

In Alberta, the obligations concerning insurance products are set forth in the *Insurance Act*. The Act requires that several items of information be disclosed within the policy,<sup>160</sup> both with regard to individual<sup>161</sup> and collective<sup>162</sup> insurance. It also defines more specific obligations, such as the obligation to disclose incentive plans,<sup>163</sup> obligations concerning online distribution,<sup>164</sup> the coverage limit,<sup>165</sup> and automobile liability insurance, as well as numerous other obligations related to the *Fair Practice Regulation*.<sup>166</sup>

In British Columbia, there are also disclosure requirements that apply when insurers are dealing with a consumer; these include information not only on insurance products, but also on compensation plans and incentive schemes.<sup>167</sup> Moreover, there are a number of regulatory requirements related to disclosure of information about life insurance. Certified representatives also have additional obligations.

#### **4.3.2 Obligations of fair treatment of consumers**

In some provinces, insurers have additional obligations with regard to sound business practices, including the fair treatment of consumers. Since June 2013, financial institutions in Québec have been subject to the AMF *Sound Commercial Practices Guideline*,<sup>168</sup> these include insurers of persons (life and health), damage insurers, holding companies controlled by an insurer, mutual insurance associations, financial services cooperatives as well as trust and savings companies (hereinafter the insurers).<sup>169</sup>

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<sup>159</sup> S. 185 of the *Insurance Act*, RSA 1900, c I-8.

<sup>160</sup> Ss. 624 et seq. IA, RSA 2000, C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, LexisNexis, 2009, p. 445, and s. 652 IA, RSA 2000, C I-3.

<sup>161</sup> Articles 697 and 699 IA, RSA 2000, C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, LexisNexis, 2009, p. 473.

<sup>162</sup> Ss. 698 and 701, IA, RSA 2000, C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, LexisNexis, 2009, p. 473.

<sup>163</sup> S. 511 (1) (f) IA, RSA 2000, C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, LexisNexis, 2009, p. 297 et seq.

<sup>164</sup> S. 511 (1) (d) IA, RSA 2000, C I-3, and Michael J. Bailey, *Alberta Insurance Law & Commentary*, LexisNexis, 2009, p. 297 et seq.

<sup>165</sup> S. IA, RSA 2000, C I-3

<sup>166</sup> *Alberta Regulation 128/2001 Insurance Act, Fair Practice Regulation*.

<sup>167</sup> S. 3 (1) *Marketing of Financial Products Regulation*.

<sup>168</sup> AMF *Sound Commercial Practices Guideline*, 2013.

<sup>169</sup> This guideline also applies to portfolio management companies controlled by an insurer, financial services cooperatives, trust companies and collective investment companies governed by the following laws: the *Insurance Act*, RSQ, c. A-32, the *Act Respecting Financial Services Cooperatives*, RSQ, c. C-67.3 and the *Act Respecting Trust companies and Savings Companies*, RSQ, c. S-29.01. Note, these laws will be amended in whole or in part by Bill 141. However, there is no reason to believe that the application of the guidelines to the entities examined in this study will not be affected.

This guideline is aimed at ensuring that financial institutions that offer products or services to consumers are properly informed and are accorded fair treatment.<sup>170</sup> It also aims at fostering confidence in the Québec system, in the current context of “rapid growth of financial markets and technologies, the increasing complexity of financial products and the greater transfer of risks to consumers are among the factors that have contributed to the increased risk of their falling victim to careless bad practices, abuse or fraud.”<sup>171</sup> It also requires adapting methods of distributing the product, taking into consideration its characteristics, the need for consumer information and advice, as well as the impact the product could have on the consumer’s financial situation.<sup>172</sup>

The fair treatment of consumers must be a central element in the company’s governance and culture at every stage of the process. Thus, at the stage of design and marketing of new products, which must be based on the needs of the various groups of consumers for whom the product is intended, those consumers that the product is not suitable for must be identified and their access to it limited. The relevant information must be disclosed before, during and after the purchase of the product and the representations that the institution makes must match the product.<sup>173</sup> In addition, when the consumer wants to change the product or the insurer, or make a complaint or a claim, the procedures provided must facilitate these operations.<sup>174</sup>

At the level of governance and corporate culture, the guideline requires that fair treatment of consumers be integrated within every stage of the product’s life cycle, in every sector of the insurance industry, particularly in the development of objectives and strategies. In addition, the policy for the remuneration of representatives and brokers must be consistent with these objectives. Also worthy of mention is the importance of adopting codes of conduct that reinforce the culture of fair treatment of consumers and promote high standards of competence, ethics and honesty, as well as the implementation of monitoring mechanisms to identify and address issues that could lead to conflict of interest.<sup>175</sup>

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<sup>170</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 2.

<sup>171</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 3.

<sup>172</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 11.

<sup>173</sup> AMF *Sound Commercial Practices Guideline*, 2013, pp. 7 and 11.

<sup>174</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 7.

<sup>175</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 9.

The AMF also expects the following best practices to be set in place:

- Having a formal process for approving new products;
- Using appropriate information to assess the needs of the various consumers groups;
- Making an evaluation of the risks inherent in new products, in light of changes in the environment that could harm consumers;
- Proceeding to the assessment of new products and related disclosure documents by competent individuals from the relevant departments in the institution;
- Training the sales force to ensure it is knowledgeable about the institution's products, the disclosure documents and the target markets;
- Monitoring of products after their launching to ensure that they in fact meet the needs of the initial target consumers and that any necessary changes are made; and
- Making the assessment of the distribution methods used<sup>176</sup>

The *Guideline* also emphasizes the management of incentives to ensure that they do not affect the fair treatment of consumers - they should not, for example, influence representatives to encourage consumers to purchase products that do not meet their needs.<sup>177</sup>

The insurer must also ensure that consumers have all the information they need to facilitate informed decision making.<sup>178</sup> To do so, the information transmitted must:

- clearly identify the institution and provide its contact information;
- clearly identify the product and set out its main features;
- clearly identify the risks associated to the product;
- clearly identify any right of termination or resolution;
- be drafted in clear and plain language and in a manner that is not misleading
- be presented in a format that is easy to read and understand;
- be up to date and available, in a timely manner, on paper or any other durable medium;
- disclose any situation that could potentially place the institution in a conflict of interest.<sup>179</sup>

The accessibility and simplicity of the claims process is central to the obligation to treat consumers fairly. Consumers must be aware that their insurer has a claims examination process, understand the various stages in this process and know how long it will take for a response. Consumers who file complaints must also be informed of their rights and obligations. If the insurer cannot respond to the claim in a timely manner, he must inform the consumer in addition to indicating when the claim will be

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<sup>176</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 11.

<sup>177</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 13.

<sup>178</sup> This is not the same duty to inform as that provided in the *Insurers' Act*.

<sup>179</sup> AMF *Sound Commercial Practices Guideline*, 2013, pp. 15-16.

processed.<sup>180</sup> When claims are dismissed, consumers need to know the factors considered in the assessment and the reasons for the decision.

The way that claims and disputes are handled is an equally important factor in the fair treatment of consumers; this is addressed in both the *Sound Commercial Practices Guideline* and in the regulations governing the insurance industry. The *Guideline* characterizes a good practice as one that causes recurrent claims to be identified and measures to be taken to eliminate them, or failing that, to mitigate them. Similarly, if the staff responsible for handling claims is guilty of inappropriate behaviour, the insurer must take adequate measures to correct it.<sup>181</sup> Also, the *Guideline* sets forth obligations with regard to privacy, particularly in cases of a breach in security.<sup>182</sup>

Elsewhere in Canada, certain initiatives were announced after this report was drafted, but before it was submitted. On April 3, 2018, the Financial Services Commission of Ontario (FSCO) proposed a guideline for the fair treatment of consumers that it featured in a public consultation held in April and May 2018.<sup>183</sup> This guideline provides similar protections to those of Québec.

Finally, on May 3, 2018, the Canadian Council of Insurance Regulators (CCIR) and the Canadian Insurance Services Regulatory Organizations (CISRO) issued a joint consultation notice regarding a draft directive on the fair treatment of customers. The aim of the consultation was to take the pulse of the various stakeholders, which included determining whether harmonization of rules on this matter can be achieved while respecting the regulations that differ from province to province, particularly as they concern the legal regime and the culture of the market in each province.<sup>184</sup> The consultation also sought to determine whether the proposed directive could achieve a balance between the roles of the various actors (insurers and intermediaries).<sup>185</sup> The directive proposed by the CCIR goes beyond the Québec guideline in two respects: it supervises the intermediaries and imposes disclosure obligations with regard to incentive plans. Moreover, in cases when the regulatory framework of one province does not apply to intermediaries in the manner that is being proposed, it is quite possible that the principles

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<sup>180</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 18, and IAIS *Insurance Core Principles*, Principle 19.6.

<sup>181</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 19.

<sup>182</sup> AMF *Sound Commercial Practices Guideline*, 2013, p. 20.

<sup>183</sup> [https://www.fSCO.gov.on.ca/en/about/superintendent\\_guidelines/pages/default.aspx](https://www.fSCO.gov.on.ca/en/about/superintendent_guidelines/pages/default.aspx)

<sup>184</sup> CCIR and OCRA “Directive CCIR and OCRA on the fair treatment of customers. Publication Notices “of May 3, 2018, and CCIR OCRA” Directive Conduct of insurance and fair treatment of customers,” 2018, p. 4.

<sup>185</sup> CCIR OCRA “Directive: Conduct of *Insurance Activities* and fair treatment of customers,” 2018, pp. 4 and 6.

arising from the CCIR Directive will allow provincial regulators to monitor the practices of the industry more extensively, without the need to modify the framework in question.

### 4.3.3 Right of rescission

In the jurisdictions we studied, the legislator may grant consumers a grace period to rescind an insurance contract, that is to say, a period during which they can change their minds after the insurance contract is obtained without the intervention of a representative. In Québec, Section 64 of the new *Insurers' Act* gives consumers a 10-day grace period when purchasing an insurance product without the intervention of a representative when the sale is concluded online.<sup>186</sup>

In Ontario, an insured person who contracts life insurance can cancel the contract within 10 days of receipt of their policy (in some cases this can extend up to 20 days).<sup>187</sup>

In Alberta, the insured can rescind the contract within 10 days of receipt of the policy for life insurance, health and accident insurance, or travel insurance for a period of less than 190 days.<sup>188</sup> The same applies to auto insurance, with regard to liability.<sup>189</sup>

In British Columbia, the insured also have the right to rescind a contract within 10 days of receipt of an insurance policy for life insurance or health and accident insurance, except for travel insurance for less than 190 days.<sup>190</sup> There are, however, a few other exceptions to this right.

### 4.3.4 Solvency Requirements

Insurers must comply with numerous solvency rules. These rules are designed to ensure the stability, not only of companies, but of the entire financial sector. They ensure that insurers have sufficient funds to compensate the insured in the event of a major claim.

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<sup>186</sup> Bill 141 s. 64 para. 1

<sup>187</sup> <http://www.fSCO.gov.on.ca/en/insurance/Pages/glossary-life.aspx> <http://www.fSCO.gov.on.ca/en/insurance/Pages/glossary-life.aspx>

<sup>188</sup> S. 5 (1) (a) *Fair Practice Regulation, Insurance Act, Alberta Regulation 128/2001*.

<sup>189</sup> S. 2 (b) s. 5 (1) (a) of *Regulation Fair Practice, Insurance Act, Alberta Regulation 128/2001*.

<sup>190</sup> S. 9 (2) *BC Reg. 108/2015*.

In Québec, the *Insurance Act* (IA) establishes the obligation of insurers to follow sound, prudent management practices. It also requires insurers to lay down rules with respect to capital adequacy. The AMF performs oversight and prudential monitoring to foster the solvency of financial institutions, including insurance companies, with the ultimate aim of protecting the interests of consumers.<sup>191</sup>

In personal insurance, the IA provides that insurers must meet various minimum capital requirements. There is also the Capital Adequacy Requirements (CAR) Guideline, which is designed to assist insurers in meeting their obligations towards policyholders, beneficiaries and savers.<sup>192</sup> This guideline follows the asset liability method prescribed by the Canadian Institute of Actuaries Standards of Practice.<sup>193</sup>

In damage insurance, the IA also imposes minimum capital obligations. In addition, there is the Minimum Capital Test (MCT) guideline, aimed at making sure that insurers have sufficient funds in the event of a major disaster, such as an earthquake. This guideline is also based on accepted Canadian accounting principles.<sup>194</sup>

Moreover, in both personal insurance and damage insurance, numerous other guidelines have been developed to ensure the financial stability of insurers. These include guidelines for reinsurance, integrated risk management, operational risk management, liquidity risk management, continuation of activities, investment management and the management of derivatives.<sup>195</sup>

Solvency tests are based on the same standards all across Canada. Regulators in Québec (AMF) and British Columbia (FICOM) monitor provincially incorporated insurers in their respective territories. The Office of the Superintendent of Financial Institutions (OSFI), a federal agency, is mandated to monitor

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<sup>191</sup> <https://lautorite.qc.ca/en/general-public/about-the-amf/mission/> and AMF *Sound Commercial Practices Guideline*, Preamble, p. 3

<sup>192</sup> AMF *Capital Adequacy Requirements (CAR) Guideline - Personal Insurance*.

<sup>193</sup> AMF *Capital Adequacy Requirements (CAR) Guideline - Personal Insurance*.

<sup>194</sup> AMF *Capital Adequacy Requirements (CAR) Guideline - Personal Insurance*.

<sup>195</sup> <https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-insurance/ld-reinsurance-fr.pdf>  
[https://lautorite.qc.ca/fileadmin/lautorite/reglementation/assurances-inst-depot/ld\\_gro\\_eng.pdf](https://lautorite.qc.ca/fileadmin/lautorite/reglementation/assurances-inst-depot/ld_gro_eng.pdf)  
[https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-insurance/ld\\_gro\\_pf\\_2016-12\\_fr.pdf](https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-insurance/ld_gro_pf_2016-12_fr.pdf)  
<https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/2009mai26-ld-liquidite-fr.pdf>  
<https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/2010mars31-ld-gestion-continue-fr.pdf>  
<https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/2010juil08-ld-gestion-placements-fr.pdf> and <https://lautorite.qc.ca/fileadmin/lautorite/reglementation/lignes-directrices-toutes-institutions/2010juil14-ld-instrument-derives-fr.pdf>

and regulate federally chartered banks and insurance companies and ensure market stability . In Québec, the AMF is also involved in supervising federally chartered insurers (such as Intact and Manulife) and those with a foreign charter; it often works collegially with OSFI. However, in most other provinces, there is an agreement that makes OSFI responsible for the prudential supervision of insurers, regardless of their charter.

#### 4.3.5 Recourse available to consumers

The presence of mechanisms for handling disputes and appeals is a prerequisite for ensuring consumer protection.

Insurers must set up claims mechanisms within their companies. This is a legal obligation in Québec,<sup>196</sup> Ontario<sup>197</sup> Alberta<sup>198</sup> and British Columbia.<sup>199</sup>

After making a claim to a company (firm or insurer), it is possible to transfer the complaint to the regulator. Some regulators, including Québec, offer free mediation, if both parties are agreeable.<sup>200 201</sup> In Ontario, FSCO has not offered a mediation service since April 2016, but in auto insurance, consumers can resort to Safety, Licensing Appeals and Standards Tribunals Ontario (SLASTO),<sup>202</sup> which is made up of several arbitral tribunals.<sup>203</sup> Alberta, has a codified dispute resolution procedure.<sup>204</sup> Finally, British Columbia does not have a mediation service.<sup>205</sup>

In the four provinces studied, the consumer may file a complaint against an insurer for non-compliance with the legal or regulatory framework. When the complaint concerns ethical violations by a certified representative, it can, depending on the professional concerned and the province where one is situated,

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<sup>196</sup> Ss. 285.29 to 285.36 of the *Insurance Act*, RSQ, c-32, which will be replaced by the *Insurers' Act* when Bill 141 is passed.

<sup>197</sup> <https://www.fSCO.gov.on.ca/en/insurance/complaints/pages/default.aspx>

<sup>198</sup> Complaint Resolution Regulation, *Insurance Act*, *Alberta Regulation*, 259/2004.

<sup>199</sup> <https://www.fic.gov.bc.ca/pdf/FicomForms/ComplaintsInquiriesInstructions.pdf?ver=2.0>

<sup>200</sup> 285. Section 33 et seq. *Insurance Act*, RLRQ c A-32, and if Bill 141 is passed, it will be replaced by s. 55 et seq. *Insurers' Act*.

<sup>201</sup> N.B. The first version of the Bill provided for cost sharing between the parties; this was vigorously contested by several groups representing the interests of consumers and the public. The section was amended in March 2018 to ensure that mediation is free for consumers.

<sup>202</sup> [http://www.slasto.gov.on.ca/fr/AABS/Pages/What-is-Automobile-Accident-Benefits-Service-\(AABS\).aspx](http://www.slasto.gov.on.ca/fr/AABS/Pages/What-is-Automobile-Accident-Benefits-Service-(AABS).aspx)

<sup>203</sup> <http://www.slasto.gov.on.ca/fr/Pages/default.aspx>

S. 519 et seq. IA

<sup>204</sup> <http://www.finance.alberta.ca/publications/insurance/consumers/insurance-complaints-claim-or-policy.html>

<sup>205</sup> FICOM "Complaints and Inquiries - Instructions"

<https://www.fic.gov.bc.ca/pdf/FicomForms/ComplaintsInquiriesInstructions.pdf?ver=2.0>

be made to a self-regulatory organization (e.g. in Québec) or to the regulator. This will be followed by an investigation, a hearing and a decision.

Consumers all across Canada can also resort to the services of an ombudsman. For general insurance, there is the General Insurance OmbudService,<sup>206</sup> and for personal insurance, there is the OmbudService for Life and for Health Insurance.<sup>207</sup> Both provide a free and independent complaints service as well as general information on insurance.

Finally, consumers in Québec who are victims of fraud can claim compensation from the Fonds d'indemnisation des services financiers (known as the Fund). They may be eligible if they have done business with a person who was authorized to distribute a financial service or product. The complaint must be filed within a year of becoming aware of the fraud. The Fund may pay compensation of up to \$200,000 per claim.<sup>208</sup> Bill 141 expands the eligibility criteria.<sup>209</sup> Consumers will now have access to the Fund if they dealt with a registered person, whether or not the representative or the firm was authorized to distribute the type of product sold.<sup>210</sup> The Fund is a consumer protection tool that is available only in Québec. There is nothing similar to it in other provinces.

In the four provinces studied, consumers can also seek legal remedies in a common law court. In insurance, the right to sue cannot be limited by the use of a contractual clause, contrary to what is permitted in other areas of law. It is possible to undertake such action in addition to the other methods of settling disputes mentioned above.

Contract clauses imposing compulsory arbitration and limiting judicial remedies were once commonplace. The courts at the time recognized such clauses as binding on consumers.<sup>211</sup> Lawmakers in Québec and Ontario subsequently intervened to make such clauses in consumer contracts

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<sup>206</sup> <https://scadcanada.org/>

<sup>207</sup> <https://www.oapcanada.ca/>

<sup>208</sup> <https://lautorite.qc.ca/en/general-public/assistance-complaints-and-compensation/submit-a-claim-to-the-fonds-dindemnisation-des-services-financiers/>

<sup>209</sup> Although Bill 141 was adopted in June 2018, this section will be retroactive to 2015.

<sup>210</sup> Representatives and firms are only allowed to sell products and services that correspond to the certificate they were given.

<sup>211</sup> *Dell Computer Corp. v. Consumers Union*, 2007 SCC 34

unenforceable.<sup>212</sup> Alberta limited such clauses severely, making them subject to ministerial approval. Only one case of ministerial approval (automobile-related) has been recorded so far.<sup>213</sup>

In British Columbia, these clauses seem to be unenforceable in consumer contracts, subsequent to a decision of the Supreme Court of Canada in one specific case.<sup>214</sup>

Then, in the context of an action rejecting a class action, the Supreme Court recognized a “free” contract as a consumer contract. In addition, Justice Abella recognized that consumers experience special difficulties online and that the balance of power between a consumer and a large company can result in the validity of the consent being affected.<sup>215</sup>

#### 4.4 Reciprocal unions

A reciprocal union is a group of people reciprocally bound together by insurance contracts.<sup>216</sup> For example, many large law firms could group together to cover a risk that exceeds the limits of general liability insurance.<sup>217</sup> Such unions are found especially in Ontario.

In Québec, there was no legal framework provided for reciprocal unions. Only one such union has been formed and this was a union of egg producers attempting to reduce the “financial risk management” related to *Salmonella enteritidis*.<sup>218</sup>

Bill 141 provides that reciprocal unions will be subject to a separate regulatory regime. Section 188 sets forth the obligations to be respected for their formation. This includes the constitution of a board of directors and the designation of mandatories,<sup>219</sup> the creation of rules on membership, resignation or exclusion from the union, and the appointment of an actuary and an auditor. The section also specifies that unions are required to pool the sums of money necessary for the exercise of their activity.<sup>220</sup>

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<sup>212</sup> S. 11.1 *Consumer Protection Act*, RLRQ c P-40.1, and item 7 (2), *Consumer Protection Act 2002*, LO-2002 C 30, ann. AT.

<sup>213</sup> Ss. 13-16 of the *Fair Trading Act*, RSA 2000, c F-2.

<sup>214</sup> *Seidel v. Telus Communications Inc.*, 2011 SCC 15.

<sup>215</sup> *Douez v. Facebook Inc.*, 2017 SCC 33.

<sup>216</sup> S. of Bill 141, which introduced s. 7 of the *Insurers' Act*.

<sup>217</sup> <http://www.lawtimesnews.com/article/firmsand39-self-insurance-raises-ethical-issues-8508/>

<sup>218</sup> Check with the Register of Québec companies in November 2017.

<sup>219</sup> S. 3 Bill 141, s. 188 (3) *Insurers' Act*.

<sup>220</sup> S. 3 Bill 141, s. 188 (6) *Insurers' Act*.

Although reciprocal unions are subject to less restrictive regulation than insurers, certain limitations do apply to them. For example, Section 188 (7) provides that the persons in the union are prohibited from accepting an insurable risk which, if it occurred, would require payment, after reinsurance, of more than 10% of the net value of the union's assets. The union must be able to fulfill its obligations to its members.<sup>221</sup> It can also exercise the rights, as plaintiff or defendant, of persons belonging to the reciprocal union.<sup>222</sup>

Section 195 of the *Insurers' Act* states: [TRANSLATION]“The only regulations and guidelines applicable to authorized reciprocal unions are those established to be applicable to those unions only and relating only to the maintenance by the mandatary of adequate assets to meet the liabilities contracted by those persons in their insurer activities, as and when they become due.”

The combination of sections 7 and 195 creates a separate regime for reciprocal unions, which constitutes a loosening of the regulations. This represents a setback for consumer protection,<sup>223</sup> a view that is echoed by the Insurance Board of Canada (IBC), which states that this will lead to “a system of two weights, two measures.” According to the IBC, the separate regime ensures that reciprocal unions can evade most of the guidelines established by the AMF with regard to solvency and business practices.<sup>224</sup> The IBC is concerned that consumers will not understand the differences in protection offered by the regulations applying to traditional insurers versus those applying reciprocal unions.<sup>225</sup> Moreover, the fact that the two groups do not play by the same rules threatens to create competition issues.<sup>226</sup>

The Coalition des associations de consommateurs du Québec (CACQ) is also concerned about the change. They see a big difference between an industry member association that is well informed and has sufficient financial resources and a group of consumers who simply come together to obtain insurance.<sup>227</sup> The lack of specific statements limiting the application of reciprocal unions could potentially make their regulatory framework applicable to digital P2P insurance platforms, which would

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<sup>221</sup> S. 3 Bill 141, s. 189 *Insurers' Act*.

<sup>222</sup> S. 3 Bill 141, s. 191 *Insurers' Act*.

<sup>223</sup> S. 3 Bill 141, ss. 7 and 195, *Insurers' Act*.

<sup>224</sup> Insurance Bureau of Canada, “Brief on Bill 141” p. 6 and written interview with the same body.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> Coalition des associations de consommateurs du Québec, « Araignée du matin, chagrin : le projet de loi 141 et la protection des consommateurs », p. 94

have the effect of exempting them from the application of numerous consumer protection measures provided in the *Insurers' Act*<sup>228</sup> as well as the *AMF Guideline*.<sup>229</sup>

The CACQ claims there is a need for a thoughtful review of the regulation of reciprocal unions, since they limit the delegation of regulatory powers to the AMF, which could affect the protection afforded to consumers, particularly if it is concluded that P2P insurance platforms are reciprocal unions.<sup>230</sup> The CACQ notes that businesses and consumers do not possess the same degree of knowledge about their rights, which renders them more vulnerable in the context of P2P insurance. It also states that it would be appropriate to establish maximum limits to ensure that the consumers' patrimony is protected.<sup>231</sup>

However, if it were decided that P2P insurance platforms were subject to the same controls as reciprocal unions, this would have the same effect as Section 6, para. 4, of the *insurers' Act*, which explicitly states that reciprocal unions are considered insurers in Québec.<sup>232</sup> P2P insurance platforms would then be considered to be insurers. Consequently, P2P insurance platforms would at least be subject to the lighter controls required for reciprocal unions, including capital maintenance rules and registration. Although this would be better than no protection at all, it would not compensate for the protections consumers would have if they were dealing with a traditional insurer.

In the other provinces studied, the controls applicable to reciprocal unions do not seem applicable to the context of P2P digital insurance platforms. For example, Alberta's *Insurance Act*<sup>233</sup> has established a framework for these. There are criteria to be met in order to be registered as a reciprocal union,<sup>234</sup> except in very specific cases.<sup>235</sup> Reciprocal unions do not seem to be accessible to individuals in the same way as P2P insurance platforms. This is apparent when we look at the restrictions on the power of attorney,<sup>236</sup> the person whose role is to sign reciprocal contracts and act on behalf of the members of the reciprocal union.

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<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> S. 3 Bill 141, s. 6 (4) *Insurers' Act*.

<sup>233</sup> *Insurance Act*, RSA 2000 c I-3.

<sup>234</sup> S. 79 *Insurance Act*, RSA 2000 c I-3.

<sup>235</sup> S. 80 *Insurance Act*, RSA 2000 c I-3.

<sup>236</sup> S. 79 et seq., *Insurance Act*, RSA 2000 c I-3c

Alberta's *Insurance Act* also specifies that a reciprocal union must meet numerous obligations in order to be registered with the regulator,<sup>237</sup> including the information to be disclosed and contracts to be respected.<sup>238</sup> It also lays down obligations with regard to calculating the amount to be held in reserve and other prudential requirements.<sup>239</sup> Reciprocal unions are not allowed to offer life insurance, accident and health insurance, surety insurance<sup>240</sup> or automobile liability insurance.<sup>241</sup> Permission must be obtained for offering home insurance.<sup>242</sup> The amount of capital required is relatively large.<sup>243</sup> The regulator also has great power of intervention. (N.B. After this report was drafted, but prior to submission, the Alberta Superintendent of Insurance published the list of reciprocal unions registered with the regulator; this list contained legal persons that were not compatible with P2P digital insurance platforms.<sup>244</sup>

Ontario's *Insurance Act* provides controls for insurers with "reciprocal insurance exchange."<sup>245</sup> They are obliged to register with the regulator.<sup>246</sup> The law allows groups of subscribers who exchange indemnity or insurance contracts through the same proxy to form a union.<sup>247</sup> The *Insurance Act* also provides that reciprocal unions must satisfy certain capital obligations.<sup>248</sup> Moreover, their monitoring obligations are not as great as those of an insurer.<sup>249</sup>

Also, Part XIII of Ontario's *Insurance Act* provides for controls that are specifically applicable to reciprocal unions.<sup>250</sup> Anyone can exchange contracts and form a reciprocal union with others, except for life insurance, accident and sickness insurance, and bond insurance.<sup>251</sup> Subscribers are not deemed to be insurers, due to the fact that they exchange reciprocal union contracts.<sup>252</sup> N.B. Members of reciprocal unions retain the right to sue.<sup>253</sup> Reciprocal unions are regulated with regard to their creation, contracts,

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<sup>237</sup> S. 84 et seq., *Insurance Act*, RSA 2000 c I-3

<sup>238</sup> *Ibid.*

<sup>239</sup> S. 98 et seq., *Insurance Act*, RSA 2000 c I-3, and 4 *Reciprocal Insurance Exchange Regulation*, Alta Reg 123/2001.

<sup>240</sup> S. 81 *Insurance Act*, RSA 2000 c I-3.

<sup>241</sup> S. 82 *Insurance Act*, RSA 2000 c I-3.

<sup>242</sup> S. 83 *Insurance Act*, RSA 2000 c I-3.

<sup>243</sup> *Ibid.*

<sup>244</sup> S. 98 *Insurance Act*, RSA 2000 c I-3. This section provides that this risk cannot exceed a value of more than 10% of the subscriber's net value and sets forth the disclosure obligations toward the Ministry of Finance.

<sup>245</sup> S. 42 *Insurance Act*, RLO 1990, c I.8.

<sup>246</sup> S. 66 (8) *Insurance Act*, RLO 1990, c I.8.

<sup>247</sup> S. 377 et seq. *Insurance Act*, RLO 1990, c I.8.

<sup>248</sup> S. 378 of the *Insurance Act*, RLO 1990, c I.8.

<sup>249</sup> S. 48 (6) *Insurance Act*, RLO 1990, c I.8.

<sup>250</sup> S. 377 et seq. *Insurance Act*, RLO 1990, c I.8.

<sup>251</sup> S. 378 of the *Insurance Act*, RLO 1990, c I.8.

<sup>252</sup> S. 378 of the *Insurance Act*, RLO 1990, c I.8.

<sup>253</sup> S. 380 (2) *Insurance Act*, RLO 1990, c I.8.

power of attorney, registration and management of the permit, minimum capital, credit checks, investment rules and inspection of financial statements.<sup>254</sup> Reciprocal unions must be registered with the regulator and comply with regulations.<sup>255</sup> The regulator also has an important role in this regard. It seems that the controls applicable to reciprocal unions in Ontario do not apply to P2P digital insurance platforms, in particular because of the obligations of the attorney, the definition of subscriber and the regulation of reciprocal unions.

Our American experts also told us that they had difficulty seeing how reciprocal union regulations could be applicable to P2P digital insurance platforms;<sup>256</sup> similarly, it is difficult for us to imagine that the Québec legislator would want the rules for supervising reciprocal unions to apply to those platforms.

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<sup>254</sup> S. 377 et seq. *Insurance Act*, RLO 1990, c 1.8.

<sup>255</sup> S. 388 of the *Insurance Act*, RLO 1990, c 1.8.

<sup>256</sup> S. 1.21; they say that section 121.17 of the *Insurance Act* is not applicable to reciprocal unions.

## Section 5. Foreign legal frameworks

### 5.1. Preliminary comments

We identified a number of foreign jurisdictions that could serve as a source of inspiration with regard to best practices, whether at the legal or regulatory level or with respect to regulators' initiatives. These are the European Union, the United Kingdom, France, the United States, Australia, and New Zealand. These are the jurisdictions and practices that will be discussed here.

### 5.2. The European Union

The European Union has adopted a very comprehensive regulatory framework for insurance. There are three types of directives. The first, instituted in 1979, was aimed at establishing a single market when the insurer is situated within a member country of the European Union other than that of the insured.<sup>257</sup> 1988 saw the establishment of the second type of directive, aimed at improving consumer protection and the creation of a "European passport."<sup>258</sup> Finally, in 1992, came a third directive, aimed at creating a "single license" for the member countries of the European Union. In accordance this directive, no State may restrict access to an insurer in another State, except for reasons of public interest.<sup>259</sup> Note that, according to a report by the European Commission,<sup>260</sup> P2P insurance platforms could improve the "single market" in insurance, especially for new niche markets, thereby increasing the permeability of the offer of insurance products in Member States.<sup>261</sup>

In 2002, Directive 2002/65 /EC was adopted. It is aimed at regulating the distance marketing of financial services, including the sale of insurance online. It states that the information to be disclosed must be adapted to the distribution channel used and transmitted in a clear, understandable manner. This information must include the main features of the insurance product concerning coverage and price

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<sup>257</sup> Directive on the coordination of laws, etc. for insurance other than direct life insurance (Directive 73 239 EEC) and Directive on the coordination of laws, etc. for direct life insurance (Directive 79 267 EEC).

<sup>258</sup> Directive 88/357/EEC and Directive 90/619/EC.

<sup>259</sup> Directive 92/96/EEC and Directive 92/49/EEC, which were consolidated in Directive 2002/83/EC.

<sup>260</sup> Please note, this report reflects the views of the authors and not those of the entire Commission. In the interests of brevity and because the report is published by the Commission, we will refer here to the European Commission as the author of the report.

<sup>261</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* 2016, pp. 201-202.

(including the amount of the premium, the amounts paid by way of commission, expenses and taxes).<sup>262</sup> The contract must be provided on paper or other “durable medium.”<sup>263</sup> This directive also provides that the consumer has a right of withdrawal that may be exercised within 30 days (in the case of a life insurance policy) or 14 days (for other types of insurance).<sup>264</sup>

There are also directives governing insurance intermediaries. These specify what their minimum competencies should be and distinguish between those who deal with one insurer and those who deal with several. Directive 2002/92/EC indicates the minimum obligations for exercising reserved acts. It sets forth the requirements with regard to the disclosure of additional information, minimum solvency rules, and measures aimed at restricting conflicts of interest.<sup>265</sup> Moreover, it classifies the intermediaries who can carry out reserved acts into five groups: brokers, general agents, insurance agents, intermediary officers, and insurance employees and intermediaries.<sup>266</sup>

In 2016, the Insurance Distribution Directive (IDD)<sup>267</sup> was tabled. It will enter into force this year and will be applicable to insurance companies as well as to intermediaries and other businesses that sell insurance products to consumers. The scope of the IDD is defined in section 2 (1):

“insurance distribution” means the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.

“Insurance company, a company according to the definition of Article 13, point 1), of Directive 2009/138/CE.”

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<sup>262</sup> Art. 3.1.2. Directive 2002/65/EC

<sup>263</sup> Art. 5.1 of Directive 2002/65/EC

<sup>264</sup> Art. 6 of Directive 2002/65/EC

<sup>265</sup> Directive 1977/92/EEC, Yvonne Lambert-Faivre and Laurent Leveneur, *Assurance de personnes*, 2011, p. 175, and Annik Bélanger-Krams, *Option consommateurs*, “Protection des consommateurs et distribution de produits d’assurance en ligne. Des enjeux inconciliables ?” 2016, p. 37.

<sup>266</sup> Thomas Nguema Evie, “Les impacts de l’économie collaborative sur le monde de l’assurance ?” *Assurance et gestion des risques*, Vol. 84 (1-2).

<sup>267</sup> Directive (EU) 2016/97 of the European Parliament and the Council of 20 January 2016 on the distribution of insurance (recast).

Insurers and intermediaries should provide the consumer with their identity and contact information.<sup>268</sup> They must also provide them with them a “key information document.”<sup>269</sup> The intermediaries, for their part, must also offer consumers products that fit their needs, in order to prevent “mis-selling.”<sup>270</sup> It is also important to clarify that intermediaries are not subject to the IDD when they are only presenting information to consumers, while no insurance contract is reached.

In addition, the IDD offers many solutions for adequately protecting consumers. In particular, it incorporates Principle 19 of the International Association of Insurance Supervisors (IAIS) regarding the fair treatment of consumers. For example, it requires that information be transmitted to the consumer in a clear and understandable way.<sup>271</sup> It accords every consumer the same level of protection, regardless of the distribution channel used. The Directive obliges all insurers, intermediaries and other businesses subject to it to set in place mechanisms for processing complaints and resolving extrajudicial disputes, even disputes that arise between parties who are located in different states. It also provides that Member States must implement procedures to facilitate access to these mechanisms.<sup>272</sup>

In accordance with the *Product Oversight and Governance (POG)*,<sup>273</sup> guidelines, the IDD requires manufacturers to carry out an evaluation at the time new insurance products are created or when substantial changes are made to existing products, in order to take into account the market for which the product is intended and the potential risks it poses for the consumer, as well as to determine the distribution strategy.

In another vein, there are several directives that protect consumers in the digital environment. For example, Directive 2000/31/ EC monitors e-commerce companies with a view to protect consumers who shop online. It lays down disclosure obligations and sets rules for service providers.<sup>274</sup> Also, Directive 93/13/EC, which is aimed at preventing abusive clauses, is also applicable to the digital environment.

Still in the digital environment, particularly as regards P2P insurance platforms, the report published by the European Commission states that it is crucial for consumers to have access to all pre-contractual

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<sup>268</sup> Art. (4) of the IDD, Directive (EU) 2016/97.

<sup>269</sup> Add Art. Directive (EU) 2016/97.

<sup>270</sup> Art. 23 of Directive (EU) 2016/97 and paragraphs 44 and 45 of the preamble to the Directive (EU) 2016/97.

<sup>271</sup> Paragraph 48 of preamble to Directive (EU) 2016/97.

<sup>272</sup> Paragraph 38 of preamble and Art. 14 of Directive (EU) 2016/97.

<sup>273</sup> Art. 25 of Directive (EU) 2016/97

<sup>274</sup> Art. 25 of Directive (EU) 2016/97

information that could help them arrive at an informed decision. This seems particularly important when the insurance platform is not subject to the same controls as an insurer. Consumers should be informed as to whether or not the platform is obliged to be backed by a reinsurer<sup>275</sup> and the impact that this could have on them if it is not (one thinks here of a claim being refused due to lack of funds). Finally, it is essential that the platform possess the means to verify the identity of the insured as well as their risk profile in order to avoid mis-selling and prevent fraud.<sup>276</sup>

Finally, and still within the context of P2P digital insurance platforms, the authors of this report believe that it would be important to provide a framework that encourages the creation of a “European passport.” They recognize that the task will not be easy, as some Member States are likely to resist such a move, especially considering that it could contravene to the existing applicable framework in the insurance sector on their territory. Some jurisdictions could impose different obligations, such as the duty to advise.<sup>277</sup> In addition, not all regulators in the Member States react in the same way to P2P insurance platforms. Some might want to regulate on the basis of their activities, as is the case with Germany.<sup>278</sup> Others might want to offer them an exemption and a lighter framework; as is the case in the UK. This could lead to market fragmentation, which would undermine the “European passport.” Such an outcome would clearly be contrary to the objectives of European Community law.<sup>279</sup>

Furthermore, P2P insurance platforms would promote the establishment of mechanisms likely to stimulate competition, both between insurers and between platforms. What is needed, therefore, is a coherent framework. We wish to stress the importance of complaint handling and dispute settlement mechanisms<sup>280</sup> and would add that the creation of comparison sites that include P2P insurance platforms could be envisaged in order to foster informed decision-making.<sup>281</sup>

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<sup>275</sup> In the case of certain insurance P2P platforms, the reinsurer is often a traditional insurer, who indemnifies when the amount of the claim is too large for the consumer group fund.

<sup>276</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 203.

<sup>277</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 203.

<sup>278</sup> IAIS, *Report of the 24th-A2ii IAIS Consultation Call: Supervising InsurTech* p. 10.

“From P2P platforms to smart insurance contracts - a regulatory perspective,” *Bitlegal*, May 18, 2016.

<sup>279</sup> “From P2P platforms to smart insurance contracts - a regulatory perspective,” *Bitlegal*, May 18, 2016

<sup>280</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* pp. 203-204.

<sup>281</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 202.

P2P insurance platforms raise important issues with regard to privacy protection. These platforms collect large quantities of sensitive information, not only when consumers apply to join the group, but also when claims are processed. There are very serious issues involved, particularly with regard to the collection, preservation and retention of such data. Such platforms could be a popular target for hackers.<sup>282</sup>

The General Data Protection Regulation was adopted in December 2015 and came into force in May 2018.<sup>283</sup> It applies to companies, organizations and individuals that collect personal information about people. It contains certain exemptions: for example, it does not apply to those who collect information from their homes for personal use alone (someone who collects contact information to invite people to a party, for example).<sup>284</sup> It is hard to imagine such exemptions applying to P2P insurance platforms, even though the members are individuals.

This regulation is aimed at enabling citizens to maintain better control over their personal information. It is also aimed at harmonizing best practices and guidelines on the territory of the European Union.<sup>285</sup> It applies to companies that possess personal information about people who reside within this territory.<sup>286</sup> It remains in effect even when services are considered “free.” It incorporates the principles of privacy by design, which take privacy protection into account at the design stage of a system. In accordance with these principles, if there is a significant risk to privacy, a prior impact assessment must be performed and measures taken to reduce the risk.<sup>287</sup>

The regulation also imposes additional requirements on the storage of personal data - it requires that it be destroyed once it is no longer needed for the purposes of collection. In addition, it prohibits profiling consumers solely through the use of automated data processing.<sup>288</sup>

Companies have additional obligations regarding documentation, document storage and security; these must be incorporated within the default settings, and not be a secondary consideration. The Regulation

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<sup>282</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 202.

<sup>283</sup> Regulation (EU) 2016/679.

<sup>284</sup> This is the exemption related to personal and home use, Regulation (EU) 2016/679.

<sup>285</sup> Preamble para. 3 of Regulation (EU) 2016/679.

<sup>286</sup> Para. 22 of the preamble and Article 3 of Regulation (EU) 2016/679.

<sup>287</sup> Art. 35 of Regulation (EU) 2016/679.

<sup>288</sup> Art. 4 (4) and Art. 22 of Regulation (EU) 2016/679.

also stipulates separate obligations for those who store personal information and those who process it.<sup>289</sup> Moreover, the OECD asserts in a report that the Regulation could impact the insurers' use of new technologies, especially in the ways that they will be allowed to use the analysis of the insured's data within the conduct of their business.<sup>290</sup>

According to the report published by the European Commission, the P2P insurance platform business model is likely to give rise to additional privacy-related problems. This is particularly true with the self-governance model, which allows all the members to view everyone else's personal information, even at the stages of admission to the group and processing of claims.<sup>291</sup> According to the Commission, none of the members of the group should have access to other users' personal data under any circumstance.<sup>292</sup> However, one wonders how these platforms would be able to reconcile a regulatory restriction such as this with their *modus operandi*.<sup>293</sup>

### 5.3 The UK

The insurance sector in the UK is regulated by three sources: community law, national law and common law. Member States must integrate European Community law within their national laws. In June 2016, UK citizens voted overwhelmingly for Brexit. However, the vast majority of Community law protections have already been integrated into national law. Moreover, it is said that British law has such a leadership role in this area that it will have little impact on consumer protection.<sup>294</sup> UK law includes better practices than some Canadian provinces.

Until 2012, the financial products sector in the UK was regulated by the Financial Services Authority (FSA).<sup>295</sup> That year, the FSA split into three bodies: the Financial Conduct Authority (CFA), the Bank of England Prudential Regulation Authority (PRA) and the Financial Policy Committee (FPC). Only the

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<sup>289</sup> Arts. 4 (4) and 4 (7) 4 (8) of Regulation (EU) 2016/679.

<sup>290</sup> OECD, "Technology and Innovation in the Insurance Sector," 2017, pp. 34-36.

<sup>291</sup> European Commission, *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report* p. 202.

<sup>292</sup> European Commission: *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report*.

<sup>293</sup> European Commission *Study on the role of digitalisation and innovation in creating a true single market for retail financial services and insurance: Final Report*.

<sup>294</sup> Annik Bélanger-Krams, *Option consommateurs*, "Consumer protection and distribution of insurance products online: irreconcilable issues?" 2016, p. 45 et seq.

<sup>295</sup> This organization was created by the *Financial Services Markets Act 2000* (FSMA).

mandates of the first two bodies are relevant to our study. The role of the FCA is to regulate the conduct of the market and protect consumers,<sup>296</sup> whereas the PRA, as its name suggests, ensures the prudential regulation of financial institutions, both in terms of minimum capital requirements and governance. The PRA is designed to ensure that financial institutions comply with the rules of the European Solvency II Directive.<sup>297</sup>

The insurance sector is rigorously supervised. It is founded on *The Financial Services Markets Act 2002* (FSMA), the purpose of which is to ensure financial stability and promote consumer confidence.<sup>298</sup> Unless specifically exempted, all insurers<sup>299</sup> must be registered, as must intermediaries.<sup>300</sup> Also, they are all subject to a set of obligations: to act with integrity, competence, diligence and prudence, act reasonably in risk management, establish appropriate standards for the fair treatment of consumers, make sure to consider consumer interests and special needs, make sure to communicate information clearly and fairly, make sure to give adequate advice, protect consumer assets, act with transparency and in cooperation with the controller, as well as comply with the rules for solvency and prudential risk.<sup>301</sup> Leaders and senior managers also have personal obligations with regard to the conduct of their businesses.<sup>302</sup>

Insurers and intermediaries cannot limit their liability or reduce their obligations.<sup>303</sup> They must process claims rapidly, fairly and diligently.<sup>304</sup> They must also set up a complaints and dispute resolution mechanism.<sup>305</sup> They cannot restrict the warranty, except where provided by law. Also worthy of mention with respect to online consent, is that clicking on “I agree” is not sufficient to ensure compliance with the *Consumer Rights Act*.<sup>306</sup>

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<sup>296</sup> <https://www.fca.org.uk>

<sup>297</sup> <https://www.bankofengland.co.uk/prudential-regulation/key-initiatives/solvency-ii>

<sup>298</sup> *Financial Service Market Act of 2000* and <https://www.fca.org.uk>

<sup>299</sup> Ss. 3-6 FSMA

<sup>300</sup> S. 19 FSMA, Articles 5.3, 5.16.2 and 5.6.2 *Perimeter Guideline Manual* (ERG) and John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, p. 34.

<sup>301</sup> *High Level Standards* and John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, p. 35.

<sup>302</sup> *Senior Management System and Control*, John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, p. 36.

<sup>303</sup> ICOBS 2.2.2, 2.2.3 and PRIN 7. and ICOBS 2.5.1 and 8.1.2 John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, p. 36.

<sup>304</sup> ICOBS 8.1.1

<sup>305</sup> John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles* 2011, p. 44.

<sup>306</sup> The *Consumer Rights Act 2015* replaces and integrates the foundations of the *Unfair Terms in Consumer Contracts Regulation 1999* and the foundations of Directive S3/13/EEC.

Intermediaries must not only disclose information to consumers in the same way as an insurance company, but they have additional obligations: to obtain directives from clients and follow their instructions and explain the essential features of the proposed insurance product.<sup>307</sup> The obligations set forth in the *Insurance Conduct of Business Sourcebook* (ICOBS) are also applicable to intermediaries.<sup>308</sup>

Since 2012, with the adoption of the *Insurance Consumer Disclosure and Representation Act* (CIDRA), the obligations of consumers have been eased. At the pre-contractual statement and contract renewal stages, the CIDRA requires only that consumers answer the questions that are put to them.

Roiv replied them. For the consumer, the duty of utmost good faith that existed previously has been eliminated and replaced by the obligation not to make a false statement.<sup>309</sup> <sup>310</sup> Then in 2015, the *Insurance Act* extended the elimination of the requirement of utmost good faith to mixed and commercial contracts, at every contractual stage.<sup>311</sup>

By creating the *Innovation Hub*, the FCA became one of the first to adopt the sandbox approach in the regulatory context.<sup>312</sup> According to the OECD report, this approach allows Insurtechs to grow and experiment without being constrained by an overly restrictive regulatory framework. The sandbox has existed since 2016.<sup>313</sup> <sup>314</sup>

In the UK, the Project Innovate, which includes the regulatory sandbox, allows innovative companies to offer new products and services while being supervised and accompanied by the regulator. This allows them to accustom themselves to their regulatory obligations and get additional help if they need it (such as an adapted accompaniment).<sup>315</sup> It also allows them to ensure that what they do is of interest to

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<sup>307</sup> John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, pp. 28 and 29, and *Groud Gilbey Ltd. v. JLT UK Ltd* (2011) EHC 124, and the Superhull case (*Youell v. Bland Welch & Co Ltd* (No. 2) (1990) Lloyds Rep 431).

<sup>308</sup> John Lowry, Philip Rawlings and Rob Merkin, *Insurance Law: Doctrine and Principles*, 2011, p. 36 et seq.

<sup>309</sup> S. 2 (2) of CIDRA and John Birds, Ben Lynch, Simon Milnes, *MacGillivray on Insurance Law*, 2015, pp. 544-545.

<sup>310</sup> This change was necessary because too many consumers did not know what they were supposed to disclose spontaneously. For example, a woman was denied her claim following a theft because she had not disclosed that her husband had pleaded guilty to the charge of receiving stolen cigarettes (the equivalent of about four cartons of cigarettes), a “crime” that had occurred several years previously. See *Lambert v. Co-operators Insurance Society Ltd.*, (1975) Lloyd's Rep 431.

<sup>311</sup> S. 14 of the *Insurance Act* 2015.

<sup>312</sup> FCA, Anna Wallace, Head of Innovation Hub, “Project Innovate” and OECD *Technology and innovation in the insurance sector* 2017, p. 30.

<sup>313</sup> IAIS, *Report of the 24th-A2ii IAIS Consultation Call: Supervising InsurTech*, September 21, 2017, p. 8-9

<sup>314</sup> Other countries, including Singapore, Hong Kong and Australia, also have regulatory sandboxes.

<sup>315</sup> IAIS, *Report of the 24th-A2ii IAIS Consultation Call: Supervising InsurTech*, September 21, 2017, pp. 8-10 and OECD, “*Technology and innovation in the insurance sector*, 2017, p. 31

consumers. In such a context, an innovative company may be given a restricted license for a limited period.<sup>316</sup>

In addition, the PRA, with the help of experts from a range of disciplines, uses prudential oversight to monitor Fintechs and developments in the market as well as reduce prudential risks. It organizes forums with various experts to assess changes in risk profiles presented by Insurtechs and to conduct studies on the subject.<sup>317</sup>

Moreover, according to the OECD report, regulation must also require that the senior management of Insurtechs establish mechanisms to ensure that rules are followed and promote the fair treatment of consumers. New technologies must also comply with Principle 19 of the International Association of Insurance Supervisors (IAIS) regarding the fair treatment of consumers.<sup>318</sup>

## 5.4 France

The community law of the European Union takes precedence over national law. Accordingly, France, like the other Member States, must incorporate the content of EU directives within its national law. The IDD will come into force on July 1, 2018, but intermediaries will have until October 9 to comply.<sup>319</sup> In addition, French law has other best practices related to the regulation of actors in the insurance market.

In France, the main regulator in the present context is the l'Autorité de contrôle prudentiel et de résolution. Its mission is to ensure the stability of the financial system, to ensure consumer protection and oversee the various players in the insurance field.<sup>320</sup> There is also the Bureau central de tarification, which operates in the area of compulsory insurance. It intervenes when an insured person has been denied access to compulsory insurance and then sets the amount of the premium.<sup>321</sup> Any insured person who has a dispute with an insurer or a mutual society can use one of its internal or external mediation processes, such as La Médiation de l'Assurance.<sup>322</sup>

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<sup>316</sup> FCA, Anna Wallace, Head of Innovation Hub, "Project Innovate" and OECD *Technology and innovation in the insurance sector* 2017, p. 30.

<sup>317</sup> IAIS, *Report of the 24th-A2ii IAIS Consultation Call: Supervising InsurTech*, September 21, 2017, pp. 8-9.

<sup>318</sup> OECD, *Technology and innovation in the insurance sector*, 2017, p. 31

<sup>319</sup> L'Argus de l'assurance, "Directive distribution d'assurance (DDA) : son application officiellement reportée," March 9, 2018.

<sup>320</sup> <https://acpr.banque-france.fr/en/page-sommaire/assignments>

<sup>321</sup> <http://www.bureaucentraldetarification.com.fr>

<sup>322</sup> <https://www.mediation-insurance.org>

In France's national law, the insurance field is governed by several laws, including the *Code de l'assurance*, the *Code civil* and certain sections of the *Code de la consommation*. The aim of the *Code de l'assurance* is to ensure the protection of policyholders by limiting the principle of contractual freedom between the parties; who cannot derogate from it.<sup>323</sup>

As already stated, there are several major players to be considered in the insurance field: stock and mutual insurers, intermediaries (five categories), and the insured (individuals and businesses).<sup>324</sup> In France, an intermediary is anyone who, in their professional activity, presents insurance contracts and offers assistance in concluding them or participates in the work preparatory to the conclusion of an insurance contract.<sup>325</sup> The country's insurance industry is highly regulated. For instance, insurers must be registered with the regulator (Autorité de contrôle prudentiel et de résolution) and comply with numerous rules.<sup>326</sup> Similarly, the intermediary should be registered with ORIAS<sup>327</sup> and respect the regulations on restricted acts.<sup>328</sup>

French law is more demanding than European law with regard to information disclosure. When a distance contract is being concluded, the insurer or intermediary is required to explain to the insured the various ways of correcting errors, the ways of preserving documents, and the conditions for accessing the document. The "double-click" rule must also be explained; this action permits consumers to confirm actual consent, to acknowledge reception, and also to confirm the technological neutrality of documents.<sup>329</sup>

In addition, France imposes a stricter duty to advise on intermediaries than what is required by European Community law. The French duty to advise is comparable to what is required in Québec. This means that the representative must offer products based on consumer needs, explain why he is offering those products and ensure that the insured do not find themselves without a guarantee.<sup>330</sup>

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<sup>323</sup> Hubert Groutel, *Droit des assurances*, Les mémentos Dalloz, 13th edition, 2015, p.11.

<sup>324</sup> Art. L 5-111-1 *Code des assurances* and Directive 2002 92 EC, Directive IDD and Thomas Nguema Evie, "Les impacts de l'économie collaborative sur le monde de l'assurance ?" *Assurance et gestion des risques*, Vol. 84 (1-2), p. 99.

<sup>325</sup> Thomas Nguema Evie, "Les impacts de l'économie collaborative sur le monde de l'assurance ?" *Assurance et gestion des risques*, Vol. 84 (1-2), p. 99.

<sup>326</sup> <https://acpr.banque-france.fr/en/page-sommaire/insurance-supervision>

<sup>327</sup> This is the registry for insurance intermediaries in banking and finance.

<sup>328</sup> <https://www.orias.fr> and Thomas Nguema Evie, "Les impacts de l'économie collaborative sur le monde de l'assurance ?" *Assurance et gestion des risques*, Vol. 84 (1-2), p. 100.

<sup>329</sup> Yvonne Lambert-Laurent Favre and Leveneur, *Assurance de personnes*, 13th edition, 2015, pp. 205-206, and JuriClasseur, *Pratique des assurances de particuliers*, 2013, p. 548.

<sup>330</sup> Yvonne Lamber-Laurent Favre and Leveneur, *Assurance de personnes*, 13th edition, 2011, pp. 124-127.

Moreover, in France, insurance is compulsory for automobiles, health and, in some cases, home (to cover the risk of fire and flood for tenants).<sup>331</sup> For this type of insurance, European Community law has higher standardization obligations, particularly with regard to minimum guarantees. Certain auto insurance clauses are also standardized.<sup>332</sup>

French law has eased the obligations of the insured. For example, since 1989, the insured no longer have to make a spontaneous declaration to the insurer; they are merely obliged to answer the insurer's questions and not make any false statements. This applies at both the pre-contractual stage and at the renewal stage. It is up to the insurer to ask questions to determine the insurable risk. This lightening of the insured's obligations is an important protection. It does not exist in Canada, where the consumer has a duty of spontaneous declaration - he must declare everything to the insurer that is relevant.

The easing of disclosure obligations of the insured in France and the UK make it less likely for consumers' claims to be denied or proportionally reduced. The duty to disclose is often misunderstood by consumers, who are not insiders to the insurance sector and are not sure what is important to declare to the insurer. This could give some weight, at least in the opinion of some consumers, to the argument made by digital P2P insurance platforms that standard insurers refuse consumer claims on unreasonable grounds.

The regulation of P2P insurance platforms raises an important issue. For example, in both France and Québec, an unregistered P2P digital insurance platform can circumvent the public policy objectives or the regulations of the insurance industry. For example, the work preparatory to the insurance offer is very similar to an intermediation activity.<sup>333</sup>

Also, insurers in France must meet considerable prudential requirements, which poses a problem for the groups on P2P insurance platforms. Some say that P2P insurance platforms should not be allowed to avail themselves of the status of an insurance firm without being registered and fulfilling the regulatory

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<sup>331</sup> Book II *Code des assurances*.

<sup>332</sup> Art. L. 111-4 *Code des assurances*,

<sup>333</sup> Thomas Nguema Evie, "Les impacts de l'économie collaborative sur le monde de l'assurance ?" *Assurance et gestion des risques*, Vol. 84 (1-2), p. 100

obligations of stock insurers<sup>334</sup> or mutual insurers.<sup>335</sup> Platforms will not respect the capital sufficiency criteria.<sup>336</sup> Accordingly, the current regulatory framework is not suited to the P2P insurance platform, with the result that, for now [TRANSLATION] “it remains relegated to being merely a popular savings vehicle that does not have the status of an insurance company due to the absence of legal oversight over its activities.”<sup>337</sup>

## 5.5 The USA

In the U.S., the regulation of the insurance sector is primarily the responsibility of the states rather than the federal government. On the other hand, some areas, such as health insurance and flood insurance, are regulated at the federal level. In recent years, the US Congress has adopted laws to widen the regulatory powers of the federal government.<sup>338</sup>

In terms of the supervision of the general insurance industry, we did not find any inspiring initiatives in the area of insurance regulation, especially compared to what is happening in other jurisdictions explored, including Europe. We noted that the regulators in different states were rather reserved about P2P digital insurance platforms, particularly as regards regulatory initiatives. This could be explained by the fact that P2P insurance platforms are still relatively rare in the United States.

Only one platform, Lemonade, seems to be active and accessible to a large number of US consumers. This observation was borne out by the US experts we interviewed. However, some other P2P insurance platforms claim they are available to US consumers.

In September 2016, Lemonade registered as an insurance “carrier” with the New York State regulator,<sup>339</sup> and has since complied with all applicable regulations.<sup>340</sup> The doctrine reports that it would like to

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<sup>334</sup> Art. R 321-1 Insurance Code and Thomas Nguema Evie, “Les impacts de l’économie collaborative sur le monde de l’assurance ?” *Assurance et gestion des risques*, Vol. 84 (1-2), p. 100.

<sup>335</sup> Art. L 322-26-1 R 211-1 *Code de la mutualité*.

<sup>336</sup> Thomas Nguema Evie, “Les impacts de l’économie collaborative sur le monde de l’assurance ?” *Assurance et gestion des risques*, Vol. 84 (1-2), p. 100.

<sup>337</sup> Thomas Nguema Evie, “Les impacts de l’économie collaborative sur le monde de l’assurance ?” *Assurance et gestion des risques*, Vol. 84 (1-2), p. 101.

<sup>338</sup> Peter Rogan, “Insurance and reinsurance Law review,” *Law Business Research*, 3rd Edition, 2015, p. 443.

<sup>339</sup> <https://www.dfs.ny.gov/about/press/pr1609211.htm>

<sup>340</sup> [https://www.dfs.ny.gov/insurance/exam\\_rpt/lemonade\\_f16.pdf](https://www.dfs.ny.gov/insurance/exam_rpt/lemonade_f16.pdf)

register with the regulator in 46 other states.<sup>341</sup> In this particular context, the current insurance framework seems adequate, since Lemonade has strict obligations to observe with regard to its solvency margin, market conduct and disclosure of information to the consumer, in the same way as any other type of insurer. Only time will tell what the real situation is.

N.B.: one of the characteristics of the Lemonade business model is refunding to members amounts not paid out in claims. This contravenes certain rebate laws, however. Currently, the law only allows such rebates to be paid to a charity chosen by the group. The doctrine suggests that the tax rules are not suited to this business model. Usually, when consumers make a donation to a charity, they get a tax receipt. Now, according to the law, if Lemonade gives to a charity on behalf of the group, it is Lemonade who will get the tax deduction, which probably does not reflect what the legislator had in mind.<sup>342</sup>

Furthermore, on March 1, 2018, the National Association of Insurance Commissioners (NAIC) issued a bulletin on P2P insurance platforms that stated that these platforms should be regulated in the same way as traditional insurers. This will result in some advantages for the regulators but also pose new challenges. Regulators should consider innovation while making sure they protect the insured and maintain market stability and consumer confidence in the insurance industry.<sup>343</sup>

## 5.6 Australia

In 2017, the German platform Friendsurance<sup>344</sup> became available to Australian consumers; the only product it offers is bicycle insurance to those aged 10 and older. It is probably the only such company to offer insurance to consumers between 10 and 17 years of age.<sup>345</sup>

There are two regulatory bodies in Australia: the Australian Prudential Regulation Authority (APRA), which seeks to ensure solvency requirements for insurers<sup>346</sup> and the Australian Securities and Investment Commission (ASIC), which provides supervision of business practices and consumer

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<sup>341</sup> Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 47.

<sup>342</sup> L'Atelier BNP Paribas, "L'assurance peer-to-peer prochaine étape de la désintermédiation ?" October 2014 and interview with U.S. experts and interview with an expert who wished to remain anonymous.

<sup>343</sup> [http://www.naic.org/cipr\\_t](http://www.naic.org/cipr_t)

<sup>344</sup> This platform has existed since 2010.

<sup>345</sup> <https://www.insurancebusinessmag.com/au/news/breaking-news/friendsurance-launches-first-australian-insurance-product-77532.aspx>

<sup>346</sup> <https://www.apra.gov.au/>

protection.<sup>347</sup> Most of these regulations originate at the federal level. Insurers must be registered with the regulator and observe strict supervision and solvency rules. Intermediaries, representatives and reinsurers are also regulated.<sup>348</sup>

Australia has not developed its own best practices like the European countries or Canada. However, the OECD has called ASIC's Innovation Hub regulatory sandbox an inspiring example of a regulatory sandbox in the insurance field.<sup>349</sup>

In Australia, an Insurtech might be eligible as regulatory sandbox if it distributes financial products and services and gives advice, but not if it is a manufacturer or gives loans.<sup>350</sup> Only general insurance products can be distributed, and they cannot include more than \$50,000 in coverage.<sup>351</sup> To be eligible for regulatory sandbox status, the Insurtech must have obtained its license less than 12 months prior or not yet have obtained it.<sup>352</sup> In addition, it must incorporate a potentially groundbreaking innovation that is of benefit to consumers.<sup>353</sup>

## 5.7 New Zealand

The insurance sector in New Zealand is overseen by two bodies: the Reserve Bank of New Zealand (RBNZ) and the Financial Market Authority (FMA). The RBNZ, which was formed by the *Prudential Insurance Supervision Act 2010* (IPSA),<sup>354</sup> is the insurance regulator.<sup>355</sup>

Both organizations require that any organization performing insurance operations is registered and subject to the regulations governing this sector.<sup>356</sup> There are obligations with regard to segregated insurance funds. Insurers must comply with minimum capital requirements depending on whether they offer life insurance or other types of insurance. Permits for intermediaries such as firms and

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<sup>347</sup> <https://asic.gov.au/>

<sup>348</sup> <http://www.nortonrosefulbright.com/files/insurance-regulation-in-australia-74993.pdf> and <https://asic.gov.au/>

<sup>349</sup> OECD, *Technology and Innovation in the Insurance Sector*, 2017, pp. 30-31.

<sup>350</sup> <http://download.asic.gov.au/media/4112096/licensing-exemption-for-fintech-testing-infographic.pdf>

<sup>351</sup> <http://download.asic.gov.au/media/4112096/licensing-exemption-for-fintech-testing-infographic.pdf><http://download.asic.gov.au/media/4112096/licensing-exemption-for-fintech-testing-infographic.pdf> and <https://asic.gov.au/for-business/your-business/innovation-hub/eligibility-for-assistance/>

<sup>352</sup> <https://asic.gov.au/for-business/your-business/innovation-hub/eligibility-for-assistance/>

<sup>353</sup> <https://asic.gov.au/for-business/your-business/innovation-hub/eligibility-for-assistance/>

<sup>354</sup> S. 3 et seq., *Insurance (Prudential Supervision) Act 2010*, 2010, No. 111.

<sup>355</sup> <https://www.rbnz.govt.nz/about-us>

<sup>356</sup> <http://www.nortonrosefulbright.com/knowledge/publications/163120/insurance-regulation-in-new-zealand>

representatives, are also supervised. However, it is not necessary to be registered to perform brokerage activities even though, in actual fact, the majority of organizations are.<sup>357</sup>

The Financial Market Authority (FMA) oversees professionals in the sector and the general conduct of the market.<sup>358</sup> It imposes many obligations with regard to sound management and disclosure of information. In its many interventions on innovation in the financial sector, it has asserted that P2P insurance platforms do not have the same financial disclosure obligations toward the regulator as other registered entities.<sup>359</sup>

It was reported in an article that the platform PeerCover,<sup>360</sup> which is a hybrid between a social financing platform and a P2P insurance platform, had registered with the regulator as a company offering financial services. The article reported that the regulator asked it to obtain legal advice to clarify its status. It also stated that the founder of PeerCover does not believe that it is acting like an insurer because insurance provides guarantees payment for uncertain future events, whereas PeerCover offers no guarantees. He claims that PeerCover acts like a trustee who is responsible for deposits of money - in this case, sharing depends on the warranty and is uncertain. PeerCover has, however, established a complaints procedure that can lead to a file being transferred to a dispute resolution body.<sup>361</sup>

In March 2017, the RBNZ launched a public consultation on the need for changes in the IPSA. In June 2017, 42 briefs were submitted to it; they came from a large number of stakeholders from a variety of fields.<sup>362</sup> One notable concern was whether the applicable framework was flexible enough to apply to all the players in the insurance market. Some of the briefs, especially those submitted by insurers, insisted that they had to be. The fear was that P2P insurance platforms will get around the prudential regulations.<sup>363</sup> In October 2017, the RBNZ announced that it planned a more exhaustive study on the question of which activities should require platforms to be subject to the same oversight as insurers.<sup>364</sup>

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<sup>357</sup> <http://www.nortonrosefulbright.com/knowledge/publications/163120/insurance-regulation-in-new-zealand>

<sup>358</sup> <https://fma.govt.nz/about-us/what-we-do/who-we-regulate/>

<sup>359</sup> <https://fma.govt.nz/compliance/guidance-library/advertising-and-comms-in-crowdfunding-and-p2p/>

<sup>360</sup> For more information on this platform, see Section 6.

<sup>361</sup> Insurance Institute, CIP Society, "Peer-to-Peer Insurance Models: Sharing economy adds [new] tech twist to [old] risk pooling"

<sup>362</sup> <https://www.rbnz.govt.nz/regulation-and-supervision/insurers/consultations-and-policy-development-for-insurers/active-policy-development/review-of-the-insurance-prudential-supervision-act-2010>

<sup>363</sup> *Ibid.*

<sup>364</sup> <https://www.rbnz.govt.nz/-/media/ReserveBank/Files/Publications/Policy-development/Insurers/IPSA-review/submissions/Sovereign-IPSA-review-submission.pdf?la=en>

## Section 6. Characterization and analysis of peer-to-peer insurance platforms

### 6.1 Our sample

In order to permit us to study (P2P) peer-to-peer insurance platforms in greater depth, we selected a representative sample of three existing models of platform.<sup>365</sup> Our goal was to determine the existence of factors likely to impact consumer protection.<sup>366</sup>

To be selected, the platforms had to meet certain criteria:

- they offer their services to consumers in some of the jurisdictions studied;<sup>367</sup>
- they provide information to consumers containing at least a description of services offered and a terms-of-service-type document;
- they provide this information in at least one of the two official languages.<sup>368</sup>

For each platform in our sample, we will focus, as far as possible, on the following:

- whether the platform is officially registered
- the services offered
- the presence of an insurer or reinsurer
- the way members are selected
- the way the group is managed
- the likelihood of being compensated as by an insurer
- the complaint and dispute handling mechanisms
- the recourse

We also briefly describe surprising practices or interesting products on these platforms, including the Russian Lexi Club (Rega) platform, the Czech Prvni Klubova platform and the British Gaggel platform.

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<sup>365</sup> Information on these models can be found in Section 2.

<sup>366</sup> As previously mentioned, only one of the platforms studied is available to Canadian consumers.

<sup>367</sup> These jurisdictions are Canada, Australia, the United States, France, the United Kingdom and New Zealand.

<sup>368</sup> Note that when a platform offers services in several countries, we were able to study it in a country where the information was available in French or English.

## 6.2 Platforms that act as brokers or firms

In this section, we report on the characteristics of platforms that act as a brokers or firms, first by presenting tables that afford an overview, then by providing more detailed information on each platform studied.

**Table 1 - Main features of platforms through which consumers deal with a broker or firm**

<b>Feature</b>	<b>Friendsurance</b>	<b>Bought By Many</b>	<b>Inspeer</b>	<b>So-sure</b>	<b>WeCover</b>	<b>Otherwise (Amalfi)</b>
<b>Licensed by a regulator</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Presence of an insurer<sup>369</sup></b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Group selected by the consumer</b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Managed by members<sup>370</sup></b>	No	No	No	No	No	No
<b>Probability of being compensated<sup>371</sup></b>	Yes	Yes	Yes	Yes	Yes	Yes
<b>Complaints mechanism</b>	Yes	Yes	Yes	Yes	N/A <sup>372</sup>	Yes
<b>Recourse</b>	Yes	Partial <sup>373</sup>	Yes	Yes	Partial <sup>374</sup>	Yes

<sup>369</sup> Note that, in this context, the insurer acts as a reinsurer, not as a traditional insurer.

<sup>370</sup> As previously mentioned, some platforms may include decisions about the eligibility of a new member and the amount of a claim. This is what is referred to here.

<sup>371</sup> Here, we refer to compensation similar to that offered by a traditional insurer.

<sup>372</sup> Since the company is registered with a regulator, the consumer should have the same recourse as with a firm or an insurer.

<sup>373</sup> There is no clause barring access to courts.

<sup>374</sup> It states that consumers may have access to civil courts.

## 6.2.1 Friendsurance

This company was founded in Germany in 2010. It describes itself as an independent broker and does business with more than 60 insurers. It offers home insurance, liability insurance and legal insurance.<sup>375</sup> In Australia,<sup>376</sup> it provides insurance for bicycles and for the risks associated with the use of a bicycle, including theft and injury.<sup>377</sup> Its brand image plays on the benefits of friendship. Its slogan is: “Friendsurance: Friends with benefits.” Individuals gather on the platform and form different groups. Upon payment of the premium, the group keeps 40% of the total; the rest goes to a traditional insurance company to cover claims, which may be substantial.<sup>378</sup>

**Table 2 - Main features of the Friendsurance platform**

Country	P2P Insurance Category	Products offered	Registered with the regulator
Australia and Germany	Broker and mutual insurer  Consumer group formed on the platform	<u>In Australia:</u> Insurance for bicycles and related risk (injuries, theft and death)  <u>In Germany:</u> Home insurance, liability insurance, and legal insurance.	Yes, holds a similar license to a broker or a firm in both jurisdictions  Deals with registered insurers and is subject to applicable framework

Friendsurance is registered with the regulator as a firm in both Germany and Australia; in both countries, it is subject to the applicable regulatory framework. In Australia, the insurer backing it is NWC, and Lloyd's acts as coverholder.<sup>379</sup> According to Michel Turcotte, it does not operate like an insurer, since it does not use its own capital and does not have to comply with the various solvency

<sup>375</sup> Insurance Institute, CIP Society, “Peer-to-Peer Insurance Models: Sharing economy adds [new] tech twist to [old] risk pooling” p. 5 and <https://www.friendsurance.com.au>.

<sup>376</sup> We studied the Australian platform because the documents were available in English.

<sup>377</sup> <https://www.friendsurance.com.au>

<sup>378</sup> Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84 (1-2), p. 81.

<sup>379</sup> In some countries such as Australia and the UK, this may seem similar to the concept of the agency in Québec, but the corporate structure is different. See <https://www.lloyds.com/market-resources/delegated-authorities/compliance-and-operations/about-coverholders>

rules. Moreover, since it manages the funds of groups, it is not limited to the operations of one firm. Fact: the insurers it does business with are regulated like all insurers.

Friendsurance provides consumers with a Financial Services Guide, as prescribed by law. This document describes the services offered and provides information about the following topics: how those who provide the services are remunerated, how personal information is protected and how the platform earns money.<sup>380</sup> It states that consumers can use Lloyd's internal complaints mechanism and, if they are not satisfied, they can turn to the Financial Ombudsman Service, an independent agency that offers a dispute resolution service.<sup>381</sup> Australian courts have exclusive jurisdiction over any dispute; consumers retain all civil remedies.

Friendsurance also provides a disclosure document on the product and the contents of the policy. This document, entitled *Product Disclosure Statement Including Policy Wording*, is 24 pages long. It explains, in relatively simple language, who the main stakeholders are, and describes them. It also provides information on eligibility requirements, what risks are covered, the withdrawal period, the procedure for cancellation and its impact on the refund and complaint handling mechanisms. It contains another document on the policy. This other document explains what risks are covered with regard to bicycles and their use (including theft, accident and disability) and the maximum amount of coverage, exclusions and definitions. Examples of risks posed by bicycles (broken teeth, broken leg, etc.) are illustrated with scenarios presented in the tables, as an aid to understanding.

N.B. Claims are made in a similar manner as with an insurer, but Friendsurance insists that the process is simpler and faster. The insured retain the same rights as when dealing with a traditional insurer. If there is money remaining in a group at the end of the fiscal year, that money is redistributed to the members of the group. If one member of a group does not claim it, each member could receive a bonus.<sup>382</sup> There are fears that this will encourage members not to make a claim for damages, but the risk is lower with this model than with the self-governance model.<sup>383</sup>

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<sup>380</sup> <https://www.friendsurance.com.au/documents/BikeProductDisclosureStatement.pdf>

<sup>381</sup> <https://www.friendsurance.com.au/documents/BikeProductDisclosureStatement.pdf>

<sup>382</sup> <https://www.friendsurance.com.au> and Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 48.

<sup>383</sup> Recall that in this model, the risk is sharing among individuals.

## 6.2.2 Bought by Many

**Bought by Many** is a UK platform that acts as a broker. It has been in operation since 2012, but has only offered products since 2017. It is available to consumers in England and Wales. It started its activities by providing insurance for exotic pets and travel insurance for people with health problems,<sup>384</sup> products that insurers generally do not offer or offer at exorbitant prices.<sup>385</sup>

**Table 3 - Main features of the Bought by Many platform**

Country	P2P Insurance Category	Products offered	Registered with the regulator
UK (England, Wales)	Broker and mutual insurer  Consumer group formed on the platform	Pet insurance and travel insurance for people with health problems  Seems to offer life insurance and sickness and accident insurance <sup>386</sup>	Yes, with the Financial Conduct Authority (FCA)  Does business with insurers who are also registered and subject to applicable framework

Interested consumers form groups based on their personal characteristics and the type of insurance they are looking for. For example, we found a group of dancers who wanted accident and sickness insurance, a group of young professionals looking for life insurance and a group of smart home owners who wanted home insurance.<sup>387</sup>

We analyzed the website, the terms of the agreement and the Bought By Many privacy policy. The company claims to be a broker and is listed with the Financial Conduct Authority. It is subject to all the obligations related to its licensure. It does business with more than thirty insurers<sup>388</sup> who are also registered with the regulator and subject to the regulations for insurers, including the rules for dealing with consumers (disclosure obligations and complaint mechanisms), and solvency rules. Consumers are

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<sup>384</sup> <https://boughtbymany.com/>

<sup>385</sup> <https://boughtbymany.com/>

<sup>386</sup> At least, that is what its website seemed to indicate.

<sup>387</sup> <https://boughtbymany.com/home-insurance/>

<sup>388</sup> <https://boughtbymany.com/terms/>

also allowed access to UK courts and it is the laws in that jurisdiction that will be applicable in the event of a dispute. Despite all this, Bought By Many states that its service is offered without a guarantee; it limits its liability except where prohibited by law.<sup>389</sup>

### 6.2.3 Inspeer

The French company **Inspeer**, which has existed since 2014, functions in a similar way to the previous two companies. It provides collaborative insurance to electric car drivers. Its members have access to comprehensive insurance, including civil liability insurance, collision insurance and insurance for the electric car batteries.<sup>390</sup> The insurance is provided by a registered, regulated insurer.<sup>391</sup>

**Table 4 - Main features of the Inspeer platform**

Country	P2P Insurance Category	Product offered	Registered with the regulator
France	Broker and mutual insurer  Consumer group formed on the platform	Auto insurance for electric car drivers	Yes, with ORIAS <sup>392</sup>  Subject to the disclosure obligations of the insurance code  Does business with insurers, who are registered and subject to applicable regulatory framework

<sup>389</sup> <https://boughtbymany.com/terms/>

<sup>390</sup> <https://www.inspeer.me/garanties-et-assistance/>

<sup>391</sup> <https://www.inspeer.me/wp-content/uploads/2017/09/Dispositions-generales-Inspeer-EQAF0693A-1707.pdf>

<sup>392</sup> This is the sole register for insurance, banking, and finance intermediaries.

Inspeer is registered as a dealer by the controller.<sup>393</sup> We analyzed the information found on its website, including the documents “Legal Notice,”<sup>394</sup> “The general provisions of the Electric Car Insurance”<sup>395</sup> and special provisions.<sup>396</sup>

Inspeer is registered with ORIAS<sup>397</sup> and meets the financial obligations set forth under Articles L512-6 and L 512-7 of the *Code des assurances*. It states that it offers insurance products and is in compliance with all the rules regarding disclosure of information. It also stresses the importance of not making false statements and the impact this could have on claims made by the insured. It provides information on the right of waiver, the processing time for a claim, and the complaint and dispute mechanisms. It limits its liability when the damage is ascribable to the insurer. It allows members to be rewarded for good conduct.<sup>398</sup>

#### 6.2.4 So-Sure

**So-Sure** is a platform in the UK available in England and Wales that provides insurance for smart phones. It claims to put its entire focus on good customer experience, especially at the stage of claims (it states that its members are compensated on the same day). Consumers are grouped according to the smart phone model they own. Members can recruit other members, which allows them not only to pay a reduced premium but also to receive a sometimes substantial bonus. Bonuses are also paid to the members of a group when no claims have been made.

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<sup>393</sup> <https://www.inspeer.me/informations-juridiques/#cgu>

<sup>394</sup> <https://www.inspeer.me/informations-juridiques/#cgu>

<sup>395</sup> <https://www.inspeer.me/wp-content/uploads/2017/09/Convention-dAssistance-Inspeer-ME3-1707.pdf>

<sup>396</sup> <https://www.inspeer.me/wp-content/uploads/2017/09/Disposition-speciales-Inspeer-EQAF065A-1707.pdf>

<sup>397</sup> This is the sole register for insurance, banking, and finance intermediaries.

<sup>398</sup> <https://www.inspeer.me/informations-juridiques/#cgu>

**Table 5 - Main features of the So-Sure platform**

Country	P2P Insurance Category	Product offered	Registered with the regulator
UK	Broker and Mutual insurer  Consumer groups formed on the platform	General insurance for smart phones	Yes, with the CFA  Deals with registered insurers who are subject to the applicable framework

We analyzed certain information on the website, and an insurance policy for an iPhone 8.<sup>399</sup> So-Sure is registered with the Financial Conduct Authority and is a licensed broker. It does business with an insurer registered in Estonia.<sup>400</sup> The information in the policy appears clear and simple - So-Sure uses a multilayered presentation<sup>401</sup> that facilitates reading and allows information to be located quickly. It provides information on the risk covered and the conditions and exclusions. It also shows how to make a claim and a complaint, first internally, then to the Ombudsman. It states that the applicable law is English law and that the remedies are not limited.<sup>402</sup>

### 6.2.5 WeCover

This is a French platform that offers car insurance. It works in a similar way to the platforms discussed previously.<sup>403</sup> WeCover is registered with ORIAS and is subject to oversight by l’Autorité de contrôle prudentiel et de résolution (ACPR). When necessary, consumers can avail themselves of the internal complaints and dispute settlement procedure; if they are not satisfied, they may turn to la La Médiation de l’assurance.<sup>404</sup>

<sup>399</sup> To access this policy, the anonymous tester had only to indicate the model of his smartphone, which brought him to a group where, before deciding to join, he was able to read the insurance policy; we did not purchase the insurance.

<sup>400</sup> <https://wearesosure.com/phone-insurance/apple+iphone+8+64GB>

<sup>401</sup> <https://wearesosure.com/phone-insurance/apple+iphone+8+64GB>

<sup>402</sup> The multilayer format presents the information in condensed form with intertitles. Consumers can access more detailed information by clicking on the tabs.

<sup>403</sup> <https://wearesosure.com/phone-insurance/apple+iphone+8+64GB>

<sup>404</sup> <https://www.wecover.fr>

<sup>405</sup> <https://www.wecover.fr/mentions/>

**Table 6 - Main features of the WeCover platform**

Country	P2P Insurance Category	Product offered	Registered with the regulator
France	Broker and mutual insurer  Consumer groups formed on the platform	Car insurance	Yes, with ORIAS  Subject to the supervision of l’Autorité de contrôle prudentiel et de résolution (ACPR)  Does business with registered insurers subject to applicable framework

### 6.2.6 Otherwise (Amalfi)

**Otherwise** is a French platform. Its mode of operation is similar to that of the other platforms we have already discussed. It provides “complementary” health insurance,<sup>405</sup> “super-complementary” health insurance<sup>406</sup> and pet insurance.<sup>407</sup> It pays out bonuses of up to 25% of the premium payment. It is registered with ORIAS and is subject to the supervision by the ACPR.<sup>408</sup> It does not restrict customers’ access to the French courts, but limits its own liability with regard to any of the information on its website. It states that it does not offer advice.<sup>409</sup>

**Table 7 - Main features of the Otherwise (Amalfi) platform**

Country	P2P Insurance Category	Products offered	Registered with the regulator
France	Broker and mutual insurer  Consumer groups formed on the platform	Pet insurance, complementary health insurance and “supercomplementary” sickness insurance	Yes, with ORIAS  Subject to supervision by f the ACPR  Deals with registered insurers who are subject to the applicable framework

<sup>405</sup> France, like Canada, has a state-run public health system. However, some things are not covered, such as optometrists, dentists and certain expenses related to hospitalization, e.g. private rooms.

<sup>406</sup> Consumers may procure this to get better service than what their employer’s group insurance offers; for example, to have no waiting periods.

<sup>407</sup> <https://otherwise.fr>

<sup>408</sup> <https://otherwise.fr/mentions-legales/>

<sup>409</sup> <https://otherwise.fr/mentions-legales/>

### 6.3 Other types of platforms

In this section, we list characteristics found in other types of platforms, i.e. those that include an insurer and consumer groups as well as those who operate according to a self-governance model.

**Table 8 - Main features of other platforms**

Characteristics	Lemonade	Besure	Teambrella
Services offered	Insurer	Risk Sharing self-governance model	Risk Sharing self-governance model
Permit from a regulator	Yes	No	No
Presence of an insurer <sup>410</sup>	Yes	No	No
Group selected by the consumer	Yes	Yes	Yes
Managed by members <sup>411</sup>	No	Yes	Yes
Probability of being compensated <sup>412</sup>	Yes	Less than with an insurer	Less than with an insurer
Claims mechanism	Yes	No	No
Recourse	Yes <sup>413</sup>	Mostly <sup>414</sup>	Almost always <sup>415</sup>

<sup>410</sup> Note that, in this context, the insurer acts like a reinsurer rather than a traditional insurer.

<sup>411</sup> As previously mentioned, on some platforms, they may make decisions about the eligibility of a new member and the amount of a claim. This is what is referred to here.

<sup>412</sup> Here, we refer to similar compensation to that offered by a traditional insurer.

<sup>413</sup> Lemonade has an insurer's license (carrier). It is therefore likely that the consumer has access to the same resources as a traditional insurer.

<sup>414</sup> It limits consumers' rights and access to courts by requiring that recourse must be filed in the State of Delaware.

<sup>415</sup> It limits access to the courts and the rights of consumers. It imposes binding arbitration.

### 6.3.1 Lemonade

The US company Lemonade is the only one in which there was an insurer and consumer groups. It is composed of three organizations: Lemonade Insurance Company (hereinafter Lemonade),<sup>416</sup> an insurer,<sup>417</sup> Lemonade Insurance Agency LLC, which acts as intermediary, and Lemonade Ltd., which provides the technology. In September 2016, Lemonade obtained its insurance license from the New York State Regulator. Lemonade is available in NY state and in 15 other states<sup>418</sup> as well as the District of Columbia. It is subject to the same obligations as insurers, particularly as regards solvency rules.

**Table 9 - Main features of the Lemonade platform**

Country	P2P Insurance Category	Product offered	Registered with the regulator
United States	Standard insurer and mutual insurer  Consumer groups formed on the platform	General insurance for renters and owners	Yes, it has an insurance license (as a carrier) in the US states where it offers its services

Lemonade offers home insurance to tenants and landlords.<sup>419</sup> It says it offers insurance 2.0 and claims that its business model promotes transparency and speed. It says that those who deal with are able to can buy insurance in 90 seconds and be compensated in three minutes. It says its prices are lower than those of traditional insurers.<sup>420</sup>

Lemonade says it offers insurance with “heart.” It enables consumers to form groups according to the charity whose cause is dear to their heart, and it is to this organization that any remaining surplus will be paid – which is quite a departure from what traditional insurers do.

<sup>416</sup> This title is disputed by other platforms such as Prvni Klubova.

<sup>417</sup> Lemonade got its insurance license from the New York State regulator in September 2016. See <https://www.lemonade.com/lemonade-goes-nationwide> and <https://www.lemonade.com/terms-of-service>.

<sup>418</sup> These are the following states: California, Illinois, Texas, Rhode Island, New Jersey, Nevada, Ohio, Georgia, Pennsylvania, Maryland, Iowa, Wisconsin, Arizona, New Mexico and Michigan.

<sup>419</sup> Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 47.

<sup>420</sup> <https://www.lemonade.com>

Lemonade aims to create policy 2.0, a simple policy that is friendly, relevant and digital - the policy will be sleek, relatively short and written in easy-to-understand language. It claims that it wants to provide “open source” platform.<sup>421</sup> It also says that it encourages the development of a high degree of autonomy in its policies and wants to expand the scope of insurance coverage, its aim being to reduce the number of exclusions and make them easier to understand. However, it says that not all exclusions can be eliminated.<sup>422</sup>

It charges a monthly fee that largely serves to provide consumers with reinsurance and to satisfy the rules related to the capital maintenance fund; these obligations accrue to it under its status as an insurer. Lemonade’s first objective is to be able to pay claims, which it does thanks to reinsurance. Besides, Lemonade says that it is more likely to indemnify than an insurer, since its goal is not to make a profit. It also has a B-Corp license, which means that it has to take into account the interests of all its members, not just those of its shareholders.<sup>423</sup>

We found no information on the site related to complaint handling mechanisms. However, since Lemonade is registered as an insurer, it is subject to the same supervision as insurers. Logically, the consumer should be able to use the complaint mechanisms provided by the regulator and civil remedies. We cannot state with certainty, however, that this is possible.

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<sup>421</sup> Open source refers to any program whose source code is made available for use or modification as users or other developers see fit. This allows for the open sharing of IT knowledge.

<sup>422</sup> <https://whatis.techtarget.com/definition/open-source>

<sup>423</sup> <https://stories.lemonade.com/worlds-first-open-source-insurance-policy-blog-9c3ebb70edff>

<sup>423</sup> <https://www.bcorporation.net/community/lemonade-inc>.

### 6.3.2 Besure

As previously mentioned, we found only one true P2P insurance platform in Canada; this is Besure, which is based in Calgary.<sup>424</sup> Besure describes itself as a risk-sharing platform and an alternative to insurance. It provides general insurance for certain goods such as electronic appliances, bicycles, skis and smart phones. It also provides insurance for pets. It aims to act as a “safety net for those who are left out by the insurance industry.”<sup>425</sup> It claims it offers peace of mind for small claims, such as losing a bicycle or a guitar.<sup>426</sup>

**Table 10 - Key features of the Besure platform**

Country	P2P Insurance Category	Products offered	Registered with the regulator
Canada	self-governing	Self-insurance for items such as musical instruments, eyeglasses, bicycles and smartphones  Self-insurance for pets	No  It says it does not offer insurance or intermediation activities  It does not offer the technology for putting consumers in contact with each other.

We studied the website, the terms of the agreement and the Besure privacy policy.<sup>427</sup> The company operates through social networks, in order to promote transparency and learn more about prospective members. At the admission stage, consumers may be invited or find a group (or “pool”) they can join on the company website. Each pool is organized around a specific insurable risk; for example, there may be a skier pool.<sup>428</sup> Anyone who wants to join a pool has to accept the terms of the agreement, the privacy policy and the rules. Once the pool has enough members to enable it to start its activities, the amount of the members’ contribution cannot increase. Besure takes a 10% commission.<sup>429</sup>

<sup>424</sup> We cannot say that Besure is truly accessible to consumers. Two of our experts have raised doubts. In addition, in the winter of 2017-2018 and the spring of 2018, we noticed that it was no longer possible to join a group. From that moment, the company also stopped responding to our emails.

<sup>425</sup> Insurance Institute, CIP Society, *The collaborative insurance models: sharing economy, new technologies and sharing of risks*, comment reported by Mr. Lalani on p. 3.

<sup>426</sup> <https://besure.com/pages/About+Us/9>

<sup>427</sup> We also contacted Besure for a phone interview. Although the company initially accepted, the interview did not take place.

<sup>428</sup> Insurance Institute, CIP Society, *The collaborative insurance models: sharing economy, new technology and risk pooling*, p. 3.

<sup>429</sup> Insurance Institute, CIP Society, *The collaborative insurance models: sharing economy, new technology and risk pooling*, p. 4.

The pools are formed and administered by the members. Each pool has its own webpage where the members may follow the pool's activities. This is good from the point of view of transparency, because members can see exactly where their money goes. Besure says it uses actuarial calculations to determine the insurable risk. When a claim is made, the members decide whether it is valid. As Besure says: "Who better than a skateboarder to decide on a claim by a skateboarder?"<sup>430</sup>

Besure says it only provides the technology or the platform that allows consumers to connect and form pools. It says its platform allows people to self-insure, and that this is its only commitment to consumers. In many places in the terms of the agreement and in the platform's regulations, Besure denies that it is an insurer, broker or intermediary. It also insists that it is not bound to an insurer and does not guarantee compensation. Finally, it says it is not involved in any decision about the pools.<sup>431</sup>

Nevertheless, in several places on its website, Besure uses the term "social insurance" (social insurance) or "self-insurance". In its "About Us" section, it talks about the services offered by an insurer, then adds: "But what about the smaller things, like your SMARTPHONE, your GLASSES, or your favourite GUITAR? Many of these items are not protected for loss or damage by traditional insurance and even if it is, you risk premium hikes and deductibles that are higher than the item's value. Besure's representations may lead one to believe that it offers an insurance product or similar product."<sup>432</sup>

Moreover, Besure says it is taking steps to protect consumer privacy, including anonymizing information before sharing it for marketing purposes and targeted advertising. Besure believes that the responsibility for the confidentiality of accounts rests with consumers. The company collects a lot of personal information, some of which does not seem necessary for the service. This is particularly the case for the data related to members of different pools, and those obtained by third parties or via a website. This latter may include information the consumer posted on various social networks, as well as information obtained from third party partners. Besure also collects the characteristics of the different

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<sup>430</sup> This phrase is inspired by a statement on the Besure website: "A snowboarder is better educated on snowboarding than a cold-hating adjuster, right?"

<sup>431</sup> <https://besure.com/terms-conditions> <https://besure.com/>

<sup>432</sup> <https://besure.com/terms-conditions> <https://besure.com/>

devices used to operate the service, including IP addresses, usernames and geographical data;<sup>433</sup> such data is also considered personal information by the Canada's Privacy Commissioner.<sup>434</sup>

Although the data collected is necessary for the service, there is a problem with sharing this information. Besure says it shares some personal information for marketing purposes.<sup>435</sup> This is a matter for concern from the standpoint of consumer protection, even though the data is anonymized.

Besure lays down rules of conduct that members must follow; if they do not, they risk being expelled from the platform. Besure says it is not responsible for the content shared on its platform. It adds that consumers use the platform at their own risk and offers no guarantees: either those conferred by law or those typically found in contracts.

Besure limits the rights and remedies of consumers. It imposes the laws of the State of Delaware, regardless of where the contract was concluded or of any provisions respecting conflicts between laws. It states that consumers may only institute proceedings against it in Delaware courts. If Besure were characterized as an insurer or firm, this would contravene the laws of all the Canadian provinces we studied. Also, if its contract were characterized as a consumer contract, this would contravene the laws and decisions of the Supreme Court. In Québec, it would also be a violation in civil law.<sup>436</sup>

But it gets worse. Besure states that any consumer who uses its platform must indemnify the company if an action is brought against it as a result of their behaviour; it also waives in advance any recourse against the platform including any action brought by a third party.<sup>437</sup>

### 6.3.3 Teambrella

Teambrella is a Russian P2P self-governance-type insurance platform that uses blockchain technology and cryptocurrency. It was launched in October 2017 and is accessible to some European (Dutch) consumers and South American consumers. It describes its service as "Not insurance. A lot better."

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<sup>433</sup> <https://besure.com/privacy-policy>

<sup>434</sup> OPC "What an IP address can reveal about you," May 2013, PIPEDA No. 2006-351, and Teresa Scassa, *Electronic Commerce and Internet Law* 2nd Edition, CCH Canadian, Toronto, 2012, p. 174.

<sup>435</sup> <https://besure.com/privacy-policy>

<sup>436</sup> <https://besure.com/terms-conditions>

<sup>437</sup> <https://besure.com/terms-conditions>

The members' only commitment is to form groups to insure autos,<sup>438</sup> pets and items of personal property such as cell phones, bicycles and computers. They undertake not to regroup for personal insurance.<sup>439</sup>

Name	P2P Insurance Category	Products offered	Registered with the regulator
<p>Russia</p> <p>Accessible in Europe and South America</p> <p>Says it wants to access US market</p>	<p>Self-governing</p>	<p>Self-insurance for some furniture and personal property (cellular, bicycles and computers), pets and auto</p>	<p>No</p> <p>It says it does not offer insurance or intermediation activities</p> <p>It does not offer the technology for putting consumers in contact with each other.</p>

Members decide the eligibility of other members, the admissibility of the claims and the amount awarded.<sup>440</sup> Teambrella is the only platform to permit the use of an Ethereum cryptocurrency wallet.<sup>441</sup> Each consumer's financial liability is thus limited to the sum that is in their wallet.<sup>442</sup>

On the Teambrella platform, experts can perform activities that are quite similar to those of an insurance adjuster. The company says that these experts must have training, be experienced as an adjuster or have significant experience that would be helpful in such cases. There are a series of rules applicable to experts.

<sup>438</sup> We should mention that because of this, it is riskier to use this platform than all those discussed earlier. In auto insurance, non-compensation has significant financial consequences. Moreover, it is important to note that it was impossible to find out what type of car insurance was offered. <https://teambrella.com>

<sup>439</sup> <https://teambrella.com> <https://teambrella.com/TermsOfService.pdf>

<sup>440</sup> <https://teambrella.com/TermsOfService.pdf>

<sup>441</sup> <https://teambrella.com>

<sup>442</sup> <https://teambrella.com> and Insurance Institute, CIP Society, *The collaborative insurance models: sharing economy, new technology and risk pooling*, p. 2, and <https://teambrella.com/WhitePaper.pdf>.

We analyzed the terms of use for North American users and took them into account in our analysis. There are several worrying clauses, most of which are similar to those noted with Besure. For example, in the Disclaimer section, Teambrella says that its service is not insurance and is not intended to promote insurance coverage in any way whatsoever. Teambrella claims that it is only a digital platform that aims to connect consumers so that they can form groups or “teams.”<sup>443</sup>

Teambrella’s role is limited to providing the technology for the platform. Teams can manage certain aspects such as the admission of members, claim applications and review, and approval and management of payments. Teambrella sets numerous default settings, but the teams can change them. It also imposes a series of rules that members must comply with.<sup>444</sup> These relate to disclosure of information on payments, eligibility criteria for new members, explanations about payment, estimating the amount of compensation, remuneration of experts and the platform’s settlement mechanisms. Like Besure, Teambrella allows team members to settle disputes among themselves.<sup>445</sup>

Also like Besure, Teambrella tells its members that they agree to use their platform at their own risk and that it is not responsible for any risks related to the self-governance model, the technology of the blockchain and the cryptocurrency. It says that while it sets up procedures, it cannot guarantee that there will be no fraud and that if fraud were committed by a member, it would not be responsible. Each member will absorb the entire financial impact of the use of the platform and acknowledge that they have sufficient funds to weather a financial loss.<sup>446</sup>

Like Besure, Teambrella offers no guarantees. Furthermore, it limits the rights and remedies of consumers by imposing the laws of the State of Delaware. It also imposes compulsory arbitration and limits access to the courts. It states that no member shall claim any form of damage related to the use of the platform and any material damage that may result from it.<sup>447</sup>

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<sup>443</sup> <https://teambrella.com> and <https://teambrella.com/WhitePaper.pdf>

<sup>444</sup> <https://teambrella.com> and <https://teambrella.com/WhitePaper.pdf>

<sup>445</sup> <https://teambrella.com> and <https://teambrella.com/WhitePaper.pdf>

<sup>446</sup> <https://teambrella.com> and <https://teambrella.com/WhitePaper.pdf>

<sup>447</sup> <https://teambrella.com> and <https://teambrella.com/WhitePaper.pdf>

### 6.3.4 Some other platforms

During our research, we came across several other platforms but were unable to verify whether they were active or not. Some appear to provide access to products similar to those we studied. Others provide access to surprising products and services. We have not included these in our analysis, but we present them briefly here.

**Lexi Club**,<sup>448</sup> Owned by Rega, offers pet insurance to Russian consumers. It would like to reach the European and US markets. As with Besure and Teambrella, it is the members who decide on all aspects of the relationship, including admission, acceptance and the amount of compensation. The platform claims not to offer insurance and is not registered with a regulator. Furthermore, it limits consumer redress. Lexi Club is accessible through a Facebook or Telegram<sup>449</sup> account. It operates using blockchain technology and the payment is in cryptocurrency. It also says it uses smart e-contracts to speed up payment of the claim. It should be noted that everything that Rega proposes seems to be still in the embryonic stage. Rega wants to expand. The next step for Rega will be to provide insurance for “gadgets,” home insurance and auto insurance.<sup>450</sup>

The Czech **Prvni Klubova** platform has offered auto insurance,<sup>451</sup> home insurance and liability insurance since 2010. It claims to be returning to the source by promoting trust, community and financial assistance.<sup>452</sup> It is registered with the regulator.

The British **Gaggel** platform offers a service similar to a risk-sharing platform. However, this is not quite the same thing as insurance, but rather a guarantee of getting a quick repair for a cell phone through a network of repairers. Few documents were accessible through its website. In addition, we did not find anything there indicating that it is registered as a broker; also, it expressly states that it is not an insurer and does not manage funds.<sup>453</sup> This raises concerns, but given the lack of access to any other

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<sup>448</sup> <http://lexiclub.org/indexEN.html>

<sup>449</sup> <http://lexiclub.org/indexEN.html> and <https://rega.life/regawhitepaper.pdf>

<sup>450</sup> <http://lexiclub.org/indexEN.html> and <https://rega.life/regawhitepaper.pdf>

<sup>451</sup> Since the information was being transmitted in Czech, it was impossible to know what kind of auto insurance was being offered.

<sup>452</sup> <https://www.prvniklubova.cz/en/default.aspx> and Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 47.

<sup>453</sup> <http://www.gaggel.com/Faq>

documents, we cannot state with certainty which real protections they offer consumers and which they do not.

The Chinese **TonJuBao** (protect everything) platform offers social risk insurance. Each member pays 400 yuan for admission and, in the event of divorce, for example, will receive 12,000 yuan a month for a year.<sup>454</sup> The platform also provides insurance for kidnapped children and unemployment insurance.

The Japanese **Bitpark** platform, whose services seem halfway between popular savings and insurance, wants to offer “smart” contracts. It says it started by providing short-term and travel insurance. Its activities seem fairly embryonic.<sup>455</sup>

There are **numerous platforms mentioned** in the doctrine **as models to emulate**, such as **CycleSyndicate** or **HeyGuevara**.<sup>456</sup> There is also much talk of hybrid P2P insurance and crowdfunding platforms such as **PeerCover** and the Canadian fertility platform **Glow**. However, at the time of drafting this report, these platforms seemed to be no longer active.

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<sup>454</sup> Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84 (1-2), p. 82.

<sup>455</sup> [https://bitpark.net/BITPARK\\_whitepaper1.2.pdf](https://bitpark.net/BITPARK_whitepaper1.2.pdf)

<sup>456</sup> OECD, *Technology and Innovation in the Insurance Sector*, 2017, p. 18, Insurance Institute, CIP Society, *The collaborative insurance models: sharing economy, new technology and risk pooling* on p. 5. Michel Turcotte, “L’assurance sans assureur ou le P2P,” *Assurances et gestion des risques*. Vol. 84 (1-2), p. 81.

## Section 7. Conclusion and Recommendations

### 7.1 In conclusion

The field of insurance is highly regulated, which is necessary in order to protect the stability of the financial sector, to ensure that stakeholders are competent and honest, and to protect consumers.<sup>457</sup> To achieve these goals, insurers have multiple obligations, particularly in terms of information, credit and equity.<sup>458</sup> They must also grant consumers access to dispute-settlement and complaint-processing mechanisms, as well as remedies.

The guidelines apply to insurers and intermediaries involved within the context of an insurance contract. In all the Canadian provinces studied, the contracts have similar features. An insurer agrees, upon payment of a premium or a contribution, to pay the insured or a third party a benefit if the insured risk materializes.<sup>459</sup> There is also a regulatory framework proper to firms and certified representatives. The distribution of insurance products is a reserved activity that requires a permit and has to respect numerous obligations.<sup>460</sup>

Digital peer-to-peer (P2P) insurance platforms offer consumers access to insurance by alternative means. They claim to be returning to the source while revolutionizing the insurance sector. Some act like brokers or firms, others like insurers, while yet others adopt a self-governance model. Our study of them led us to conclude that they represent a return to mutual insurance. In doing so, they have several advantages - the products are inexpensive, the service is rapid (both at the time of getting insured and at the time of compensation), they demonstrate a certain degree of transparency and their customers enjoy relative autonomy.

These platforms, however, at least the ones that are registered and subject to the supervision of the insurance sector, raise some serious issues as regards consumer protection. These issues are similar to

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<sup>457</sup> Denis Boivin, *Insurance Law*, 2nd Edition, *Essentials of Canadian Laws*, LexisNexis, 2015, pp. 61 to 63.

<sup>458</sup> See section 4.

<sup>459</sup> Art. 2389 *Civil Code of Québec*, RLRQ c CCQ-1991 and Didier Lluellas "terrestrial insurance Accurate" 5th Edition, Éditions Thémis, 2014, p. 12.

<sup>460</sup> As discussed in Section 4, those obligations are particularly stringent in Québec, where the insurer is required to be registered, to respect a code of ethics and to pursue continuing education.

those related to online distribution of insurance products without the intervention of a certified representative. For one thing, they involve complex products that are difficult for consumers to compare. For another, there is significant information asymmetry between uninitiated consumers and insiders from the traditional insurance milieu and the platforms.

Furthermore, on platforms where speed is the watchword, insurance products are offered *à la carte*<sup>461</sup> and appear to be simple. But there is no such thing as a simple insurance product. In the words of a brief by the *Chambre de la sécurité financière*, [TRANSLATION] “these so-called “simple” products actually have nothing simple about them, apart from the need they aim to fill.<sup>462</sup>” All this increases the risk that consumers might end up purchasing an insurance product that is unsuited to their needs, leading them to being underinsured or denied compensation.<sup>463</sup>

While analyzing the risks posed by P2P insurance platforms for consumers, we realized that they differ from one type of platform to another. On the one hand, our research revealed that platforms that act like brokers and those that act like insurers are usually registered with the regulator and subject to the supervision of actors in the field of insurance, which gives consumers a significant degree of protection - protection that is similar to that found in insurance products distributed online.

On the other hand, platforms based on the self-governance model are generally not registered with a regulator and say that they are not subject to supervision by the insurance domain. They refuse to give any guarantees, deny any liability and severely restrict consumer redress. These types of clauses are worrying because in the field of insurance, consumers are particularly vulnerable. In addition, the platforms use language that gives the impression that they in fact do offer insurance, which can be confusing for consumers.

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<sup>461</sup> Brief by the *Chambre de l’assurance de dommages*, “*Loi visant à améliorer l’encadrement du secteur financier, la protection des dépôts d’argent et le régime de fonctionnement des institutions financières*,” Bill 141, January 17, 2018, p. 7 et seq. and *Chambre de l’assurance de dommages*, “*Rapport sur l’application de la Loi sur la distribution de produits et services financiers*,” September 2015, p. 11.

<sup>462</sup> Brief by the *Chambre de l’assurance de dommages* “*Loi visant à améliorer l’encadrement du secteur financier, la protection des dépôts d’argent et le régime de fonctionnement des institutions financières*,” Bill 141, September 2015, p. 11

<sup>463</sup> Brief by the *Chambre de l’assurance de dommages* “*Loi visant à améliorer l’encadrement du secteur financier, la protection des dépôts d’argent et le régime de fonctionnement des institutions financières*,” Bill 141,” January 17, 2018, p. 7 et seq. and *Chambre de l’assurance de dommages*, “*Rapport sur l’application de la Loi sur la distribution de produits et services financiers*,” September 2015, p. 11.

The emergence of P2P digital insurance platforms, which are currently only available abroad, raises important issues with regard to consumer protection. In the face of predictions that the insurance sector is “ripe to be disrupted”<sup>464</sup> provincial regulators could find themselves at a crossroads. To protect consumers, they have to be proactive while leaving room for innovation, since innovation could promote healthy market competition, which is also beneficial for consumers.

For provincial regulators, the first solution is to continue to be vigilant and to exercise diligence in intervening as soon as a P2P insurance digital platform becomes available on their territory. They should then conduct an analysis of the platform’s activities and respond appropriately. If it is seen to be carrying out reserved activities, they can force it to register as an insurer or a firm and ensure that it complies with the applicable regulations.

Furthermore, if we consider that P2P insurance platforms are subject to the regulations framing reciprocal unions in Québec,<sup>465</sup> they would then be regarded as insurers. However, this does not solve all the problems. Since reciprocal unions benefit from a lighter regulatory regime, consumers might then be less protected than if they were dealing with a traditional insurer. In any event, if the platforms refuse to register and comply with the applicable framework, the regulators will have to intervene to halt their activities. This is the option favoured by the majority of authors and experts we interviewed. Given the current regulatory framework for insurance in the provinces studied, this is also the solution we advocate.<sup>466</sup>

Not everyone agrees, however. They fear that acting in this way would be harmful to innovation and competition. In Canada, in the area of securities, businesses can qualify to enter the regulatory sandbox. This could allow them to benefit from registration or an exemption for a limited period, with an increase in the maximum investment and a longer reporting<sup>467</sup> period.<sup>468</sup> Under the current framework, companies in the field of insurance do not appear to be eligible for the regulatory sandbox. However,

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<sup>464</sup> Insurance Institute, *Sharing Economy: Implications for the Insurance Industry in Canada*, 2017, p. 4 and George Walker, “Financial Technology law: a new beginning and a new future,” *International Lawyer*, 50: 1.

<sup>465</sup> This is possible given what is provided in Bill 141 (see section 4).

<sup>466</sup> N.B. the German regulator also favours this per activity approach. See: IAIS *Report of the 24th-A2II- IAIS Consultation Call, Supervising InsurTech* September 21, 2017, p. 10.

<sup>467</sup> The obligation to disclose is translated into French as “l’exigence de déclaration”

<sup>468</sup> Jean Bernard Ricard, “Les régulateurs face à l’innovation : le modèle du bac à sable »

the fact that some P2P insurance platforms include a crowdfunding component while others use cryptocurrency, could change this.

Abroad, the sandbox is open to all players in the insurance environment. In order to qualify in the United Kingdom, it is necessary to have a license from the Financial Conduct Authority and satisfy certain criteria, including having an innovative product that is of benefit to the consumer.<sup>469</sup> In Australia, a company that distributes insurance can access the regulatory sandbox while a manufacturer cannot (see Section 5).

Some authors and experts maintain that there is no need for P2P insurance platforms to be subjected to the same supervision as traditional players in the insurance domain, because they operate based on the model of the collaborative economy, a model that will eliminate the problems observed historically in insurance. We with this position.

Some platforms say they are not insurers or do not offer insurance. However, when observing their activities, one notices the presence of acts reserved for registered insurers, either insurance activities or insurance distribution activities. Here, we are faced with the same kind of circular argument that Uber used in its early stages in order to avoid being regulated. These arguments did not pass the test of the courts and were also rejected by the legislator.

In the case *Uber v. Revenu Québec*, Justice Curnoy wrote: [TRANSLATION]“Uber’s argument is circular when it claims that since UberX drivers transport people using a car without having a taxi license, they do not operate a taxi business. But the activity that requires the holding of a taxi permit is paid transport of persons using an automobile. One cannot claim that the activity one performs avoids the application of the law because it does not meet the clear and unambiguous terms of the law.”<sup>470</sup>

He added, “The implementation of the transport made available by the Uber app means that Uber cannot be considered the third party and neutral intermediary that it claims to be, since it provides the management and control of the service. Without the intervention of Uber and its application, drivers

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<sup>469</sup> IAIS, *Report of the 24th-A2ii IAIS Consultation Call, Supervising InsurTech*, September 21, 2017, pp. 8 and 9, and FCA, Anna Wallance, Head of Innovation Hub, “Project Innovate”.

<sup>470</sup> *Uber Canada Inc. v. Agence du Revenu du Québec*, 2016 QCCS 2158 (CanLII), paras. 203 to 206.

could not provide the UberX service.<sup>471</sup> Moreover, in 2017, the European Parliament recognized that Uber was a transport company, not an information company.<sup>472</sup>

Some authors maintain that the collaborative aspect of these platforms eliminates the informational and economic asymmetry between the parties, which obviates the need for regulation. We believe on the contrary that in insurance, the use of a platform has the effect of increasing informational asymmetry. Consumers believe they will be dealing with individuals on an equal footing to them, whereas in fact, they are dealing with a large company that is neither registered nor regulated. The result is that consumers lose all the protections deriving from the supervision of insurance players, and find themselves caught in an unequal balance of power.

Unless it is to insure low-value items (e.g. a smart phone), we believe that it is just too dangerous for consumers to use P2P insurance platforms, which are not subject to the same supervision as the various actors in the traditional insurance industry. We insist: one simple mistake in this domain can have serious consequences.

## 7.2 Our recommendations

### That regulators governing the insurance sector:

- continue to conduct a diligent watch to ensure that no P2P insurance platform operates without the necessary permits and without complying with the relevant regulations. This watch would enable them to respond quickly when required;
- continue to study P2P insurance platforms in order to identify the best means of protecting consumers while promoting technological innovation and healthy market competition;
- permit these platforms to provide the consumer with insurance only when the financial risk is not a threat to the consumer's patrimony;
- issue or continue to issue warnings aimed at educating consumers about the dangers of doing business with organizations that perform reserved activities without holding the necessary permits;

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<sup>471</sup> *Uber Canada Inc. v. Agence du Revenu du Québec*, 2016 QCCS 2158 (CanLII), para 209.

<sup>472</sup> Judgment in Case C-434/15 *Asociación Profesional Elite Taxi/Uber Systems Spain SL*, Court of Justice of the European Union, December 2017, and opinion of Advocate General Szpunar of the Court of Justice of the European Union, May 11, 2017.

- promote education and awareness in the public aimed at raising awareness of the various issues related to the use of these platforms; such activities may be performed in collaboration with consumer associations.

**That P2P digital insurance platforms:**

- before entering the Canadian market, ensure respect for all the rules regarding the supervision of insurers or firms and obtain the appropriate license from the regulator;
- ensure that their contracts do not contain unfair terms or unenforceable clauses on consumers;
- make sure not to misrepresent the services offered on their website and other representations to consumers, for example in marketing materials, information and the terms of use.

**For consumers:**

- Before doing business with a P2P digital insurance platform, make sure:
  - o that an insurer is involved,
  - o that the platform is registered with a regulator;
- Exercise great vigilance before doing business with a P2P digital insurance platform, including inquiring about their rights and available mechanisms for settling complaints and remedies;
- Do not use these platforms to insure high-value goods;
- Refrain from using these platforms particularly for auto insurance, home insurance, civil liability insurance and all types of personal insurance;
- Inform the regulator if there is a platform that is not registered or does not respect the law.