

# **Consumer Protection: Some Further Thoughts**

**Presentations made at the AIDA Consumer Protection and  
Dispute Resolution Working Party Meeting held  
in Athens on 08 May 2014**

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## Foreword

Due to the fact that the consequences of the collapse in consumer confidence (as a result of the global financial crisis) have extended not only in the financial sectors but also to the sale of insurance products, the need for the insurance market to build further on the trust that consumers pose on it is nowadays even more pertinent than before, for, only this will allow it to further grow in size and to flourish in all respects.

Both the PEICL and the IMD II, though different in nature and function, are “instruments” which have sought to safeguard the consumer (assured) and fortify its better protection.

The assured consumer relies on the expertise of the insurance mediators. Notwithstanding such reliance and expertise, practice has revealed a number of shortcomings and failures in respect of insurance brokerage, which have been sought to be addressed via the revision of the Insurance Mediation Directive (IMD I). Indeed IMD II seeks to install some important changes so as to tackle the pre-existing weaknesses and - via measures such as the full fee disclosure element and the improved and harmonized advice standards - benefit consumers and make them better understand the services offered to them. On the other hand, certain provisions of the PEICL provides such as the duty of the insurer to provide the assured (consumer) with all necessary information, warn the consumer with regards to potential inconsistencies in the cover and advise him on its commencement of the cover, aim as well to the better protection of the consumer. The IMD II and PEICL apart, national legislations further enhance the safeguard of the consumer assured. The Greek insurance law has always sought to safeguard all contracting parties in insurance whilst securing a minimum standard of protection for the assured party (consumer). Already at the negotiation stage the consumer needs to be fully aware and informed of all the necessary documents and information regarding the prospective insurance contract conclusion. This duty extends to both the time of the conclusion of the contract

and its execution. Furthermore, intermediaries need observe clarity and transparency. This net of provisions aims at the better and more efficient protection of the assured.

Those efforts to better serve and protect the interests of the consumer extend also to the dispute resolution stage. This is enhanced by the use of means of alternative dispute resolution such as that of the Online Dispute Resolution (“ODR”) which uses technology to facilitate or assist the function of dispute resolution. ODR is different from other dispute resolution processes in that it is characterized by the technological platform on which it develops. As all ADR mechanisms it saves time and money, as well as being efficient. Safeguarding a fair and just adjudication is an essential requirement for ODR systems. Hence, ODR systems promote *inter alia* the features of transparency, impartiality and confidentiality, thus further safeguarding the interests of the assured consumer. Statistics show that insurance is a sector whereon ODR systems can be successfully applied, not least due to the inherent obligation of the insurer and intermediaries and the overall augmented need for the better protection of the assured consumer.

The present booklet contains the articles corresponding to the presentations given by the respective authors at the session of the Working Party “Consumer Protection and Dispute Resolution” which was organized on the occasion of the Athens HILA-AIDA Summit on Insurance Law (May 2014). Our esteemed colleague Mrs Alkistis Christofilou and the “young and rising stars” Ms. Theodora Kostara and Ms.Stella Sakellaridou are wholeheartedly thanked for their contributions.

*Samim Unan, Kyriaki Noussia*  
*Istanbul, Athens*  
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Working Party: Consumer Protection and Dispute Resolution

# Online Dispute Resolution

**Alkistis Christofilou**

*Partner, ROKAS, GREECE*

## 1. What is ODR?

Online Dispute Resolution ("ODR") is a branch of dispute resolution which uses technology to facilitate or assist its function. It was generated by the inherent need to swiftly and efficiently resolve the thousands of disputes arising in electronic commerce. It is often seen as the online equivalent for alternative dispute resolution ("ADR").

Its main features are the distance between the contracting parties, which may often find themselves in different countries, or even continents; communications take place not concurrently, but in an asynchronous manner and often off working hours; the affected range of disputes is very large in number, usually of low value and mostly generated in business-to-consumer ("B2C") transactions, but can also extend to business-to-business ("B2B") transactions.

It is therefore difficult and perhaps practically unattainable, to resolve such disputes by going to court. To litigate, one would first have to answer questions such as: where is the trader located? Which is the competent court or forum? What is the applicable law and procedure? How will the claimant be represented? When will the outcome be available? How will it be enforced? What is the cost?

## 2. ODR Characteristics

ODR has a number of characteristics that differentiate it from other dispute resolution processes, and these can be summarized as follows.

- It is available independently of geographical location and time.
- It promotes an impersonal character, as there is no Face to Face ("F2F") communication between the parties. This may sacrifice possible positive

synergies which could ensue from direct F2F communications to the possible grievances arising therefrom.

- The more automated the system, the more the communication is in writing, as each step in the process is led by the software itself.
- ODR systems are not adversarial. They are by design solution oriented; therefore the element of blame is absent.
- As in most ADR processes and unlike public courts, the procedure is private. However there are inherent risks to privacy owing to the sensitivity of the internet to external violations.
- The process is not rigid, which creates flexibility for the possible outcomes.
- In the context of dispute prevention, software indicators can allow identifying similarities between disputes, grouping them and developing dispute mitigator tools as well as more uniformity in the resolutions.
- By tracking problematic transaction patterns, prevention measures may improve the transaction design.
- In a nutshell, ODR can be cheap, speedy and efficient.

ODR is critically characterized by the technological platform on which it develops. The importance of technology has been recognized by commentators, who have elevated it to the position of the “Fourth Party” on the setting of the dispute resolution procedure, alongside the two disputants and the neutral third party which assists in the process. In automated ODR systems it may even substitute such neutral party.

### **3. ODR variations and examples**

ODR is flexible and can adapt to many kinds of ADR. ODR practice presents a number of successful fully automated systems, such as Cybersettle which has been developed in the USA in the context of insurance disputes. In fully automated systems the software guides the parties to the consequent steps of the process without calling for human intervention. Such systems often use game theory in their design. They are more suitable to low-value, high-volume disputes with diagnosed similarities, which usually arise from transactions with homogeneous characteristics.

ODR can also be used in combinations of automated software with human interaction, for example when the human neutral third party is called to assist after a certain phase of the resolution process has been completed, or if such process has proven unsuccessful (for example, the eBay facility provides expert mediation if the automated system has not been successful

in resolving the issue). At the other end of the spectrum, there are ODR tools which simply provide the electronic communications platform to facilitate a traditional ADR process (for example, to provide video-conferencing or intra-net communications).

ODR platforms are much more expanded in North America than in Europe. Further examples to those already mentioned are the Family\_Winner and AssetDivider, used to resolve family disputes in the USA; the Sports Dispute Resolution Center of Canada; OGIS, designed to resolve citizen-to-government disputes in the USA.

In the EU, FIN-NET has been introduced to resolve disputes arising from cross-border financial transactions, including insurance, and has built a successful record taking into account the fact that it is not well known in the market. ODR has not yet acquired extensive visibility and confidence among consumers and market players in Europe and therefore its use is very limited.

#### **4. The requirement for a just process**

Safeguarding the principles for a just process is an essential requirement for ODR systems. Within the framework of the international community's efforts to tame the internet through widely accepted principles and regulations, prominent international organizations and fora including UNCITRAL, OECD, ICC, GBDe, OAS have established working groups and have issued sets of suggested rules on ODR. The common parameters delineating the requirements for a just ODR process can be summarized as follows:

- Transparency: information on the respective ODR system must be publicly available and easily accessible.
- Impartiality: An ODR system must be neutral.
- Representation: all parties must be given the opportunity to present their side and their arguments.
- Applicable rules: the process must proceed and conclude in equity and/ or pursuant to codes of conduct ensuring the application of best practices.
- Confidentiality, privacy and personal data protection must be safeguarded.
- The parties must not be deprived of their right of recourse to their natural judge.
- The outcome should be enforceable.

The compliance of the ODR platforms and systems to the above shall not only promote their use and application, but it will also add value and trust to

the providers of the underlying transactions, thereby facilitating the further development of e-commerce.

## **5. The EU ADR/ODR package**

To promote cross-border trade within the “Single Market Act” framework, the European Union recently introduced a new system for out-of-court resolution for consumer disputes. The system comprises a Directive and a complementing Regulation.

### **5.1 The ADR Directive**

Directive 2013/11/EU on alternative dispute resolution for consumer disputes (the “ADR Directive”) provides the prerequisites for the formation of a body of certified ADR providers active within the EU. It applies to disputes between consumers and traders (C2B) initiated by consumers, which arise from domestic or cross border, on- and off-line transactions for products or services. The directive affects horizontally all kinds of ADR procedures available in the member states.

Existing and new-coming out-of-court dispute resolution providers may be qualified and accredited under the requirements of the Directive, once they fulfill quality requirements attesting their independence, impartiality, transparency, effectiveness, knowledge, and ability to deliver a fast and fair resolution procedure.

Traders who commit to using ADR entities shall post on their websites the details of such ADR providers, as well as the terms and conditions for the provision of their services. An agreement to submit to ADR shall not be binding on the consumer, if it has the effect of depriving him/her from seeking recourse in court.

ADR providers must conform to certain additional requirements upon the dispute resolution process: for example, before the complainant consumer agrees to follow a solution they propose, they must inform such complainant of his/her rights, as well as of the consequences deriving from such solution. When ADR providers have resolved a number of disputes with certain homogeneous characteristics, they must identify and make publicly available any problems that recur systematically or frequently or which are of significant importance, and make recommendations to improve traders’ standards and develop best practices for the relevant conduct.

With regard to the enforceability of the resolution, the ADR/ODR package relies on national laws. The national legislator may, for example, submit the resolution agreement to the enforcement regime available for arbitration decisions.

The ADR Directive will develop its effects without prejudice to the Mediation Directive 2008/52/EC and to the European Small Claims Procedure Regulation (EC) 861/2007, affecting claims up to EUR 2,000. It must be transposed into national laws by 8 July 2015.

## **5.2 The ODR Regulation**

Pursuant to Regulation 524/2013 on online dispute resolution for consumer disputes (the "ODR Regulation"), by the start of 2016 the EU Commission shall have established a free, interactive ODR platform. The platform will serve as a hub for incoming notifications of consumer disputes arising from cross border trade. It will direct the complaints to the registered, appropriate, nationally approved ADR providers, who are most suitable to resolve the dispute.

The complaints will be submitted in the consumer's language, and the platform will provide a language facility, which will translate the complaint and the underlying documentation into the language of the respondent. It is not clear whether the translator facility will support the whole procedure, in the sense that it will take place in two languages with the assistance of the translator. The platform will be available for use to consumers and ADR providers at no cost, while operating ADR providers are free to charge a fee for their services, however at a reasonably low level. The platform intends to secure the efficient resolution of disputes, requiring that the dispute must be resolved within 90 days from filing.

## **6. ODR and Insurance**

The ADR/ODR Package has raised positive response as well as certain concerns. For example, there is no indication as to whether the ODR platform will be designed to provide an automated negotiation tool offering computer-generated resolution proposals, tailored to the particularities of the dispute; also, it is uncertain whether it will provide the possibility of direct negotiation between the parties with the assistance of the platform, before the services of an ADR provider will be asked for (often such direct communications result in the swifter resolution of the matter). It remains to be seen how its mechanics will be designed, in order to assess how far it will be able to effectively reduce the dispute turnover in insurance claims.

The fact that the platform is intended to serve only cross-border disputes will be a deterrent to its expansion. To a certain extent, this effect should be mitigated by the translation tool which the platform offers. Also, ODR technology requires high investment; the ODR platform may cover a large part of the relevant cost.

The numbers show that insurance is an ideal field for the application of ODR systems; it is therefore not surprising that it has been serving as a field for the construction and testing of ODR methods. This owes, among others, to the fact that insurers are obliged to respond to complaints and claims as an inherent part of their business, and they are regulated and supervised in this respect. In addition, certain insurance disputes relating to specific classes of insurance present homogeneous and to an extent standardized patterns, in which the resolutions share a number of uniform features. Such cases are for example motor third party liability insurance claims where no bodily injuries are involved, or claims from small standard covers such as mobile phone insurance. It is a fact that fully automated ODR systems can only apply to limited cases, while human intervention will be unavoidable when judgment is necessary to take into account certain variables other than those which had been taken into account at the stage of the platform design.

To promote the penetration of ODR, active awareness campaigns must be undertaken. However its proper expansion could have positive results with regard to reducing the cost of claims management for insurance undertakings.

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# **“Duties of the Insurer and the Intermediaries Vis-à-vis the Need to Adequately Protect the Consumer (assured) under the EU Directive IMD II”**

**Dr. Kyriaki Noussia<sup>1</sup>**

## **I. Introduction**

The collapse in consumer confidence since the financial crisis extends further than retail banking also to the sale of insurance products.

Insurance mediators are valuable assets to the sector bringing a depth of knowledge that consumers have become reliant upon. This reliance brings with it risks and has exposed a number of shortcomings which the IMD I revision sought to address.

IMD I regulated the point of sale of insurance products. More specifically, it set minimum standards for a variety of matters such as fitness and propriety, training and competence, prudential requirements and complaints handling and also required a certain minimum of pre-sale information to be given to the consumer customer (assured) by those who sell insurance (the “insurance intermediaries”).

In short, IMD I set a benchmark for protecting consumers and clarifying what responsibilities Member-States must take, designed to ensure a high level of professionalism and competence among insurance intermediaries.

Since then, when the European Parliament was working on Solvency II, there were indications of potential market failure in respect of insurance brokerage and thus the European Parliament called for a review of IMD I.

On 3rd July 2012, the Commission presented a three-part legislative package “dedicated to rebuilding consumer trust in financial markets”, which includes

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the proposal for the revision of IMD I ("IMD II"). The version of IMD II which has been published on 9th July 2012 makes some important changes to IMD I, some clearly aimed at addressing the previously perceived weaknesses.

IMD II stresses the need to have full disclosure of fees to the customers. A general estimation allows us to say that, for the consumers and the society, it brings benefits as - by introducing improved and harmonized advice standards - consumers will indeed be benefited via the improved comparability of offers, including that across different distribution channels.

In effect, consumers are estimated to have an improved understanding of the services and products on offer. As a result, it is also estimated that they will be inclined to compare offers and shop around for products and deals better suited to their needs. In effect it is also estimated that this will ultimately also reduce the cost/price paid by the consumer.

## **II. Proposed Reforms**

Reforms proposed in IMD II include:

- the mandatory disclosure by insurance intermediaries of the nature (i.e. fee and/or commission), basis and amount of remuneration received as well as any variable remuneration received by individual employees
- the additional information requirement for the sale of bundled products
- the inclusion under the scope of IMD II of Insurance mediation activities that are ancillary to the sale of services (e.g. travel agents selling travel insurance)
- a simplified declaration procedure which will apply for some insurance intermediaries (e.g. travel agents as per the above, claims managers, etc.) and they will be subject to a less burdensome regime;
- the reform of remuneration rules in an effort to achieve the following result, i.e. that the best interest of the consumer is always what motivates the mediator's advice. Thresholds on claims and targets for sales of particular contracts will no longer be a factor that consumers have to consider. The burden of disclosure will fall on the intermediary to voluntarily disclose rather than the consumer having to make a request.
- other requirements, such as professional and organizational requirements (e.g. appropriate knowledge and ability, good repute) and the need to register and provide specific information prior to the insurance contract being entered into, will remain under IMD II and be subject to less significant modification.
- IMD II finally aims to facilitate cross-border entry for those selling insurance,



and a number of provisions aim to enhance co-operation between regulators at European level, including the European Insurance and Occupational Pensions Authority.

### **III. Remuneration Disclosure**

The most significant change, however, is the new requirement for insurance intermediaries to disclose their remuneration to clients.

The issue of brokers' remuneration and the debate on whether commission should be disclosed is not new although it remains a lively one. The Commission had looked into this issue as early as September 2007 when it published a report on the business insurance sector enquiry, which (Report) raised concerns over potential conflicts of interests surrounding contingent commission (payments by insurers linked to specific targets being achieved).

The Commission wanted more transparency; therefore, IMD II requires insurance intermediaries to disclose details of the ways in which they are remunerated for their advice. Remuneration is widely defined in IMD II as "any commission, fee, charge or other payment, including an economic benefit of any kind, offered or given in connection with insurance mediation activities."

The new requirements for insurance intermediaries focus on the need to disclose the nature (fee/commission) basis and amount of remuneration they receive. This will require (in lieu of disclosure on request) mandatory prior disclosure to clients of the amount of commission retained by the intermediary / paid by the insurer. This, of course, is something which is very controversial in the general insurance sector across many countries.

The disclosure requirement is stringent as it requires disclosure of the nature of the payment, the amount or basis of calculation and fairly extensive details of any contingent commission. Those requirements apply only to intermediaries. Further disclosure requirements covering variable remuneration received by employees for distributing and managing the insurance expressly apply to insurers who engage in direct sales as well as intermediaries.

For a transitional period of five years, the mandatory disclosure regime will apply to the sale of life products only, while the remuneration disclosure requirement in relation to non-life insurance products will be "on request" only (though customers will need to be notified of their right to request disclosure). At the end of the five year period, the full mandatory disclosure regime will apply to both life and non-life products.

Much has been written about the transitional period but its effect may be minimized given that intermediaries will also be under a duty to tell customers about their right to request information on remuneration.

Moreover, the transitional period does not apply to the requirements to disclose (i) contingent commission and (ii) variable remuneration paid to employees.

Overall, the remuneration disclosure requirements are intended to mitigate up to now existing conflicts of interest between sellers and buyers of insurance products, and are a particularly significant new development.

#### **IV. Critique**

The most controversial change under IMD II is the requirement for mandatory disclosure to the policyholder of the nature and structure of commission arrangements (subject to a five-year transitional period for non-life products where such disclosure shall be "on request").

Trade bodies representing insurance brokers have resisted these changes, arguing that the information may be too complex to help consumers and that intermediaries will be placed at a disadvantage when compared with direct-selling insurers. However, the EU has made clear that it regards the changes as an important step forward for customers in that they will enable them to make informed choices and will prevent conflicts of interest) and it seems the proposals are unlikely to change.

In a similar vein, the draft IMD II also places a requirement for intermediaries, and insurers selling direct, to disclose any variable sales related remuneration that is paid to staff.

For insurance products that are also investments, additional new rules are proposed, aimed at bringing the sale of such products more in line with the Markets in Financial Instruments Directive (MiFID) which regulate other investment products.

#### **V. Conclusions**

The financial crisis emphasized even more than before the importance of effective consumer protection across all financial sectors including insurance mediation.

The IMD I was intended to create a single market for the sale of insurance products. Described in the Commission's consultation as dense, legalistic and jargon-ridden, it fell short in terms of drafting quality and has resulted in a lack of harmonisation of regimes across the M-S.

Because the IMD I had been implemented differently between M-S, therefore:

- EU insurance markets were fragmented;
- there were significant inconsistencies in the information requirements imposed on sellers of insurance products; and
- consumers were more likely to misunderstand the risks, costs and features of insurance products.

As a result, on 3 July 2012, the EU Commission adopted a Proposal for a revision of the Insurance Mediation Directive (IMD II).

The aim of the Commission's Proposal is to improve consumer protection in the insurance sector through establishing common standards in the provision of insurance products and advice.

It remains to be seen what the result in practice will be.

# **Title: Duties of the Insurer and the Intermediaries *Vis-à-vis* the Need to Adequately Protect the Consumer (assured) under the Greek Insurance Law Regime**

**Theodora Kostara - Stella Sakellaridou**

## **Introduction**

The Greek insurance law policy aims at balancing the interests of all contracting parties. The respective legislative framework further provides for safeguards for the maintenance of the contractual relationship as well as for the guarantee of a *minimum* standard of protection for the assured party (consumer).

This short paper attempts an overview of the Greek insurance law regime specifically with regard to the obligations of the insurer (Part I) and the insurance intermediaries (Part II) towards the policyholder. Finally, the last part (Part III) provides the reader with a critical assessment of the Greek legislation in the light of the P.E.I.C.L. and the IMD II.

## **Part I: Duties of the Insurer towards the Policyholder**

Within the context of the Greek insurance law regime, the Greek legislator aims to set the framework in order to specify the pre-contractual and contractual duties of the Insurer towards the consumer (assured), so as to secure a minimum standard of protection for the consumer party.

The Legislative Decree 400/1970 establishes the obligations of the Insurer before the contract conclusion, i.e. at negotiations stage. According to Articles 4 §2G and 4 § 3D of this Decree, the Insurer must inform the assured with regards to the governing law of the contract, the country where the insurance company has its registered seat and he must, also, hand to the assured the document including all the necessary information in Greek (such as the duration of the contract, the description of the insurance cover, the details of the premium etc).

The most important legal basis of the insurer's duties, is Law 2469/1997 (i.e. the Greek Insurance Contract Act, "Greek ICA" hereinafter). More specifically, Article 2 of the Greek ICA states that the Insurer must make use of a questionnaire so as to estimate the risk, which is exclusively relied upon the precise questions put in writing by the insurer. The Insurer must deliver the insurance contract to the assured, inform him about the general and specific terms of the contract and deliver them together with the contract. The assured has the right to object within thirty days from the time of receipt of the contract. All terms of contract must be clearly written and shall respect the interests of the assured. Any legal transaction restricting the assured's rights is void (Article 33 §1 of the Greek ICA).

During the execution of the contract, the insurance company must inform the assured concerning any change that may occurs in the company's data (Article 4 § 3E of the aforementioned Legislative Decree 400/1970). The insurer's duty to provide the above information to the consumer is also imposed by article 288 of the Greek Civil Code (principle of good faith). Furthermore, the insurer must comply with the provisions regarding the general terms of the trade imposed by article 2 of Law 2251/1994 on consumer protection and according also to article 4a§5 of the same Law 2251/1994 on consumer protection in case of a contract concluded by distance.

Finally, as per article 3 of the No. 3/08.01.2013 Act of the Executive Committee of the Bank of Greece, the insurance company is obliged to inform the assured regarding the existence and the potentials/ capacities of the complaint mechanism.

## **Part II: Duties of the Insurance Intermediaries towards the Policyholder**

**The notion of 'insurance intermediaries' is defined in Article 2 of the European Directive 2002/92/EC.** Accordingly, an insurance intermediary is *'any natural or legal person who, for remuneration, takes up or pursues activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim'*.

The regulation of the insurance intermediaries' duties relies upon the Greek Insurance Law 1569/1985 in combination with the Presidential Decree 190/2006. Under the latter, the duties of the insurance intermediaries are set to cover both the pre-contractual and the contractual phase, in case of modification or renewal of the contract. Article 11 of the respective Decree describes the duty of information conferred upon the intermediaries.

More specifically, the intermediaries must inform the policyholder on their ID, contact address and registry details. The duty of information further includes the intermediary's disclosure when holding more than 10% shares in insurance companies.

Moreover, the relationship between the intermediary and the policyholder demands for further transparency. Hence, the available dispute settlement mechanisms at the disposal of the consumer must become known to him and the assured party must be advised by the intermediary impartially, upon professional criteria and on the basis of the insurance contracts which circulate in the market.

The intermediaries' duties are further developed in the Bank of Greece Executive Committee Act 31/30-09-2013 which contains provisions on the Insurance Intermediaries' code of conduct. Provisions 4 to 8 set the general principles governing the exercise of their professional activity, the duty of information and the formalities applicable to the contracts concluded between the intermediaries and the insurance companies. Moreover, the Greek legislator giving great emphasis to the transparency element in the insurance contracts, has extended the application of the information duty to other legislative initiatives such as the amendments to Law 3869/2010 for the debt regulation of indebted natural persons and the promotion of transparency in the functioning of the insurance market.

Following the general presentation of the intermediaries contractual commitments, a 'duties overview' will be presented for each of the intermediaries groups: the insurance agents, the insurance brokers, the insurance advisers and co-ordinators.

With regard to the insurance agents, this group's duties are governed by the Law 1569/1985. Articles 3 and 4 clarify the agent's scope of activities. Actually, the agent acts on behalf of the insurance company. A registration to the respective Chamber of Commerce as well as a declaration to the consumer party that he/she is acting in the capacity of an agent is required. In order to further guarantee the protection of the policyholder, the termination of the agency contract has to be announced by the insurance company to the Ministry of Commerce.

The insurance broker is dealing with the preparatory works for the conclusion of the insurance contract and the main undertaken task is to assist the policyholder during the (pre) contractual phase. In general, similar duties with the insurance agents bind the insurance brokers as well. The Law 1569/1985 remains applicable also for this intermediary group and requires a registration to the Chamber of Commerce. Furthermore, the insurance broker is bound by a 200.000€ warranty commitment for the proper execution

of the contract and he/she needs to have financial and legal independence from insurance companies.

Furthermore, in relation to the duties of the insurance advisers, the relevant applicable law is the Greek ICA. The main activity of this intermediary group is advising on market planning and insurance solutions. As stated in provisions 16 to 17, the adviser acts for the insurance company, the agents, the brokers and/or other advisers. He/she is contractually committed by a project-type contract. However, adviser's activities are limited. The adviser cannot legally represent either the Insurer or the Policyholder and he/she cannot sign the insurance contract. The same formalities applied for the insurance agents and brokers are also required for the advisers such as their registration to the Chamber of Commerce and the general duties described in the Bank of Greece Executive Committee Act 31-30-09-2013 and the Presidential Decree 190/2006.

The last category comprises the duties of the insurance co-ordinators. Subject to Presidential Decree 190/2006 Articles 4 and 5, the insurance co-ordinator undertakes insurance mediation on behalf of an insurance undertaking *via* a group of insurance consultants of his choice whom the co-ordinator trains and supervises. Insurance co-ordinators have to be registered in the Chamber of the Insurance Intermediaries.

### **Part III: Critique**

From the above, we conclude that there is a certain number of rules imposing duties on the Insurer and Insurance Intermediaries. These rules aim to secure a high level of protection for the "consumers" (in the sense of insurance consumers) and can be found either in National Laws or in the PEICL and IMD.

In the PEICL, the Insurer on the one hand has the pre-contractual duties to provide the documents with all the necessary information, warn about inconsistencies in the cover (duty of assistance) and the commencement of the cover. The Insurer is also obliged to issue the Insurance policy. On the other hand, Intermediaries are under the following duties towards the prospective policyholder: duty of verification, information, advice, warning, placement and assistance.

The IMD II contains a number of provisions in order to address perceived or potential shortcomings in the interaction between intermediaries and assureds. One such provision is an obligation to act honestly, fairly and in the best interests of customers. IMD II introduces the mandatory disclosure to the policyholder of the nature and structure of commission arrangements. Intermediaries will be obliged to ensure they have all the information about

a potential customer's knowledge, experience, financial situation and investment objectives.

Moreover, the intermediaries must warn the potential customer when the product/service is not appropriate to him and provide customers with better advice on how a particular insurance product meets their needs. IMD II will allow the "bundling" of insurance products with other services provided that the insurance product is also available separately. Finally, it is requested that IMD II is aligned with the revision of the Markets in Financial Instruments Directive (MiFID II).

## **Conclusion**

Overall, as a general conclusion, it should be stressed out that all laws existing and examined, i.e. the national Laws as well as the PEICL and the IMD II impose duties or obligations on the Insurer and Insurance intermediaries towards the assured. These provisions aim towards the more efficient protection of the policyholder providing him with the asset of getting a better understanding of insurance services and products so that he finally selects the most suitable for his needs.



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# Insurer's Information Duties under the PEICL

**Samim Unan** (*AIDA Turkey*)

## Introduction

The PEICL (Principles of European Insurance Contract Law) constitute an important step towards the unification of the insurance contract law. Although the main objective is to unify the insurance contract law within the EU, the impact will not be limited to Europe and for countries outside the EU, this set of rules will be one of the principal references in respect of the solutions to be adopted to solve the current problems.

PEICL are a compromise between north and south (German law culture and Roman/Latin law culture) and also between the stronger and less strong legal systems. Experts from a large variety of countries representing different legal families (civil law countries and common law circles) finally agreed on provisions found satisfactory.

Therefore the PEICL are suitable to all the concerned parties. Perhaps the PEICL are not as sophisticated as the VVG but it is believed that in many respects the PEICL contain solutions compatible with German legal culture. On the other hand, the PEICL can be judged to be more revolutionary compared to some legal systems but nothing prevents them from adopting the PEICL solutions as domestic rules.

Draft legal instruments appropriately prepared and bringing adequate solutions to current issues are important and will remain so even if they are never enacted. They assist different law systems to make progress by serving as a model totally or partly. This observation is valid also for the PEICL.

This relatively short article aims at underlining a precise perspective: What are the information duties of the insurer under the PEICL? The appropriate protection of the consumer requires at first glance that it be given the opportunity to make an informed decision. The path leading to an informed decision mandatorily passes through the insurer's information duty being

duly complied with. The information that the consumers need for making a good decision (choice) is (or is supposed to be) in the possession of the trader who wants to sell them products or services. This explains why the insurer will be under the duty to inform on many different points the consumer before and during the contract.

## **Insurer's information duties under the PEICL**

The first thing to emphasize at the outset is that the information duty imposed on the insurer in the context of its contractual relationship with the policyholder is not limited to the information that must be given at the pre-contractual stage. This duty comprises also the provision of relevant information throughout the contract. The policyholders must be informed not only on important changes that occur during the insurance period but also a large number of warnings must be addressed to them to enable them to make use of their rights.

## **Insurer's Pre-contractual Duties**

### **Provision of pre-contractual documents (Art.2: 201)**

The insurer is required to provide the "pre-contractual documents" in order to give the prospective policyholder the opportunity to make an evaluation for the contract that is proposed to him.

The documents to be provided include

- a copy of the proposed contract terms, and
- a document including information about a number of points (where relevant). The information must be provided in sufficient time to enable the applicant to consider whether or not to conclude the contract. Therefore the so-called "policy method" consisting in furnishing the information with the policy the delivery of which to the policyholder would constitute the insurer's acceptance forming the contract, is not allowed under the PEICL.

The document in question will contain information on

- the identity of the contract partners (in particular the name and the legal form of the insurer, the address of its head office, the particulars of the branch through which the insurance is taken, the name and address of the insurance agent who mediated the contract.
- the name and address of the insured and, in the case of life insurance, the beneficiary and the person at risk

- the subject matter of the insurance and the risks covered
- the sum insured and any deductibles
- the amount of the premium and the method of calculating it
- when the premium falls due as well as the place and mode of payment
- the contract period, including the method of terminating the contract and the liability period
- the right to revoke the application or avoid the contract in accordance with Article 2:303 in the case of non-life insurance and in accordance with Article 17:203 in the case of life insurance
- that the contract is subject to the PEICL
- the existence of an out-of-court complaint and redress mechanism for the applicant and the methods of having access to it
- the existence of guarantee funds or other compensation arrangements.

## **Duties to Warn**

In addition to the information duty, the PEICL provide on the other hand duties to warn the applicant. Although the duty to warn is different from the information duty, it would be appropriate to mention also the latter in this short article taking into account the similarity. The duty to warn is accomplished at the final stage by sharing a diagnosis, thus includes the transmission of information.

### **Duty to Warn about Inconsistencies in the Cover (Art. 2:202)**

At the pre-contractual stage, the provision of information is not sufficient to adequately protect the applicant who may nevertheless buy an insurance product not covering him as properly as needed. In addition to the duty to provide the pre-contractual documents, the PEICL imposes therefore on the insurer the duty to warn about the inadequacy of the product: Before the conclusion of the insurance contract the insurer must warn the applicant about the inconsistencies between the cover offered and the applicant's requirements. This duty exists only if the insurer is (or should be) aware of these requirements. The extent of the duty is depending on the circumstances, the mode of contracting and the assistance –if any- brought to the applicant by an independent intermediary.

If the insurers breach their duty negligently, they will be required to indemnify the losses sustained as a result of this breach. The PEICL underline in Article 2:202(2)(a) that the person entitled to make a claim is the "policyholder"

(and not the "applicant"). The term used leads to the result that if the conclusion of the contract does not happen, the insurer will not be liable for breach of the duty arising out of the PEICL Article 2:202.

What if the insurer who warns the applicant does not give accurate information by so doing? For instance the insurer declares that there are gaps between the cover proposed and the cover needed, but further states that there is no product in the market to satisfy the applicant's needs and leads the applicant to give up its decision to take out insurance. In such a case, the inaccurate information given to the applicant would engender the insurer's liability pursuant to the general principle of c.i.c. ("culpa in contrahendo").

The policyholder is entitled to terminate the insurance contract upon the breach even if the insurer is not negligent.

### **Duty to Warn about Commencement of Cover (Article 2:203)**

It is a widespread belief amongst the policyholders that the submission of the application form will trigger the coverage immediately even before the conclusion of the insurance contract. However the effective coverage begins often at a later date (after the contract is concluded or upon the payment of the premium or the first instalment thereof). If the applicant has reasons to believe that the cover begins with the application, the insurer who is (or should be) aware of this belief has to warn the applicant that the commencement of cover will occur later, earliest with the contract conclusion. The preliminary cover constitutes the exception to this rule. The negligent breach of the duty will entitle the applicant to claim its losses.

### **Mandatory Character (Art.1: 103)**

The rules in the PEICL have a mandatory character in favor of the policyholder, insured and beneficiary also as regards the information duties (including the duties to warn). This means that derogations are allowed if not detrimental to the policyholder, insured or beneficiary. Therefore the extent of the insurer's information duties can be increased and its liability enlarged (for instance where the PEICL provide liability based on fault, the requirement of fault can be lifted).

Large risks are the exception. In case of an insurance contract covering a large risk, derogation is possible also to the detriment of the policyholder, insured or beneficiary.

### **Language and Interpretation of Documents (Art.1: 203)**

The PEICL Article 1:203 concerns certain fundamental principles applicable to documents and their interpretation. The insurer must provide plain and

intelligible documents. This requirement is valid not only vis-à-vis the consumer but for all the policyholders. On the other hand, the documents must be written in the language used during the contract negotiations.

If the wording of a document or information is ambiguous or not clear, it must be interpreted in a way most favourable to the policyholder, insured or the beneficiary. This rule protects any policyholders insureds or beneficiaries even when they are professional or traders.

### **Receipt of Documents: Proof (Art. 1: 204)**

In respect of the provision of documents the PEICL Article 1:204 places the burden of proof on the insurer. If the policyholder disagrees with the allegation that documents are furnished, the insurer will have to prove the effective provision.

### **Written Notice of Intention in case of Breach of the Applicant's Duty of Disclosure (Art.2: 102)**

The PEICL Article 2:101 requires that the applicant answer correctly to the insurer's clear and precise questions. The applicant will be in breach of this duty if it omits to disclose the circumstances it knows or should know.

If the applicant's duty to give correct answers is breached the options granted to the insurer is the termination of the contract and the possibility to propose a variation. The insurer is required to notify the policyholder of its choice together with information as to the legal consequences it would create. The insurer has to comply with this notification requirement within a period of one month to be counted from actual or constructive awareness.

### **Abusive Clauses (Art.2: 304)**

The protection of the consumer against abusive clauses of a standard contract is one of the major concerns of the consumer law. The PEICL extend the general protective rule about the consumers to "insurance consumers" who can be shortly described as any policyholders including small and medium size enterprises. The only policyholders remaining outside of the insurance consumers' definition are those in respect of whom the large risk exception applies.

An insurance contract term shall be regarded as abusive when it causes a significant imbalance to the detriment of the policyholder, the insured or the beneficiary, in a manner incompatible with the requirements of good faith and fair dealing if this term is not individually negotiated. As the negotiation of the contract term is the decisive step, it transpires that the insurer is under

the duty to inform the policyholder of the content. Besides the burden of proof as regards negotiation (that it has taken place) lies with the insurer.

### **Preliminary Cover (Art.2: 402)**

The insurer's information duty exists also in the case of "preliminary cover". When an insurance granting preliminary cover is taken out, the insurer must issue a "cover note" which must contain some of the information to be furnished in the insurance policy (identities and contact details of the parties and related persons, subject matter of the insurance and the risks covered, the sum insured and any deductibles, the contract period and the liability period). The insurer's duty to provide pre-contractual documents (containing relevant information) and the duty to warn about commencement of cover are excluded when preliminary cover is granted.

### **Contents (of the Insurance Policy) (Art.2:501)**

The provision of the pre-contractual documents occurs at the pre-contractual stage and is aimed at giving the policyholder the possibility to take an informed decision about the proposed insurance. After the conclusion of the contract the insurer must issue an insurance policy containing relevant information on different points:

- name and address of the contracting parties,
- name and address of the insured and, in the case of life insurance, the beneficiary and the person at risk
- name and address of the intermediary;
- subject matter of the insurance and the risks covered;
- the sum insured and any deductibles;
- the amount of the premium and the method of calculating it;
- when the premium falls due, place and mode of payment;
- the contract period and the liability period;
- the right to revoke the application or avoid the contract in accordance with Article 2:303 in the case of non-life insurance and with Article 17:203 in the case of life insurance;
- that the contract is subject to the PEICL;
- the existence of an out-of-court complaint and redress mechanism for the applicant and the methods of having access to it;
- the existence of guarantee funds or other compensation arrangements.

Under the PEICL, the insurance policy may differ from the application form

or the prior agreement of the parties provided the differences are made sufficiently apparent. In such case the policyholder who does not object will be deemed to have consented to the changes. The insurer is nevertheless required to draw the attention of the policyholder to the right of objection in bold print. If the insurer fails to act in accordance with the requirements cited above, the contract will be deemed concluded on the basis of the application or the prior agreement.

### **Alteration of Terms and Conditions (Art.2: 603)**

The PEICL provide "automatic prolongation" of the insurance contract at the expiry of the default contract period of one year (however the default contract period of one year does not apply to personal insurance). The automatic prolongation can be prevented if the insurer sends a notice to the contrary.

In the case of an insurance contract liable to automatic prolongation the insurer may feel the need to alter the premium or some of the contract terms and may have inserted into the contract a special clause for that purpose. The validity of such a clause is subordinated to certain conditions. One of them is the sending of a written notice that would inform the policyholder about his right of termination and the consequences of not exercising it.

## **Post-Contractual Information Duties of the Insurer**

### **Article 2:701 (General Information Duty) and Article 2:702 (Further Information upon Request)**

The insurer's duty to inform the policyholder is not limited to the pre-contractual stage. The insurer must inform the policyholder also during the contract period.

This information duty may be split in two: Information about the changes concerning the identity, status or address of the insurer must be given in writing and without delay. It is not reasonable to expect that the policyholder make a request for being informed about those changes. However in respect of a number of other points, the request of the policyholder is necessary for the birth of the duty: The insurer will be required to inform in writing on matters relevant to the performance of the contract and new standard terms offered for insurance contracts of the same type (as the one concluded with the policyholder) upon written demand.

### **Powers of Insurance Agents (Art.3:101)**

The information duty to be fulfilled towards the policyholders is not incumbent only to insurers but also to insurance agents who are their representatives.

A part of the agent's authority can be restricted but a clear notification in a separate document is necessary to that effect. On the other hand, the authority of the insurance agent must include the power to inform and advise the policyholder.

### **First or Single Premium (Art.5:101)**

In many insurance contracts the fact that triggers the beginning of the cover is the payment of the premium (or the first instalment thereof). The PEICL have adopted a good solution in respect of the validity of the clauses stipulating that the risk would be taken over by the insurer only upon premium payment: Such clauses are without effect if they are not communicated to the applicant in writing using a clear language and warning the applicant that there will be no cover until the payment of the premium.

### **Subsequent Premium (Art.5:102)**

The PEICL establish also a duty of information in respect of the subsequent premiums: Insurance contracts may contain clauses providing that the cover will cease if subsequent premiums are not paid. That kind of clause will be valid only if the insurer sends an invoice stating the amount and the date of payment and after the due date a reminder of the outstanding due together with the warning that the cover will be immediately suspended if payment is not made.

### **Termination of the Contract (Art.5:103)**

Upon the policyholder's default in paying the premium, the insurer will be entitled to terminate the insurance contract by written notice. However, the right to terminate can be used only if this right is stated in the invoice (to be sent in accordance with Article 5:101(b) or in the reminder (to be sent in accordance with Article 5:102 para.1(b)).

*The day this short article was finished, the last parts of the PEICL (about liability insurance, personal insurances and group insurances) were still to be kept confidential. By virtue of this requirement we will not give any details and only mention the essential choices.*

## **Liability insurance – Insurer's duty to inform the policyholder that a direct claim has been made**

The insurer will be under the duty to notify the policyholder of any direct claim made against it. In many jurisdictions direct claim from the liability insurer is possible (as a general rule for all liability insurances or as an exceptional rule in respect of specific liability insurances such a motor vehicle



liability insurance). It is in the interest of the policyholder to know whether the victim seeks compensation directly from the insurer (to avoid double payment for example). Therefore a burden similar to the policyholder's duty of informing the insurer on any third party claim is placed on the shoulders of the insurer.

## **Life Insurance on the Life of a Third Party**

In case of an insurance contract on the life of a person other than the policyholder, the informed consent of the person at risk is a fundamental requirement. The PEICL will contain provisions as to the form of the consent and the consequences that will arise if that consent is not obtained.

## **Insurer's Pre-Contractual Information Duties in Life Insurance**

In the life insurance, the insurer will have additional information duties in respect of the right to participate in profits. On the other hand, in life insurance the information that pre-contractual document must contain has to be specifically described. In particular the insurer must make a specific reference to the compulsory publication of its annual report on its solvency and financial condition. The document will contain further information on each benefit, the proportion of the premium attributable to each benefit and bonuses, surrender and paid-up values, in unit-linked policies: the nature of the underlying assets, the tax arrangements applicable, the risks assumed by the policyholder. The insurer shall have to provide also a model calculation.

## **Insurer's Post-Contractual Information Duties in Life Insurances**

The insurer will be required to inform on:

- the annual statement of the current value of the bonuses
- changes concerning the policy conditions
- any differences between the actual development and the initial data on estimated amount of benefits.

## **Conversion of the Contract**

The insurer shall have to inform the policyholder on the conversion value and the surrender value.

## **Group (Life) Insurances**

### **Accessory Group Insurances**

The duty to inform the new group member has to be regulated. In particular who will be under this duty? Group organizer? Insurer? Information about the right to continue cover is also one of the good solutions adopted.



