TURKEY

Insurer's Precontractual Information Duty

SİGORTA HUKUKU TÜRK DERNEĞİ
TURKISH CHAPTER OF AIDA

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(AIDA TURKEY)

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Foreword

Consumer Protection & Dispute Resolution Working Party of AIDA (International Insurance Law Association) met on May 7th 2013 in Lisbon at the occasion of the XIII. CILA Congress (Congresso del Comité Ibero-Latinoamericano de AIDA) held at Calouste Gulbenkian Foundation.

On the working party agenda was the "Insurer's pre-contractual information duty", a very controversial subject proposed by Prof. Anne Pélissier. Presentations were made in Spanish (Prof. Anne Pélissier from France and Prof. Roberto Rios from Chile) and in English (Sofia Martins from Portugal and Ana Keglevic from Croatia) followed by a discussion. Anna Tarasiuk-Flodrowska from Poland who was due to speak at the working party meeting was unfortunately hindered at the last minute. Nevertheless she agreed to send her report later for publication.

This booklet contains the papers of the abovementioned speakers and a paper prepared by Samim Unan from Turkey with the aim to give the reader a general idea on the issue. But there is also something unusual and new in it: Prof Anne Pélissier had this very interesting idea to ask her master program students to prepare collectively short papers in English, each of them dealing with a different aspect of the insurer's pre-contractual information duty in French law. A total of 15 master students (Pierre Vuillemin, Caroline Esteve, Pierre Skotowski, Dimitri Lizot, Elise Farines, Mayline Lagasse, Karima Touileb, Marion Laurent, Mélissa Boschet, Cindy Ligorio, Johana Boutrin, Charlotte Spony, Badiaa Benyachou, Maelle Sartre, and Magalie Touzani) contributed to the elaboration of those short papers. Hoping that those young master students will become later faithful members of AIDA, the collective papers are all published right after the Prof. Pélissier's paper in the booklet.

The Consumer Protection & Dispute Resolution Working Party of AIDA expresses its gratitude to the authors who made it possible to publish the booklet in a relatively short period of time.

Istanbul 30 June 2013

Samim Unan
Chairman
Consumer Protection & Dispute Resolution Working Party of AIDA

Content

AIDA Consumer Protection & Dispute Resolution Working Party
Lisbon Meeting May 2013

Insurer's Pre-contractual Duties to Inform and Warn/Advise

Samim Ünan *(AIDA Turkey)*

The insurer's pre-contractual duties are mainly aimed at protecting the "insurer-consumer" which can be defined as all prospective policyholders with the exclusion of those wishing to obtain cover for a so-called "large risk".

The policyholder is the weak party in the insurance contract and must be protected. It may have acquired some financial strength but this would not lift the need of protection since it has less knowledge about insurance and insurance products than the insurer.

On the other hand, the insurers conclude contracts on the basis of pre-formulated contract terms and even in cases where the prospective policyholder is financially stronger than the insurer, the former is generally less familiar with those terms. This fact has justified the prospective policyholder's protection even with regards to a large risk, at least in some countries, when it comes to "unfair contract terms".

The first protection would consist to provide the prospective policyholder with the necessary information in order to enable it to make an "informed decision".

I. Insurer's pre-contractual information duty

The insurer is not only under the duty to inform the prospective policyholder before the conclusion of the contract but also later during the contract period. In this work we will focus exclusively on the insurer's pre-contractual information duty.

The duty to inform the contractual partner about points that are relevant for its decision is sometimes based on the general principles of law such as "fair dealing" or "culpa in contrahendo". In the field of insurance, national

legislations generally do contain special provisions dealing exclusively with that duty. But in the absence of a special provision resort to general principles may be envisaged. This may even be compulsory. However it is obvious that general principles would not be sufficient to govern such a delicate and complicated issue. Thus there is need to regulate in detail by special rules.

1) Form requirement

Information may be given orally or verbally. However "verba volant, scripta manent" (spoken words fly away, written words remain). Taking this into account, in most legislations the insurer is requested to deliver the relevant information "in writing".

In that respect one of the controversial issues is to know to what extent electronic means (including the web sites) should be allowed.

In recent years a special form called "textform" (textual form) appeared. It is defined as comprising also the electronic texts. The so-called textform includes then information on "paper" and on "durable medium". According to the EU Directive 2009/65 Article 2(m) durable medium means an instrument which enables an investor to store information addressed personally to that investor in a way that is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored.

The textform does not fulfill the classical functions of the form requirement (i.e. warning, proof and identification) but it is helpful where more than verbal communication is needed.

On the other hand, nowadays the number of persons having access to the Internet is constantly increasing and websites are largely used for different types of communications. With regards to the insurer's information duties the use of the Internet constitutes also one of the solutions that can be envisaged.

Today's tendency is to allow the insurer to accomplish its duty to inform via electronic means including the website but under certain restrictions: The information can be given on durable medium (i.e. classical paper, discs, CD, computer fax, e-mail etc.) or via the website but a paper copy shall be provided to the customer upon its request (and free of charge).

The provision of the information by using a durable medium other than paper may be subordinated to the following conditions

- the use of the durable medium is appropriate in the context of the business conducted with the prospective policyholder;

- and the prospective policyholder has been given the choice between information on paper and in the durable medium, and has chosen that other medium.

In respect of the provision of the information by the means of a website, the conditions that may be required include mainly the following:

- the information must be addressed personally to the prospective policyholder
- the provision of the information by means of a website is appropriate in the context of the business conducted with the policyholder
- the prospective policyholder has consented to the provision of the information by means of a website
- the prospective policyholder has been notified electronically of the address of the website, and the place on the website where the information is located
- it is ensured that the information remains accessible on the website for such period of time as the prospective policyholder reasonably need to consult it.

In case the prospective policyholder has regular access to the Internet (the fact that it gave an e-mail address can constitute sufficient evidence in that regard), the provision of information using a durable medium other than paper or by means of a website may be deemed as appropriate in the context of the business conducted with it.

2) Pre-contractual documents

In order to achieve the transparency and to enable the prospective policyholder to take an informed decision the insurer must deliver the pre-contractual documents to acquit itself of the information duty.

a) Duty to provide pre-contractual documents

The pre-contractual documents to be delivered to the prospective policyholder must contain the relevant information concerning the insurance contract under negotiation, in other words those documents shall be about the proposed contract terms.

The provision of the pre-contractual documents is independent of the obligation to deliver the insurance policy that will usually contain similar points. But the policy may differ from the pre-contractual documents since the contract negotiations may have led to an agreement on different terms.

The "Product Information Document" prepared by the insurer is useful for

the consumer (stricto sensu i.e. a natural person acting for purposes which are outside its trade, business, craft or profession) and some national legislations expressly provide its delivery to the prospective policyholder.

b) Content of the pre-contractual documents

The content of the pre-contractual documents may vary according to the insurance branches. Indeed in some branches additional information seems appropriate for example life assurance. However it is also true that consumers will be drowned in excessive information. Thus a fair balance must be established.

During the "Transparency" colloquium held in Istanbul in May 2012, our German colleague Dr. Peter Reusch emphasized that for an ordinary life assurance contract, the information to be given to the prospective policyholder attains "hundred pages" and made the observation that it was very difficult and onerous for insurers to comply with this duty.

c) Duty to give a copy of the application form

In many cases the insurer or its agent requires that the prospective policyholder answer the questions put in a "form" or "questionnaire" when applying for the insurance. It is important for the prospective policyholder to have a copy of this form or questionnaire and keep it as proof of the request it made to the insurer. Therefore a duty to give a copy (duly certified by the insurer) of the questionnaire or application form back to the policyholder seems to constitute an appropriate solution. PEICL has clearly adopted it (PEICL 2:201(3)) .

3) When to accomplish the information duty

The information duty aims at ensuring that the policyholder takes an informed decision when entering into the insurance contract. It will weigh pros and cons in the light of the information provided by the insurer and will perhaps make a search in the market. All this will require some time. Therefore, it is important that the insurer provides the relevant information about the eventual contract in time i.e. sufficiently in advance, before the prospective policyholder gives his consent for the conclusion of the contract.

4) Duty to inform about the contract conclusion model

The insurance contract may be concluded on different contract conclusion models. In that respect the so-called "policy model", the "offer model" and the "invitation to offer model" merit special attention.

In the **policy model**, the prospective policyholder submits a filled form (offer), the insurer sends the policy (acceptation) and the relevant informative documents. The contract formation is completed upon

receipt of the policy and informative documents by the policyholder. In this model, the informative documents are given simultaneously with the policy at the moment when the contract is entered into. As the policyholder has already given its consent to the contract before being aware of the relevant information (that might change its decision), it is obvious that this model is detrimental to it. The provision of the relevant information at the last stage (too late for an informed decision) amounts to an attempt to "save the appearance" and brings no additive value to the policyholder's decision about the insurance contract.

The **offer model** seems to suit best to the interests of the policyholder. In this model the prospective policyholder is given the relevant information before it makes an informed and advised offer. This is the desired solution.

The **invitation to offer model** is a derivative of the previous. The prospective policyholder after being advised makes a written invitation (invitatio ad offerendum) and the insurer after evaluating the risk makes an offer which -if accepted- leads to the conclusion of the contract. Here too, the informative documents are handed over to the prospective policyholder in good time before entering into the insurance contract.

The insurer must explain to its contracting partner how (i.e. according to which method) the insurance contract will be concluded. The prospective policyholder is in need to know the relevant steps and it appears that a duty imposed on the insurer in that respect would constitute a good solution.

5) Extent of the pre-contractual information duty

The extent of the information duty is -as mentioned above- an important issue which should be considered carefully since it touches not only the burden (both operational and financial) to place on the shoulders of the insurer but it concerns also the protection of the prospective policyholders. Excess of information would have a negative effect on the average prospective policyholder since it will not feel confortable in accessing the details and would develop then a reluctance, which is not desired at all by the industry.

The main rule is that the prospective policyholder must be informed of all clauses of the contract at the initial conclusion. However at renewal, it would suffice to give information about the modified terms only. The same prevails at the alteration of an existing contract.

In addition to the contract terms, other relevant information must be submitted too: In that respect we should mention

- the identity and contact details of the insurer
- out of court redress and complaint mechanisms

  The decision of the prospective policyholder will be depending on the insurer. Thus the details about the insurer have to be communicated (name, business centre, size, main classes of insurance etc.).

  Another point relevant for the policyholder is the existence of out of court redress and complaint mechanisms. If a dispute arises, the court proceedings should remain the last resort. Prior to it, other mechanism should be available under the condition that they are not binding on the policyholder who would conserve the right to sue the insurer when it deems it necessary. Often, effective complaint mechanisms help avoiding further development of the conflict. Thus the insurer will have the duty to inform the prospective policyholder on the alternative dispute resolution means and possible complaint procedures.

The contract terms don't bring an adequate solution to everything. Often it is necessary to apply the legal rules in order to resolve the issues in question. It is possible in general to make a choice of law in respect of the insurance contract and the legal provisions compulsorily applicable to that contract are of utmost importance. The prospective policyholder should know at the beginning to which law the contract to be entered into will be subjected (the law of the country where it lives or to a foreign law).

Insurance being a business regulated and controlled, it is relevant for the policyholder to know which authority is competent when it comes to the insurer and the insurance contract concluded.

One of the current topics of the insurance law is the so-called "cross-selling" (i.e. "tying and bundling practices"). An insurance product is sometimes sold together with other products in a package (bundle). "Tying practice" is defined as the offering of one or more ancillary services with an insurance service or product in a package where this insurance service or product is not made available to the consumer separately. A "bundling practice" differs from the tying practice in that the insurance service or product is also made available separately but not necessarily on the same terms or conditions as when offered bundled. The new approach is in the direction of allowing only bundling practices (under certain conditions) but banning the tying practices. Where it is authorised, the bundling practice would be subject to a special information duty: The insurer or the intermediary would warn the prospective policyholder that it is possible to buy the components

of the package separately and give information of the costs and charges of each component of the package that may be bought through or from it separately.

6) Addressee of the information duty

The addressee of the information duty at the pre-contractual stage is the prospective policyholder (who will become the contractual partner if the insurance contract is entered into later).

In group insurances if the insured is not at the same time the policyholder, the information duty must be acquitted only vis-à-vis the policyholder. However where the insured persons are at the same time policyholders, the duty to inform must be fulfilled in respect of each new insured.

7) Fairness, clarity and accessibility

The information duty must be accomplished with fairness, clarity and accessibility otherwise the goal targeted by that duty would not be attained.

In that respect the language is of primary importance. According to the prevailing solution, the information must be given in the official language of the state where the risk is situated or the state where the commitment occurred or the language agreed by the parties.

The insurance undertaking and the intermediary must refrain from using "jargon". Instead -when possible- everyday language must be preferred.

Information must be free of charge otherwise the accessibility requirement would be endangered.

8) Exceptions to the information duty

Although it is widely recognized that the information duty must remain as broad as possible to enable the prospective policyholder to make an informed decision, some exceptions unavoidably exist. First of all the "large risks" are outside the scope of the pre-contractual information duty.

Large risks (as enumerated in the PEICL 1:103(2)(a), (b) and (c)) are those related to

- certain classes of insurance (such as railway rolling stock, aircraft, ships, goods in transit, aircraft liability, liability for ships) regardless of the insured value, or
- the classes of credit and suretyship when the policyholder is engaged professionally in an industrial or commercial activity or in one of the liberal professions (provided that the risk is related to such activity), or

- the classes of land vehicles, fire and force of nature, other damage to property, motor vehicle liability, general liability or miscellaneous financial loss in so far as the policyholder exceeds the limits of at least two of the following three criteria:
  - balance-sheet total: 6,2 million Euros
  - net turnover: 12,8 million Euros
  - average number of employees during the financial year: 250

The notion of large risks does not exclude professionals and medium sized enterprises except in rare cases.

Reinsurance is not subjected neither to information requirement.

9) Conclusion of the contract by phone

Special rules are needed for contracts concluded on the phone. Although theoretically it is possible in some instances to provide written information before the conclusion of the insurance contract by phone (during a first contact the insurer may learn the e-mail address of the client and send textual information there and at the second stage phone to finalize), usually this will not be the case. The provision of information orally on the phone is never sufficient and another solution must be envisaged. The most appropriate solution seems to be the provision of written information without delay after the conclusion of the contract, together with the right to cancel (benefit of a cooling off period).

10) Waiver of the right to be informed

The prospective policyholder may waive its right to be informed at the pre-contractual stage. The first problem consists in determining how this waiver will be validly consented to. In order to protect the prospective policyholder the best solution would be a form requirement. Therefore the waiver would be valid only if expressed in writing.

Another important issue is to know whether the consumers should be restricted in their right to waive? If the choice is in that sense, only the waivers agreed by persons or legal entities acting for the purposes of their trade, business or profession would be held valid.

11) Legal consequences of the breach of the duty to inform

If the duty to inform imposed on the insurer at the pre-contractual stage is not complied with different consequences may arise:

- In case the general conditions of insurance (general contract terms) are not provided to the prospective policyholder sufficiently in advance for

consideration and negotiation, they will not have any binding effect on it. This is in line with the fact that in accordance with the rules about general contract terms, non negotiated stipulations will not bind the weak party (*in countries where the application of the rules on general contract terms are not limited to consumers; policyholders who are professionals and traders will not be bound by non negotiated clauses)*

- The cooling off period from which the policyholders benefit will be prolonged as long as the duty of information is not fulfilled.
- The policyholder will have the right to cancel or terminate or avoid the contract. The breach of the information duty by the insurer will enable the policyholder to lift the validity of the contract retroactively. This solution enables the policyholder to benefit from the cover in cases where the risk is materialized before the cancellation. But if there is no cover, the policyholder may either claim its losses (if cover would have been obtained, had the information duty been complied with correctly- i.e. possibility of optional additional cover against higher premium or taking out insurance from another insurer who would cover also the materialized risk) or terminate the contract or both.
- The policyholder will have the right to claim its losses (arising out of the breach of the information duty). This point may be controversial: The said duty may be based on general principles such as "fair dealing" and "culpa in contrahendo" and the policyholder may be granted the right to claim its losses even if the insurance legislation is silent on such a possibility. The legal nature of the duty may be relevant in deciding whether the policyholder may ask its prejudice to be compensated. If this duty is qualified as a true "obligation", the violation would give rise to a claim for losses. However a qualification as "duty" would lead to a different result. In that case the policyholder would have only the options explicitly provided in the law and if there were no clear provision enabling it to claim for losses, that sanction would not be available.

12) Duty to declare the conflicts of interests

In recent years, the question "how to deal with eventual conflicts of interests" gained weight. It involves the insurance intermediaries in a broader extent, but the insurance undertakings also have to comply with certain rules in order to avoid conflicts of interest that may appear when their employees are used in the sale of the insurance products and are remunerated for this task.

With regards to the avoidance of conflicts of interest, the first requirement is the disclosure of "participation" (holding). The insurance intermediary

must state whether it has a holding (direct or indirect) worth of being disclosed (for instance more than 10 per cent of the voting rights or of the capital of a given insurance undertaking) and also whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a holding, direct or indirect, has a similar holding in the insurance intermediary.

Whether the intermediaries and insurance undertakings should be under the duty to declare the fees paid to them for their mediation activities is a very debated issue. It is well known that brokers are strongly opposed to such duty. The main arguments advanced by brokers against the EU proposals emphasize that the information about commission arrangements will not be easily accessible by the consumers.

The new EU proposals for IMD2 (the second –revised- insurance mediation directive) contain rules on mandatory disclosure to the policyholder of the commission arrangements. The disclosure requirement will be complied with only "upon request" in non-life products. The drafters considered that an immediate application of the new rules would not be appropriate in non-life products and have therefore provided a transitional period of five years. It is proposed that the intermediary disclose

- the nature of the remuneration received
- whether it works
  - on the basis of a fee (the remuneration paid directly by the customer) or
  - on the basis of a commission of any kind (the remuneration included in the insurance premium) or
  - on the basis of a combination of fee and commission
- the full amount of the remuneration concerning the insurance products, and where the precise amount is not capable of being given, the basis of calculation of all the fee or commission or the combination of both
- the targets or thresholds if the amount of the commission is based on the achievement of agreed targets or thresholds, as well as the amounts payable on the achievement of them.

Moreover, the IMD2 proposal provides that the EU Commission will be empowered to adopt delegated acts to specify

- appropriate criteria for determining how the remuneration of the intermediary shall be disclosed to the customer
- appropriate criteria for determining in particular the basis of calculation of all the fee or commission or the combination of both

- the steps that might reasonably be expected to take to disclose the remuneration.

In our view, the cited points are important and need to be regulated to have a complete protection system in favor of the insurance consumers.

13) Insurance Investment Products

Insurance products may have the character of being also investments. This is the case for some of the life insurances. Within the EU, in order to align insurance investment products with other products falling within the ambit of Markets in Financial Instruments Directive (MiFID) more detailed additional rules are proposed. We can summarize as follows:

The basic rule is that the special provisions proposed with regards to insurance investment products will apply "in addition" to those provided for any other insurance product.

IMD2 proposal adopts as a fundamental principle that all appropriate steps to identify conflicts of interest that arise in the course of carrying on insurance mediation between

- the intermediary or the insurance undertaking (including their managers, employees and tied insurance intermediaries, or any person directly or indirectly linked to them by control) and their customers or
- between one customer and another.

The disclosure of the existence of a conflict of interest is required only if steps taken are not sufficient to ensure, with reasonable confidence, that risks of damage to the interests of customers/ potential customers will be prevented. In such case, the insurance intermediary or the insurance undertaking shall clearly disclose the general nature or sources of conflicts of interest to the customer before undertaking business on the customer's behalf.

IMD2 proposal does specify

- neither the steps and effective organizational and administrative arrangements to identify, prevent, manage and disclose conflicts of interest,
- nor the appropriate criteria for determining the types of conflict of interest.

Delegated act by the EU Commission will fill those gaps.

In respect of the information duty towards customers, the basic principles set out can be resumed as follows:

All information, including marketing communications to customers or

potential customers shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

The customers/ potential customers must be informed about:

- the insurance intermediary or insurance undertaking and its services.
- in case advice is given, whether the advice is provided on an independent basis and whether it is based on a broad or on a more restricted analysis of the market. Information must specify also whether the customer shall be provided with an on-going assessment of the suitability of the insurance product recommended.
- insurance products and proposed investment strategies (including appropriate guidance on and warnings of the risks associated with investments in those products or in respect of particular investment strategies)
- costs and associated charges.

The information must be provided in a comprehensible form to enable the customers/ potential customers to understand the nature and risks of the specific insurance product offered. This will lead to investment decisions on an informed basis. The use of standardized format is authorized.

IMD2 proposal contains also provisions on "advice on an independent basis". If the customer is informed that insurance advice is provided on an independent basis, the following requirements are to be complied with:

> A sufficiently large number of insurance products available on the market must be assessed (in that respect a diversification rule is provided: insurance products should be diversified with regard to their type and issuers or product providers; besides, they should not be limited to products issued or provided by entities having close links with the insurance intermediary/ undertaking).
>
> The insurance intermediary/undertaking must refrain from accepting or receiving fees, commissions or any monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to customers.

The specific rules in the IMD2 are not sufficient neither to create a complete system. Thus the method of "delegated acts" will be here too of help. The EU Commission will be empowered to adopt delegated acts concerning measures to ensure that insurance intermediaries/ undertakings comply with the principles provided. The delegated acts will relate to the nature of the service(s) and the nature of the products.

The suitability and appropriateness of the investment product to the needs

and (reasonable) expectations of the customer is no doubt one of the most important goals to achieve within the context of advice. IMD2 imposes to the intermediary/insurer the duty to detect and to report to the customer eventual non-suitable and non-appropriate products. The special rules on this particular issue may be summarized as follows:

The insurance intermediary/ undertaking shall obtain first the necessary information about the customer's/ potential customer's

- knowledge and experience with regards to the field relevant to the specific type of product
- its financial situation
- its investment objectives.

The insurance intermediary/ undertaking must base its recommendation concerning the insurance products that are suitable on that information.

Where no advice is given, the insurance intermediary/undertaking must ask the customer/ potential customer to provide information regarding its knowledge and experience in the investment field relevant to the specific type of product or service (offered or demanded). The aim of this investigation is to enable the insurance intermediary/ undertaking to assess the appropriateness of the insurance service or product envisaged.

If upon the information given by the customer the insurance intermediary/ undertaking considers that the product or service is not appropriate, a duty to warn must be complied with. A standardized format may be used for that warning.

It may be that customers refrain from giving information or provide insufficient information regarding their knowledge and experience. If this is the case, the insurance intermediary/ undertaking shall be under the duty to warn them it is not in a position to determine whether the service or product envisaged is appropriate. This warning also may be provided in a standardized format.

As words fly away, the establishment of a record by the insurance intermediary/ undertaking including documents (for example a contract agreed between the insurance intermediary/ undertaking and the customer setting out the rights and obligations of the parties, and the other terms relating to the provision of services to the customer) is made compulsory.

The receipt of adequate reports by the customer from the insurance intermediary/ undertaking on the service provided (including periodic communications to customers, having regard to the type and the complexity of insurance products involved, the nature of the service and where applicable, the costs associated with the transactions and services

undertaken on behalf of the customer) is also an adequate solution to ensure a better protection for the insurance consumers buying investment products. IMD2 institutes also such duty.

In its advice, the insurance intermediary/ undertaking must specify how this advice meets the personal characteristics of the customer.

Gaps in the IMD2 will be filled by the EU Commission empowered by the proposal to adopt delegated acts specifying the nature of the service(s) offered or provided and the nature of the products.

14) Key Information Documents

The new EU legislation proposal about investment products that will be also applicable to insurance investment products provides special rules on the so-called "key information documents" ("KID"s).

The main features of this proposal are as follows:

The person selling an investment product shall be required to provide the key information document to retail investors free of charge.

The KID must be provided to the retail investor in one of the following media:

- on paper
- using a durable medium other than paper (under certain conditions)
- by means of a website (under certain conditions)

If the KID is provided using a durable medium other than paper or by means of a website, a paper copy must be provided to retail investors upon request and free of charge.

The provision of the KID using a durable medium other than paper are subordinated to the conditions cited below:

- the use of the durable medium is appropriate in the context of the business conducted between the person selling an investment product and the retail investor; and
- the retail investor has been given the choice between information on paper and in the durable medium, and has chosen that other medium.

The KID may be provided by the means of a website if it is addressed personally to the retail investor or under the following conditions:

- the provision of the key information document by means of a website is appropriate in the context of the business conducted between the person selling an investment product and the retail investor;

- the retail investor has consented to the provision of the key information document by means of a website;
- the retail investor has been notified electronically of the address of the website, and the place on the website where the key information document can be accessed;
- where the key information document has been revised, all revised versions shall also be made available to the retail investor;
- it is ensured that the key information document remains accessible on the website for such period of time as the retail investor may reasonably need to consult it.

As to the appropriateness of the provision of information using a durable medium other than paper or by means of a website, the following criteria must be met:

- The use of a durable medium or the web site must appear as appropriate in the context of the business conducted between the person selling an investment product and the retail investor,
- There must be evidence that the retail investor has regular access to the Internet. (The provision by the retail investor of an e-mail address for the purposes of that business shall constitute such evidence).

II. Insurer's duty to warn/advise

The prospective policyholder is the weak party in its relation with the insurer. It will be able to take an appropriate decision only if the insurer (or the insurance intermediary), in addition to what falls within the ambit of the information duty, provides on the other hand accurate advice and accomplishes necessary warnings.

It is obvious that the duty to advise or warn cannot be accomplished without being aware of the circumstances surrounding the prospective policyholder, its desires and needs. Thus the insurer shall have to gather first information. This initiative can be shortly defined as "know your customer". After this task is achieved, the insurer will draw the borderlines of its advices and warnings.

Below we will examine briefly the solutions of the PEICL and the German Insurance Contract Act (VVG).

1) PEICL

The Principles of the European Insurance Contract Law (PEICL) provide three separate duties for the insurer that must be complied with at the pre-contractual stage:

- duty to provide pre-contractual documents
- duty to warn about inconsistencies in the cover
- duty to warn about commencement of cover

Only the first duty above relates to information requirement. The others concern the duty to advise/warn.

a) Insurer's duty to warn about the inconsistencies in the cover

Instead of the duty to advise, sometimes reference is made to the duty to warn about the inconsistencies in the cover. It seems that both expressions relate (more or less) to the same notion. We would prefer the use of a single term.

PEICL (Principles of European Insurance Contract Law) preferred the expression "the duty to warn about the inconsistencies in the cover". PEICL's approach is as follows:

In most cases the prospective policyholder fills an application form at the pre-contractual stage. Taking into account the inequality of knowledge and experience between the insurer and the prospective policyholder (applicant), the insurer must

- be put under the duty of assisting the applicant when it fills the application form
- give the applicant the reasons for any advice

b) Scope of the duty to warn about the inconsistencies

The duty to warn about the inconsistencies is relevant in areas where the insurer is usually considered to have expertise (especially with regards to the evaluation of the risks, to the content of the insurance policy). Consequently the insurer will be obliged to warn about the lack of cover.

PEICL impose on the insurer the duty to warn of any inconsistencies between the cover offered and the applicant's requirements of which it is or ought to be aware. This duty must be accomplished taking into account the circumstances and the mode of contracting. It will be more extensive in face-to face negotiations but will be at least very reduced in respect of insurance products sold on shelves in supermarkets.

On the other hand when the applicant is assisted by an independent intermediary (broker) the duty to warn will be lifted.

c) Breach of the duty to warn about the inconsistencies

The breach of the duty to warn about the inconsistencies of the cover would lead to insufficient cover or over-insurance or undesired coverage. The insurer would then be liable to pay all losses resulting from the non-

appropriate insurance contract unless it proves that it acted without fault. Thus the liability is based on fault. In addition to the liability for losses, PEICL provide as a second sanction the termination of the insurance contract. The policyholder must use its right to terminate by written notice within two months to count from awareness of the breach.

d) Duty to warn about commencement of cover

In case the applicant requests for immediate cover (equivalent to request for preliminary cover), the insurer must respond immediately by either granting of preliminary cover or warning the applicant that cover will begin later (for instance upon payment of the first part of the premium).

There is a misbelief amongst the policyholders that cover begins without any delay when the contract is concluded. The duty to warn about the commencement of cover would aim at remedying the severe consequences of that misbelief by imposing on the insurer a special duty (to warn the policyholder that risks that may occur after the conclusion of the insurance contract will not be covered until at a later stage (lack of cover). If this duty is breached the insurer will be held to compensate the losses caused by the breach. This would mean that the insurer would be liable as if the cover had already started.

2) VVG

We underlined above that the duty to advise was provided in order to remedy the imbalance that exists between the insurer and the prospective policyholder. The new VVG applying to insurance contracts concluded after 1.1.2008 contains new provisions about that duty.

Under VVG § 6, the insurer is requested

- to ask the needs and wishes of the prospective policyholder and
- on the basis of the information furnished, to give its advice and the grounds thereof
- to document (or record) its advice.

However the German Law does not provide a general duty for the insurer to make a detailed risk analysis. The duty to question the prospective policyholder about its needs and desires, the duty to advise (with grounds) and the duty to record are to be complied with only under certain conditions:

- the insurer will ask the prospective policyholder's desires and needs and will give advice only in cases where it is justified having regard to the difficulty in deciding whether to take out or not the proposed insurance, to the person of the policyholder or its situation

- the advice will be given only if this seems proportionate taking into account the expenses engendered by the advice and the premium
- the documentation duty will be dependent on the complexity of the insurance contract offered.

The above mentioned criteria are criticized for being too open ended and for not being sufficiently concretized (WANDT, Manfred, Versicherungsrecht, 5. Auflage, 2010, Rn. 266).

It should be emphasized in particular that

- In case of simple standard insurance products the need for investigation on the desires of the prospective policyholder will be at the lowest level, especially if the prospective policyholder expressed clearly and restrictively its desire.
- But in case of a life assurance, one must admit in principle that an investigation is justified and the insurer should ask why the prospective policyholder envisages to take out insurance (for a better economic position in the future, to protect the persons who will be left behind, as guarantee of a loan etc.). The advice on the suitability will be largely depending on the answers given.
- The insurer or the intermediary acting on its behalf should consider why the prospective policyholder wants to take out a particular insurance, not only on the basis of the answers given but at the same time by taking into account the reasons pushing the prospective policyholder to conclude an insurance contract. The examples given by WANDT (op. cit. Rn. 266 p.104) illuminate this:
  - If the prospective policyholder expressed its desire to take out general liability insurance and there is a dog living at its house, it must be clearly advised of the fact that general liability insurance does not include cover for liability for dogs.
  - The intermediary who, in the house of the prospective policyholder remarks the presence of valuable things, and learns about the modest insurance sum that this prospective policyholder has in mind, must warn of an eventual underinsurance.
- The rule stating that the duty to advise will be acquitted only to the extent that it seems proportionate (having regard to the expenses engendered by the advice and the premium) does not appear to be appropriate since the duty to advise should not be linked to the premium paid/to be paid. A minimum advice duty of a general kind should exist in any case.

In German law, the advice may be provided verbally if the policyholder so wishes or if only provisional cover is granted. In such cases the insurer

is under the duty to provide the advice in textual form without undue delay after the conclusion of the insurance contract. However, there will be no duty to advise verbally in cases where subsequently the contract is not entered into or the insurance taken out is a provisional cover for a compulsory insurance.

The policyholder may waive the right to be advised and documentation thereof. To that effect a special written declaration is necessary. The insurer must have indicated clearly on the same special declaration that the waiver may be detrimental to the prospective policyholder's right of claiming losses (for breach of duty). It appears that under German law, the insurer will draft the waiver and the prospective policyholder will only sign it. Thus a waiver clause inserted in the general conditions of business (insurance) would not suffice even if these conditions were signed by the prospective policyholder.

3) Legal Remedy

The sanctions applicable in case of breach of duty by the insurer are mainly the termination (with effect in the future) or avoidance (with retroactive effect) and the liability for losses. In that context, we can give as examples of loss the following: The policyholder may have made alternative cover expenses or may have refrained from engaging in the activity involving the risk if advised that the risk was uninsurable in the market. Will the liability of the insurer for breach of the duty be based on fault? VVG § 6(5) requires a faulty behaviour. However the existence of the fault will be presumed (this presumption being refutable). The onus of proof and the standard of proof are also two important issues to decide in accordance with lex fori.

VVG § 6(5) provides as remedy only the liability of the insurer in breach for losses. However, the modification of the contract is also possible.

4) Exceptions to the duty to warn/advise

Large risks are the first exception to the rule. Insurance law will protect mandatorily the "insurance consumer", this notion comprising also the professionals and small and medium sized enterprises. But for large risks mandatory provisions don't apply. This is now an established rule.

The second exception would be the "negotiation" of the contract through a broker. If the contract negotiations with the insurer are conducted by an insurance broker, there is no need to put the insurer under a duty to advise. If the applicant has appointed a broker and is assisted by it, it is incumbent on the broker to provide to the applicant the appropriate advice.

Distance contracts must be exempted from the duty to advise also since

in the contracts concluded by using a distant communication means it is difficult or in most cases impossible to comply with the duty to advise.

5) Late discovery of the breach of the duty to warn

What will happen if the duty to advise/warn is complied with later? If the delay did not cause any loss there will be no room for compensation. But other sanctions may remain available until a certain date; the inactivity of the policyholder may have thus a rectifying effect.

III. Lex specialis?

A last issue consists to determine whether the rules about insurer's information/ advice/ warning duties provided in the insurance legislation will apply exclusively. It seems more convenient to admit that the general rules in the civil codes are not excluded if the legislator's aim was not "precluding their application by enacting special rules in the insurance legislation". Thus, in each concrete case the jurists will have to evaluate if a duty is imposed by civil law and if so what the sanction will be in case of breach.

"EL DEBER PRECONTRACTUAL DE INFORMACIÓN DEL ASEGURADOR"

Pre-contractual Information Duty of the Insurer

Roberto Ríos Ossa[1]*

Resumen: La buena fe impone al asegurador un deber de informar sobre el contenido del contrato. Se trata de una carga *in contrahendo* recogida por el legislador chileno, que tiene por objeto resolver la problemática que acarrea la asimetría de información en los contratos de seguro estandarizados.

Abstract: The Good faith requires the insurer a duty to report on the contents of the contract. It is a duty taken by the Chilean legislature, which aims to solve the problems that carry the asymmetry of information in the insurance contracts.

I. Preliminar

Los deberes de información en la etapa de formación del contrato, recogen las exigencias de la buena fe *in contrahendo,* y buscan proteger al contratante que está en una situación de desventaja[2]. Esta posición desmejorada

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[2] Lo que señalamos obedece a una transformación de los sistemas de contratación. La autonomía privada, no tiene una aplicación irrestricta en la contratación moderna, y más bien corresponde, según Gallo al liberalismo propio del siglo XIX, época en la que no encontramos una configuración del deber de informar, entendiendo que las partes se encontraban en una situación de equilibrio o igualdad durante el proceso de contratación (*caveat emptor, dejar al comprador estar precavido)*. Gallo, Paolo: *Asimmetrie Informative e dovere di informazione,* Rivista Trimestrale di Diritto Civile, 2007, p p. 644. En este espectro socio-jurídico, la voluntad del individuo será el motor de la vida social y económica, donde "la concepción liberal del contrato, que se funda en una igualdad abstracta, permitía a cada una de las partes defender por sí misma sus propios intereses, todo ello basado en un principio elevado a la categoría de ficción jurídica: un contrato no podría nunca ser injusto ni abusivo", ya que "el libre juego de las fuerzas económicas produce siempre lo mejor: necesariamente un resultado justo *(Quit dit contractuel, dit juste)*". Barrientos, Marcelo: *Daños y Deberes en las Tratativas Preliminares de un Contrato,* Lexis Nexis, 2008, p. 49. Ello es consecuencia de las ideas humanistas de la época, evocadas con

durante el proceso formativo del negocio jurídico tiene su origen, entre otros factores, en la falta de simetría en materia de información. Ello, debe ser corregido. Consiente libre, quien lo hace informado[3].

La asimetría de información, característica de la contratación en masa, se observa, que duda cabe, en el seguro. En consecuencia, este negocio jurídico queda permeado por la denominación de contratante débil o en desventaja[4], tipología que en la fase *in contrahendo* está representada en el tomador, e impone al asegurador un deber de información[5].

El deber de informar del asegurador se contextualiza en los datos que debe suministrar al tomador, y que permiten a este conocer de qué modo queda protegido o amparado por el seguro. Se trata de informar no sólo sobre el objeto del contrato (la cobertura o riesgo asegurado) sino de todo aquello que permita al tomador durante la vigencia del seguro, acceder a la satisfacción de su interés en el caso de ocurrencia de un siniestro.

II. El deber de información del asegurador en el Derecho chileno

El legislador chileno ha propiciado una serie de modificaciones tanto a la legislación sobre seguros, como en otros cuerpos legales que provocan, a nuestro juicio, un cambio relevante si de deberes de información del contrato de seguro se trata. Representativas de estas modificaciones son las introducidas a nuestra Ley de protección al consumidor número 19.496 (en adelante LPC)[6], y las contenidas en la Ley 20.667 sobre modificación

magistral fuerza y convicción por los ilustrados que pregonaban igualdad y libertad. Sobre el principio de la autonomía de la voluntad y los nuevos sistemas de contratación véanse: De Castro, Federico, *El Negocio Jurídico,* Instituto Nacional de Estudio Jurídicos de Madrid, 1967, p. 550; Martínez, Eva, *La formación del contrato a través de la oferta y la aceptación*, Marcial Pons, 2000, p. 21; Mazzamutto, Salvatore, *Dottrine Dell'Autonomia Privatta Dall'Italia All'Europa*, Rivista Critica del Diritto Privato, 2009, p. 595.

3 Sobre los deberes de información como instrumentos que permiten resolver la problemática que provoca la asimetría en el proceso de formación del contrato véanse Gómez Calle, Esther: *Los Deberes Precontractuales de Información,* La Ley, 1994, pp. 18 y ss.; Gallo, *ob. cit.*, p. 649. Zimmermann, Reinhard: *El nuevo Derecho Alemán de las Obligaciones*, Bosch, 2008, p. 246; De La Maza, Iñigo: *Los Límites del Deber Precontractual de Información,* Thomson Reuters – Civitas, 2010, p. 12 y ss.

4 Gómez Calle señala, que "los deberes de información tienen, en fin, una finalidad protectora. Estos deberes, pretenden proteger al que se halla en una posición más débil, por su escasa información o por su inexperiencia negocial". Gómez Calle, *ob. cit.*, p. 15. En el mismo sentido, De la Maza, *ob. cit.*, p. 120.

5 A juicio se Zimmermann, el derecho opta por un enfoque tipológico: concede protección a una de las partes que considera débil o en desventaja frente a la otra. Zimmermann, *ob. cit.*, p. 185.

6 Las modificaciones se contienen en la Ley 20.555. Si bien al analizar la exposición de motivos de esta ley, se observa que inicialmente el interés de ejecutivo fue dotar de

al Título VIII del Libro II de nuestro Código de comercio (en adelante CCMCH)[7].

Los deberes de información a cargo del asegurador, en el contexto del CCMCH, están contenidos en los artículos 514 y 529, que disponen:

> *Artículo 514. Propuesta. La proposición de celebrar un contrato de seguro deberá expresar la cobertura, los antecedentes y circunstancias necesarios para apreciar la extensión de los riesgos.*
>
> *Para estos efectos, el asegurador deberá entregar al tomador, por escrito, toda la información relativa al contenido del contrato que se celebrará. Esta deberá contener, al menos, el tipo de seguro de que se trata, los riesgos cubiertos y las exclusiones; la cantidad asegurada, forma de determinarla y los deducibles; la prima o método para su cálculo; el período de duración del contrato, así como la explicitación de la fecha de inicio y término de la cobertura.*
>
> *Artículo 429. Obligaciones del asegurador. Además de la contemplada en el artículo 519, el asegurador contrae las siguientes obligaciones: 1) Cuando el seguro fuere contratado en forma directa, sin intermediación de un corredor de seguros: prestar asesoría al asegurado, ofrecerle las coberturas más convenientes a sus necesidades e intereses, ilustrarlo sobre las condiciones del contrato y asistirlo durante toda la vigencia, modificación y renovación del contrato y al momento del siniestro. Cuando el seguro se contrate en esta forma, el asegurador será responsable de las infracciones, errores y omisiones cometidos y de los perjuicios causados a los asegurados[8].*

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mayores atribuciones al Servicio Nacional del Consumidor – Sernac -, con posterioridad será el mismo Ejecutivo el que presentará una serie de indicaciones ampliando el contenido de la ley, en especial al introducir una serie de deberes a los proveedores de productos y servicios financieros en materia de información. Ver en www.congreso.cl historia de la Ley N° 20.555. Las modificaciones introducidas por la Ley 20.555 a la LPC recurren a los vocablos productos o servicios financieros. Sobre esta denominación, es nuestro parecer, que la fuente – a los menos indirecta – de la norma chilena esta en la Directiva comunitaria 2002/65/CE, que en su artículo 2º, letra b) señala: *"Servicio financiero: todo servicio bancario, de crédito, de seguros, de jubilación personal, de inversión o de pago".* Podríamos concluir, en consecuencia, que la referencia a servicios o productos financieros de la LPC incluye a todo tipo de seguros masivos o estandarizados.

[7] El Código de comercio chileno fue modificado mediante la Ley 20.667 publicada en el Diario oficial (en adelante D.O) el 09 de mayo del 2013. La referida ley tiene una vacancia legal. El artículo transitorio de esta ley señala: *"La presente ley comenzará a regir el primer día del séptimo mes siguiente al de su publicación"*.

[8] Sobre el artículo 529, la exposición de motivos de la Ley 20.667, señala: *"El artículo 529 que consagra como una de las obligaciones principales del asegurador la de indemnizar el siniestro cubierto por la póliza, fue objeto de una indicación sustitutiva de los Diputados Burgos y Chahín, aprobada por unanimidad, que consagra como obligaciones del*

Las referidas normas, deben leerse en complementación con el artículo 17b de la LPC, que impone una serie de deberes de información al proveedor a favor del consumidor. Señala es texto del referido artículo lo siguiente:

> *Artículo 17 B.- Los contratos de adhesión de servicios crediticios, de seguros y, en general, de cualquier producto financiero, elaborados por bancos e instituciones financieras o por sociedades de apoyo a su giro, establecimientos comerciales, compañías de seguros, cajas de compensación, cooperativas de ahorro y crédito, y toda persona natural o jurídica proveedora de dichos servicios o productos, deberán especificar como mínimo, con el objeto de promover su simplicidad y transparencia, lo siguiente:*
>
> *a) Un desglose pormenorizado de todos los cargos, comisiones, costos y tarifas que expliquen el valor efectivo de los servicios prestados, incluso aquellos cargos, comisiones, costos y tarifas asociados que no forman parte directamente del precio o que corresponden a otros productos contratados simultáneamente y, en su caso, las exenciones de cobro que correspondan a promociones o incentivos por uso de los servicios y productos financieros.*
>
> *b) Las causales que darán lugar al término anticipado del contrato por parte del prestador, el plazo razonable en que se hará efectivo dicho término y el medio por el cual se comunicará al consumidor.*
>
> *c) La duración del contrato o su carácter de indefinido o renovable automáticamente, las causales, si las hubiere, que pudieren dar lugar a su término anticipado por la sola voluntad del consumidor, con sus respectivos plazos de aviso previo y cualquier costo por término o pago anticipado total o parcial que ello le represente.*
>
> *d) Sin perjuicio de lo establecido en el inciso primero del artículo 17 H, en el caso de que se contraten varios productos o servicios simultáneamente, o que el producto o servicio principal conlleve la contratación de otros productos o servicios conexos, deberá insertarse un anexo en que se identifiquen cada uno de los productos o servicios, estipulándose claramente cuáles son obligatorios por ley y cuáles voluntarios, debiendo ser aprobados expresa y separadamente cada uno de dichos productos y servicios conexos por el consumidor mediante su firma en el mismo.*

asegurador prestar asesoría integral al asegurado, en caso que el seguro fuere contratado en forma directa sin intermediación de un corredor de seguros, e indemnizar el siniestro cubierto por la póliza". Ver historia de la Ley 20.667. p. 130.

> *e) Si la institución cuenta con un servicio de atención al cliente que atienda las consultas y reclamos de los consumidores y señalar en un anexo los requisitos y procedimientos para acceder a dichos servicios.*
>
> *f) Si el contrato cuenta o no con sello SERNAC vigente conforme a lo establecido en el artículo 55 de esta ley.*
>
> *g) La existencia de mandatos otorgados en virtud del contrato o a consecuencia de éste, sus finalidades y los mecanismos mediante los cuales se rendirá cuenta de su gestión al consumidor. Se prohíben los mandatos en blanco y los que no admitan su revocación por el consumidor.*
>
> *Los contratos que consideren cargos, comisiones, costos o tarifas por uso, mantención u otros fines deberán especificar claramente sus montos, periodicidad y mecanismos de reajuste. Estos últimos deberán basarse siempre en condiciones objetivas que no dependan del solo criterio del proveedor y que sean directamente verificables por el consumidor. De cualquier forma, los valores aplicables deberán ser comunicados al consumidor con treinta días hábiles de anticipación, al menos, respecto de su entrada en vigencia.*

El asegurador debe suministrar al tomador o contratante del seguro "*por escrito*"[9] todos los datos sobre la cobertura, por lo que, debe ser preciso en la descripción del riesgo cubierto, tanto en su individualización por inclusión como su delimitación por exclusión[10].

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[9] En aquellos casos en los que se informa por medios no tradicionales (a distancia o tecnológicos) el asegurador debiera implementar mecanismos que garanticen la recepción de la información y que exista la posibilidad del asegurado de almacenar o imprimir la información. Con ello, se siguen los criterios impuestos en el artículo 12A de la LPC. Señala el artículo 513 letra v) del Ccmch: *"Seguro celebrado a distancia: aquel que se ha convenido entre las partes mediante cualquier sistema de transmisión y registro digital o electrónico de la palabra escrita o verbal".*

[10] Se debe considerar la imperatividad del artículo 542 de Ccmch, y su efecto en cuanto al control de contenido del contrato. De este modo, se pone atajo a la libertad del asegurador predisponente. La imperatividad está contenida en el artículo 542 del Ccmch, que dispone: *"Carácter imperativo de las normas. Las disposiciones que rigen al contrato de seguro son de carácter imperativo a no ser que en éstas se disponga otra cosa. No obstante, se entenderán válidas las estipulaciones contractuales que sean más beneficiosas para el asegurado o el beneficiario. Exceptúanse de lo anterior, los seguros de daños contratados individualmente, en que tanto el asegurado como el beneficiario, sean personas jurídicas y el monto de la prima anual que se convenga sea superior a 200 unidades de fomento, y los seguros de casco y transporte marítimo y aéreo".* Esta norma de imperatividad, constituye el elemento que provoca la transformación en la regulación sobre el contrato de seguro en el Derecho chileno, que contemplaba en la estructura decimonónica sustituida, un sistema de normas dispositivo. La exposición de motivos de la Ley 20.667, refiere como justificación general de la imperatividad, la necesidad de ajustar la normativa que regula el contrato de seguro a las necesidades del tráfico

El asegurador debe informar la extensión de la cobertura tanto en su dimensión cualitativa (causal, espacial y temporal) como cuantitativa[11].

Las normas que hemos referido, en especial el artículo 514 apuntan a solucionar no sólo la falta en la entrega de información. La ley se ocupa de la forma en la que se suministra la información. Ello, apunta a resolver la otra cara de la problemática de la asimetría, denominada en la doctrina como *racionalidad imperfecta*, esto es, la imposibilidad del consumidor de comprender la información que recibe[12].

Con todo, es nuestra opinión que los artículos 514 y 529 del Ccmch, priman por sobre el artículo 17b de la LPC. En consecuencia, la norma de la LPC citada, sólo se aplicará en aquellos casos en los que nuestro Código de comercio silencia.

Para terminar, y si bien estamos en la etapa formativa del contrato – tratos previos o preliminares – las información que expide o entrega el asegurador tendrá relevancia al momento de la conclusión del proceso de formación del consentimiento, más aún, considerando que la Ley 20.667 considera al contrato de seguro como consensual, sustituyendo el régimen de la solemnidad de la póliza[13].

III. Efectos derivados del incumplimiento al deber de información del asegurador

En el caso de un incumplimiento del deber de información que pesa sobre el asegurador, el Ccmch no contempla una norma especial o diversa a las

actual, así como la implementación de mecanismos que permitan reequilibrar la relación entre tomador y asegurador, tanto en el *iter* de formación del contrato, como durante su ejecución. La propuesta de corrección a la falta de simetría, apunta a lo siguiente: normas mínimas obligatorias que les den un marco de certeza jurídica que no pueda ser modificado contractualmente. Ver: Informe de la Comisión de Economía, Fomento y Desarrollo de la Cámara de Diputados, correspondiente a la tramitación de la Ley número 20.667, publicada en el D.O el 09 de mayo del 2013, sobre el contrato de seguro. Sobre la imperatividad véanse: Embid, José Miguel, *Aspectos Institucionales y Contractuales de la Tutela del Asegurado en el Derecho Español*, Revista Española de Seguros, 1997, p. 21; Diez-Picazo, Luis, *Contratos de consumo y derecho de contratos*, Anuario de Derecho Civil, 2006, p. 14; Petit, María Victoria, *La Protección del Asegurado en la Doctrina de Nuestros Tribunales*, Revista Española de Seguros, 2007, p. 70.

[11] Este deber de información (asesorar) corresponderá al intermediador en los casos en que el denominado producto de seguro lo ofrece un corredor y no directamente el asegurador. El artículo 10 del Reglamento de Auxiliares del Comercio de Seguros Nº 1055, sobre obligaciones de corredores de seguros, señala: *"Los corredores estarán obligados a: 1) Asesorar a las personas que deseen asegurarse por su intermedio, ofreciéndole las coberturas más convenientes a sus necesidades e intereses".*

[12] Sobre la racionalidad imperfecta en la doctrina chilena ver por todos De La Maza, *ob. cit.*, p. 160.

[13] Señala el artículo 515 del Ccmch (norma introducida por la ley 20.667): *Celebración y prueba del contrato de seguro. El contrato de seguro es consensual.*

consideradas por nuestro derecho común. En este contexto y considerando que la falta de información es inductiva de error, el tomador en su calidad de *errans* podría requerir la nulidad de contrato conforme a la disciplina general sobre vicios del consentimiento (artículos 1451 y siguientes de Código civil).

Obstante lo señalado, a nuestro juicio, las normas sobre protección del consentimiento de nuestro derecho común, siguen la concepción tradicional del contrato que no considera la tipología de contratante débil propia de las relaciones de consumo, y por lo tanto son insuficientes en el contexto de la fenomenología de la contratación masiva o estandarizada que caracteriza a toda una relación contractual de consumo[14].

No obstante, el silencio de Código de comercio se suple en la LPC. En su artículo 17E, contempla una regla especial de nulidad de la cláusula o estipulaciones defectuosas, y la adaptación del contrato el contrato según los casos. Si consideramos la aplicabilidad de las normas de la LPC a todos tipo de seguros, frente a una defectuosa o incompleta información entregada por el asegurador al tomador, que provoque un defecto o vicio en la voluntad de este último, procede la nulidad en los términos de los artículos 17E.

La norma citada reza lo siguiente:

> *Artículo 17 E.- El consumidor afectado podrá solicitar la nulidad de una o varias cláusulas o estipulaciones que infrinjan el artículo 17 B. Esta nulidad podrá declararse por el juez en caso de que el contrato pueda subsistir con las restantes cláusulas o, en su defecto, el juez podrá ordenar la adecuación de las cláusulas correspondientes, sin perjuicio de la indemnización que pudiere determinar a favor del consumidor.*
>
> *Esta nulidad sólo podrá invocarse por el consumidor afectado, de manera que el proveedor no podrá invocarla para eximirse o retardar el cumplimiento parcial o total de las obligaciones que le imponen los respectivos contratos a favor del consumidor.*

Frente a un supuesto de nulidad, nuestro ordenamiento contempla la facultad de anular la cláusula o estipulación defectuosa, siempre y cuando tal ineficacia permita mantener el contrato en el sentido de poder quedar satisfecho el interés de amparado del tomador del seguro. En caso que la

[14] En la doctrina española, a juicio de Ossorio, no es posible ignorar "la floración de nuevos principios, totalmente ajenos al pensamiento tradicional, que invaden hoy el régimen de las obligaciones, y que no es posible armonizar con la dogmática clásica: la protección que la ley dispensa a veces a uno de los contratantes por considerarlo más débil". Ossorio, Juan, *Crisis Dogmática del Contrato,* Anuario de Derecho Civil, 1952, p. 1176.

nulidad de la cláusula o estipulación no permita que el contrato subsista, queda facultado el juez para ordenar a las partes una adaptación del seguro. Con todo, si las partes no adaptan el contrato podría el tribunal cumplir con este mandato legal[15].

Subsiste siempre la acción de indemnización de daños que pueda intentar el tomador en contrato del asegurador.

IV. Conclusiones

1. El derecho chileno regula los deberes de información del asegurador en los artículos 514 y 529 del Ccmch. Estas normas imponen al asegurador un deber de entregar información sobre el contenido del contrato, en una prima fase con un objetivo que la ley denomina "asesorar". Este deber o carga de informar se complementa con la carga informativa del artículo 514, que exige la entrega o suministro de información por escrito.
2. Las normas contenidas en el Ccmch, deben complementarse con el artículo 17B de la LPC.
3. La problemática que encontramos en el análisis de las normas contenidas en el Código de comercio, queda representada por el silencio de este cuerpo legal, en materia de efectos derivados frente al incumplimiento del deber de informar.
4. Es nuestra opinión - aunque aún en estudio y por consiguiente preliminar – que la inejecución del deber de informar del asegurador se resuelve en el contexto de la LPC, en concreto en el artículo 17E.

[15] Pizarro, Carlos, *Artículo 17E en La Protección de los Derechos de los Consumidores*, Thomson Reuters, 2013, p. 442.

Consumer Working Party
CILA, Lisboa, 8 de mayo de 2013

El Deber de Información del Asegurador

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Como es a menudo el caso, la situación del derecho francés en lo que se refiere al deber de información del asegurador no es fácil. Voy a seguir la trama propuesta por Samim Unan para intentar explicar nuestra situación lo más claramente posible.

A / Bases jurídicas

Le ley de creación del derecho de seguro en Francia, la ley del 13 de julio 1930, no preveía el deber de información del asegurador aunque fuese una ley de protección del asegurado. Por lo contrario, el asegurado era el único sometido a un deber de información en el momento de la comunicación de su riesgo.

Así, el deber de información nació en la jurisprudencia. Se dice que el juez descubrió el deber de información que estaba contenido implícitamente en el contrato, no sólo en el contrato de seguro pero en todos los demás contratos. Porque una parte de la relación contractual mantiene una información que la otra parte puede legítimamente pasar por alto, la parte que sabe tiene que informar la otra. Esta lógica resulta del deber de colaboración entre contratantes que resulta en sí mismo del deber de buena fe.

En lo que se refiere al contrato de seguro, la jurisprudencia estableció el deber de información del asegurador en una decisión de la Cour de cassation (Tribunal Supremo) de 1984 (Civ. 1re, 2 octobre 1984, n° 83-14295 : primera sala de lo civil, 2 de octubre de 1984, n°83-14295) .Y esperó hasta 1989 para que el legislador intervenga en vistas a transponer las directivas de la comunidad económica europea que preveían este deber de información.

Ahora, en el código de seguro francés, el deber de información del asegurador está previsto en diferentes disposiciones del derecho común del contrato de seguro así como por algunos contratos especiales como el seguro de vida o el seguro de grupo. Hay que añadir también el deber de información y de consejo de los mediadores de seguro. Artículo tras artículo se dibuja un mosaico de disposiciones dedicadas a la información del asegurado.

A pesar de esta importancia cuantitativa de los textos del derecho de seguro, se deja lugar a textos más generales. En aplicación de la disposición de que la ley especial deroga a la ley más general, cada vez que la ley especial no reglamenta una situación, se tiene que aplicar la ley más general. Así, el derecho del consumo se añade al derecho del seguro, tal como el derecho común de los contratos del código civil. Por consiguiente, no queda más remedio que contar con esta pluralidad de fuentes. Es posible verlo através de la substancia de la información esperada del asegurador.

B / Substancia

El código de seguro sólo exige **un formalismo informativo**, excepto para los mediadores de seguro y el seguro de vida para los cuales existe también un deber de consejo. El artículo L. 112-2 del código prevé que el asegurador tiene que proveer una documentación precontractual, es decir un documento de información sobre el precio y la cobertura antes de la conclusión del contrato y también un ejemplar del proyecto de contrato o una reseña de información sobre el contrato que debe contener varias informaciones listadas en el artículo :

- descripción precisa de la cobertura y de las exclusiones
- deberes del asegurado
- domicilio de la sociedad de seguro
- ley aplicable al contrato
- manera de tratar las reclamaciones del asegurado

Observamos que esta lista esta mucho menos completa que la de los principios de derecho europeo del contrato de seguro (artículo 2:201). Pero otras informaciones deben aparecer en la documentación, diferentes con arreglo a diferentes tipos de contratos de seguro. Por ejemplo, el seguro de grupo requiere una reseña especial (artículo L. 141-4 C. ass.), tal como el seguro de vida, porque es un contrato muy complejo, exige varias informaciones sobre los soportes de inversión, el valor debido, los gastos de gestión…(etc) Bien se los decía que el derecho Francés es muy complicado…

Este deber de información, por medio de la documentación precontractual es fácil de llevar a cabo por el asegurador. Lo prueba con la firma del asegurado sobre la póliza. ¿Pero a pesar de esto, es el asegurado correctamente informado?

¿Más allá del formalismo informativo, se exige además **un diálogo informativo**? Se exige en dos casos:

- los mediadores deben aconsejar (asesorar) a los clientes como le impone una directiva de 1992 (2002/92/CE del 9 de diciembre del 2002), transpuesta en Francia con una ley del 15 de diciembre del 2005 (artículo L. 520-1 C. ass.).
- los aseguradores y los banqueros deben aconsejar (asesorar) a los clientes cuando proponen un seguro de vida y esto desde una ordenanza de 2009 (n° 2009-106 del 30 de enero 2009: artículo L. 132-27-1 C. ass.).

Pero, para los demás contratos de seguro, ningún texto del código de seguro menciona un deber de consejo (o asesoramiento). ¿Quiere decir esto que éste deber no existe? Por supuesto que no!

Se puede aplicar el código del consumo (artículo L. 111-1 y desde la ley n° 2010-853 del 23 de julio de 2010, el artículo L. 111-2) que exige un deber de información mas general que el código de seguro, que no se limita al formalismo pero que sólo concierne los contratos concluidos por la vida privada del asegurado. Sin embargo, a pesar de su aplicabilidad, ninguna decisión de la Cour de cassation (del Tribunal Supremo) aplicó este texto a un contrato de seguro.

El deber de consejo del asegurador fue creado, o sea (incluso) inventado, por la jurisprudencia. Como lo he dicho antes, fue a partir de los años 80.

Ya sea legal o jurisprudencial, este deber de consejo impone un diálogo entre el asegurador y su cliente. En primer lugar, el asegurador tiene que recoger informaciones sobre la situación del asegurado. Es decir que la ejecución del deber de consejo (o asesoramiento) supone para el asegurado un deber de comunicar acerca de su situación. Sin esto, no se puede aconsejarlo. En segundo lugar, el asegurador tiene que explicar los productos de seguro que puede proponer. Y, en tercer lugar, brinda el consejo (o asesoramiento), es decir que tiene que proponer el contrato más adaptado a la situación del asegurado y motivar su consejo. Además, este deber de consejo (o asesoramiento) es muy sútil porque hay que proporcionarlo con el grado de competencia del asegurado. Por ejemplo, si es un profesional del seguro, la intensidad del consejo será menor.

El diálogo puede además perseguirse con un deber de informar contra los riesgos de la operación. Es también un deber jurisprudencial, más reciente

que el deber de consejo y es por eso por lo cual es difícil delimitar los entornos?. Aparece cada vez que el contrato contiene un riesgo especial, una exclusión especial o una limitación de la definición de la cobertura, sobre todo cuando hay una renovación del contrato.

Tengo que explicar ahora como se sanciona la violación de estas obligaciones de información.

C / Sanción

Antes de determinar la naturaleza de la sanción, se plantea la cuestión de la prueba de la violación.

En primer lugar, el asegurado tiene que traer la prueba de la existencia de la obligación de información. Eso no crea problema cuando es la ley que impone la información o el consejo. Pero, cuando es la jurisprudencia, el asegurado tiene que demostrar que el asegurador conocía una información que el asegurado podía legítimamente ignorar y que se ha callado. Por consiguiente, es el juez que apreciará si la obligación existe o no.

En segundo lugar, hay que probar la inejecución de esta obligación. En principio, es el que alega de la inejecución que tiene que probarla, pero es una carga demasiado pesada para el asegurado probar que no fue informado. Por eso, la jurisprudencia y después el legislador decidieron que el asegurador tiene que probar que ha informado bien el asegurado; lo que es un inversión de la carga de prueba.

La prueba perfeccionada, ¿qué sanción puede esperar el asegurado?

El código de seguro no prevé ninguna sanción excepto para el seguro de vida. En este ámbito, si la reseña de información no fue comunicada al asegurado, éste último puede renunciar al contrato cuando quiera. Cuando la reseña esta comunicada, el asegurado dispone sólo de un plazo de un mes para renunciar.

A parte del seguro de vida, la sanción de la violación de un deber de información obedece al derecho común de los contratos. Dos tipos de sanciones pueden ser consideradas, la de la protección del consentimiento y la de la responsabilidad.

Para la protección del consentimiento, es posible solicitar la nulidad del contrato si el asegurado demuestra que cometió un error o que el asegurador tenía la intención de engañarle (dolo). Pero las condiciones impuestas por el derecho francés, para alcanzar estas sanciones son muy estrictas. En práctica, son sanciones poco pronunciadas, más aun cuando, la mayoría de las veces, el asegurado no tiene interés en ver desaparecer su contrato, es decir su garantía.

Para la responsabilidad, el asegurado tiene que demostrar la culpa del asegurador, lo que resulta de la violación del deber de información, su perjuicio y la relación entre la culpa y el perjuicio. La mayoría de las veces no será un perjuicio seguro porque ninguno sabe lo que habría hecho el asegurado si hubiese tenido la información. La reparación cubrirá la perdida de una suerte de poder hacer de otro modo. Así la reparación será menor.

La otra dificultad reside en el hecho de que hay que saber sobre cual fundamento de responsabilidad es posible fundamentar el requerimiento. En derecho francés hay que determinar si la responsabilidad depende del contrato y en este caso será contractual o no depende del contrato y será entonces delictual. La apreciación de las condiciones de la responsabilidad es diferente entre los dos tipos de responsabilidad. Es muy fácil demostrar la responsabilidad contractual pero el requerimiento está cerrado en un plazo de prescripción de sólo dos años contra cinco para la responsabilidad delictual. Como el deber de información interviene la mayoría de las veces en el periodo pre-contractual, la responsabilidad tendría que ser delictual pero vemos que la jurisprudencia tiene muchas dificultades para encontrar la cualificación adecuada.

Para concluir, pluralidad de las fuentes del deber de información, varias expresiones de la substancia de la información esperada, entre formalismo informativo y diálogo informativo, intensidad diferente de este deber, sanciones inadaptadas… En lo que se refiere al deber de información del asegurado, el derecho francés es desordenado, lo que es perjudicial para la protección del asegurado consumidor.

Para ayudarles a comprender nuestro derecho, nuestro desorden, los estudiantes del Master de derecho de seguro de la facultad de derecho de Montpellier publicaron, en inglés, en la publicación organizada por Samim Unan varias pequeñas contribuciones sobre los diferentes aspectos del deber de información en derecho francés. Así esperamos que nuestro derecho les parecerá menos obscuro.

Information Duty

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Initially, the policyholder was in charge of the information duty towards the insurer. Indeed, the policyholder was expected to answer strictly to the insurer's questions, especially in the Declaration form of risk. This situation had evolved under the influence of European law. As a matter of fact, the insurer is now in charge of the information duty towards the insurer.

I. The existence of the information duty

The article L112-2 of the Insurance Code is the only article in insurance common law which mentions a duty for the insurer to provide information to the insured (information notice, draft contract, etc.). Even though the article L111-1 of the Consumption Code establishes a duty for the professional to provide information to the consumer, its field of action is limited to the Consumption rights. Even the civil code doesn't contain any specific text about the information duty.

There are 3 steps in the informative dialogue. The first step is the factual information which is the duty to deliver objective information. The second step is "the obligation of advice" which includes a duty to deliver not only an appropriate but also a consistent information taking in account the insured's specificities. And the final step is "the warning of the consumers" about the ever-increasing risks of the coverage.

Even though it looks like the information is controlled, this isn't a proper vision of reality. For instance, there are a lot of different definitions given by the authors in order to describe the notion of information. Nevertheless other professionals, such as real estate agent and solicitors, are concerned with this lack of definition. For example, solicitors know how important it is to subscribe an insurance to renovate a building.

II. The sanction of the information duty

In the information duty the judges reverse the burden of proof. The information duty lies on the debtor who has to prove the right execution

of his duty. The debtor can give proof through any possible means, but most commonly with the creditor's signature in the insurance policy. The insurance policy contains a clause about the delivery of documents that state the enactment of the obligation.

The delivery of documents clause is validated for the factuel information but they are still discussed regarding the "obligation of advice" or "the obligation of warning". In the "obligation of advice", the insurant will have to prove that he needed the advice and it belongs and the insurer has to prove the delivery of the advice.

The information duty in the Insurance code is important but does not incurred a specific sentence. It is necessary to return to the common law and to apply the sentences bound to the defect of consent and the sentences bound to the civil fault. Indeed, there is a judges' confusion to identify the applicable sentence. In the case of lack of information or wrong information, the sentences are based on the defect of consent especially the mistake and the willful misrepresentation. These sentences are inappropriate because they lead to the nullity of the contract and therefore to the absence of cover. Therefore, the sentences based on the defect of consent are not appropriated sentences for violation of the information duty by the insurer.

There is the possibility of rulings on the grounds of the civil liability. However this raises difficulties about the identification of the damage and the nature of the responsibility. If a lack of information occurred before the conclusion of the contract, the responsibility would be tortious and the prescription biennial. If it occurred afterwards, the responsibility would be contractual and the prescription decennial. The jurisprudence considers as damage the loss of chance such as not being informed and not making enlightened choices. The loss of chance in insurance law can be understood as the loss of subscription of an adequate guarantee

A repeated violation of the Insurance Code leads to its information duty by the insurance company and could lead to sentences enforced by the Authority of Prudential control (ACP). The incurred sentences are, the warning, the disapproval, a ban from specific operations for a maximal duration of 10 years, the temporary suspension of executive directors for a maximal duration of 10 years, the automatic resignation of executive directors, the partial or total withdrawal of approval or authorization and the removal of the list of the approved persons. Additionally or instead of these sentences, a 100 million euros fine can be also sentenced.

Thus, the creditor of the information duty, the insurant, can appeal in case of the debtor's breach, the insurer, and can act on various grounds according his purpose and on the personal interest on the outcome of the ruling.

The Information Duty in Insurance Group

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The insurance group is an original legal mechanism developped in USA in 1911 then in France in 1928 with social insurance's creation, and developped in life insurance, well in global property and casulaty insurance (IARD). In each type of insurance contract there is an essential obligation arising from the contract.

About the sources of infomation duty in insurance group:

In the insurance goup a tipartite relationship arises between the subscriber, the member and the insurer. Faced with this situation it's difficult to dissociate the obligations of each one about the information duty.

The insurance code deals with the insurance group in the articles L 141-1, about the subscriber's obligation of information towards the member it's the article L 141-4 which deals with in general terms.

However about insurance policy subscribes during a loan there is a special law, for example about consumer credits it's the Act n° 78-22 of january 10, 1978 which deals with.

Then, the Act n° 79-596 of july 13, 1979, in the insurance policy subscribes during a home loan.

About the methods to carry out the information's obligation from the insurer to the member, no law deals with beacause of the the relationship between the member and the subscriber in insurance group.

Indeed the insurer upstream work affects his relation with the subscriber so we understand that between subscriber/member is an privileged relation.

Netherveless even if the insurance code doesn't deal with a duty information

incumbent on the insurer towards the member but just the subscriber, the french common law fill this lack.

So the question is how to combine french common law with the artciles about this obligation in insurance code's articles?

That's why some judgements try to elucidate the situation, judges consider that the obligation of information (information duty) wich is stated by the insurance code and the one which is stipulated by the french common law permits to force the insurer to respect this obligation in any case.

The judges want to extend the legal obligation of information to the insurance group.

In front of this lack of coherence it will be appropriate to analyze the informative dialogue 's content in each relationship between the three parties.

In respect of loan insurance there is a specifc duty to warn supporting by the subscriber and it's a decision from the Assemblee Plenière of the french supreme court (Cour de Cassation) of march, 2, 2007 which established this special duty to warn.

Therefore, the borrower member of the insurance group is at the same time creditor of an general obligation of information established under the Consumer Code and the duty to warn, obligation established by case law.

In the futur we'll see if this duty to warn will be extended to each type of insurance contract.

About the evidence, its different between the insurance subscriber side and the insurer one.

In insurance group, the subscriber is the debtor of the duty information (L 141-4 Insurance Code) and he has the burden of proof about the delivery of the information leaflet.

No particular formalism is forced by the insurance code

The insurance code doesn't force no particuliar formalism so in order to appreciate this proof, trial court's judges called in France "les juges du fond" proceed in two stages, check the delevery then, that the information is clear for the member.

On the insurer side, he has to give the information leaflet to the member after writing and prove it.

About the obligation to inform which lie with the insurer to the member, the

Insurance Code in the article R 112-3 enunciates that delevery of documents is noted by an endorsment dated and signed from the subscriber on the insurance policy.

So he recognized, that the other pary handed him all documents deal with this obligation of information.

About the kind of the sanction it deals with the responbality of the different contractual relationship's parts.

Fisrt, when the member engaged the subscriber's responsability:

It's the case where the information leaflet has been given by the insurer to the subscriber who doesn't transmit it to the member therefore it's the underwritter responsability which is engaged.

However when the insurer himself doesn't respect its bligations the french Suprem Court (Cour de Cassation) considers that the member can't engaged the subscriber's responsability without looking for if the insurer has written the information leaflet and has sended it to the subscriber.

But the insurer's liability will be engaged if he is unable Then, if the insurer is unable to relay the information leaflet to the member. Otherwise, the subcriber is liable in the case of failure, unclear information or way to inform.

Regarding subscriber's liability to the insurer, it's the liability's french comman law which is applied. In this way the insurer can't be liable for the subscriber's incompetence neither towards the member nor to the subscriber who doesn't given him the correct informations.

Laslty, in the case of the the breach of information and recommendation obligations, the non invocability contractual clause is applied as the penalty.

It's same penalty when the contactual clause is unclear or missing from the information leaflet. About the "ambiguouses clauses", it's always a reading in favour of the insured party which is adopted, in France it's designated by the expression "l'interpretation in favorem".

To conclude in France the information duty in insurance group is a legal mechanism which is rather regulated.

The Obligation to Provide Information of the Insurance Intermediary

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Introduction

The activity of insurance intermediary is defined under the French law. It consists in present, suggest or help to conclude insurance contracts. There are two types of intermediaries: the insurance agent and the broker. The agent is affiliated to an insurance company while the broker is independent and is not bound by an employment contract with an insurance company.

The intermediary must perform its obligation to provide information to its client.

In 1964, the jurisprudence enshrined this obligation to provide information for the insurance intermediary. Another obligation of the insurance intermediary is the duty to advise its clients.

Furthermore, the jurisprudence added that the broker had to be a "secured and experience guide" for its clients. The duty to advise is very important, it helps the future insured to choose a cover that fits its needs the best. Thanks to the intermediary, clients are aware of the risks when they take out the insurance as they are to be warned of the policy's underlying risks and dangers.

If the intermediary fails to fulfill its obligation to provide information to the client, the penalty is different whether it is an agent or a broker.

In order to protect the insured, the French law provides a general obligation to provide information for the Insurer. The intermediary must find the most adapted product to the client's needs. Advice must be given according to each client types and situations.

The intermediary must provide the client with a draft policy before its conclusion. The Information must be clear, simple and precise. The intermediary must write down all information given to the insured. In addition, it must provide some information about its own professional and financial situation. Lastly, if the intermediary promotes or advertise, it must mention other information such as its name, or the insurance company it works for.

I. The essence

There are three types of obligation to provide information for insurance Intermediaries: the duty to inform (A), to advise (B) and to warn (C).

A. Duty to inform

The duty to inform only concerns the intermediary's situation. It consists, for the intermediary, in disclosing generic information to its client.

Formalism is essentially pre-contractual since the wording mentions new clients. However, it does not exhaust until the policy ends, especially while renewals or modifications.

The insurance intermediary must disclose to each new client (article L520-1):

1) its name or company name and its professional address;
2) its registration number, as well as means for clients to verify it (such as the website of the registry);
3) if it holds, directly or not, over 10% of the voting rights of an insurance company shares;
4) if an insurance company or the parent company of an insurance company holds, directly or not, over 10% of the voting rights of its company shares;
5) if there is a claims handling service, its contacts information. As well as contacts of the Prudential Supervisory Authority (ACP).

In addition, insurance brokers that claim to give advice based on an objective analysis of the market must also, when appropriate, provide their client with the name of the insurance company or insurance group which generated more than 33% of their revenues of the previous year.

This information only concerns new clients. However, any change affecting this information, the intermediary must inform every clients at their policy renewal date or when modifying their policy, or if they take out a new policy.

6) the needs and requirements expressed by the potential policyholder.

7) reasons explaining the advice provided for a specific policy.

The more accurate the intermediary will be in providing the information, the more reliable the information will be, leading to a better transparency from the insurance intermediary, the insurance contract being, above all, a contract in good faith.

In addition, regarding when the information is to be provided by the insurance intermediary, two judgments were rendered.

The first is from the Court of Cassation's Second Civil Division of December 15th, 2005. This judgment states that the intermediary is no longer bound by its duty to contractually inform its client, when in conflict with the insurance company. When the broker is sued, it shall be discharged from its duty to inform the insured.

The second judgment from the Second Civil Division of July 5th, 2006 states that the duty to inform and to advise of the insurance agent does not end when the policy is taken out. Insurance intermediaries' duty to inform is, therefore, both pre-contractual and contractual.

The information provided by the intermediary is not to be confused with the information to be disclosed by the insurer. It must precede the choice made and include assessments of the insurance intermediary.

B. Duty to advise

Intermediary's duty to advise induces a critical appraisal of the insured's particular situation.

First, the intermediary must define the insured's needs and consult the insurance market in order to find the most appropriate cover. Accordingly, the insured will have to disclose some information regarding its situation. The intermediary is under no obligation to verify the accuracy of the information provided. brokers, in order to explain their advice, need to objectively analyze the market. In other words, they will have to consult a sufficient number of insurance companies.

However, a distinction needs to be made between the broker and the agent. Indeed, while the broker is free to consult several insurance companies, the agent will be necessarily limited due to its affiliation with one single insurance company.

Although the intermediary's duty to advise must be performed both prior to the policy's conclusion and throughout the life of the contract.

The intermediary will have to adapt the guarantees to best fit the risk and so, throughout the policy lifetime. The intermediary will also need to adapt its advice to the knowledge and skills of the insured. In case of the insured

being knowledgeable and/or skilled enough regarding the cover it wishes to get, the intermediary's duty to advise will, therefore, be reduced.

Finally, it's strongly recommended for the intermediary to write down all information which was given to the insured.

C. Duty to warn

The intermediary's duty to warn the insured does not come from the law but from the French jurisprudence and judicial doctrine.

Some authors such as Jean Bigot consider that the intermediary's duty to warn consists in warning the insured about the risks of taking out insurance that does not meet its needs. The duty to warn is, therefore, based on exchanges between the insured and the intermediary. The duty to warn requires the intermediary to present the downside, underlying dangers or risks of the policy to the insured. According to Jean Bigot, it would rather be, for the intermediary, an obligation of results than an obligation of means.

II. Penalty for not complying with the obligation to provide information

The insurance intermediary must demonstrate that the information was properly provided to the insured. In practice, regarding the conditions of disclosure of the information, the insurance intermediary, prior to the policy's conclusion or at the latest when signing the insurance policy, must provide the client all the information in writing, in plain and intelligible language.

Insurance intermediaries' professional organizations are thinking on implementing a specific document in order to ease the obligation to provide information and the demonstration that the information was properly provided.

Among penalties for not complying with the obligation to provide information, although we could primarily consider the lack of consent, the most commonly used penalty is the intermediary's liability, which would imply that all the liability's inherent elements: a fault, which, in this particular case, is easily established since the intermediary fails to demonstrate that the information was properly provided, a damage and a causal link.

Regarding the qualification of the harm, judges also qualify the non-compliance with the obligation to provide information as a loss of opportunity. However, regarding the damage qualification, it must have been directly occasioned by the insured. Damage can therefore be classified as the loss of opportunity, the insured not being able to take out a cover fitting its needs.

The Pre-contractual and Contractual Information in Life Insurance Policy

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Life insurance policy, product investment, has ceased to be under the lights of the legal news. Investment options are very wide, which explain the importance of the obligation of pre-contractual and contractual information. Therefore, it will be necessary to consider how the legislature, the courts and authorities as French Prudential Supervisory Authority have organised protection rules for customers. Beyond the traditional rules of common law, life insurance is to provide a formalism and a reinforced informative dialogue, all framed by specific sanctions. Orders and decrees have continued to supply Insurance Code from the law of 15th December 2005 (law n° 2005-1564).

The abundance of legislation reflects legislature will to surround a complex product which is that of life insurance. Professionals being drowned in a puddle of bonds, this flood of texts is necessary. The first aim is to further inform the customers consent with an adequate information and a provision aims to allow them to withdraw their consent.

The law of 15th of December 2005 n°2005-1564 has modified the contents of the legal obligation to provide information to the insurer.

For contracts entered into before 1st March 2006, the insurer must provide the insurance assures a proposal including a draft letter to make easy this right of withdrawal as well as a briefing on the essential terms of the contract (article L.132-5-1 of Insurance Code).

After the entry into force of this law, two dispositions took place at the former of the article L.132-5-1 of Insurance Code.

The article L.132-5-1 (new) is reduced and no longer deal with the

modalities of exercising the right to cancel and its consequences. Now, professional must submit a draft letter to make easy the exercise of the right of cancellation.

Article L.132-5-2 of Insurance Code states that the insurer must submit an information note on the conditions for exercising the right of withdrawal and its consequences through a draft letter to make easy the exercise of this right.

Article L.132-27-1 of the Insurance Code is to lay down the burden of the insurer but also bankers who commercialise life insurance and capitalization contracts, an obligation to provide advise for the customers. This obligation consists to advise the policyholders about the harmony between the agreement with their needs. The insurer must be based on the financial situation and customer subscription aims. Clarity and accuracy of the information provided is of the essence.

In these texts are added to the recommendations of the Prudential Supervisory Authority. In its latest recommendation n°2013-R-01, on the corpus of information available to the customer under the duty to advise in life insurance, which will be applicable as of October 2013, the Prudential Supervisory Authority describes how to follow in order to provide appropriate advice to the client if not the sanction will fall.

I. Existence of duty to provide information.

The information requirement is set under Article L.132-27-1 of the insurance code. This obligation must be met before the life insurance contract is concluded. This information shall enable any policy holders / underwriters to understand the nature of the contract and its issues/ challenges.

The duty to collect information comes across as balanced/ neutral information that all the customers should receive in the life insurance policy which they are interested in. The law of December 15th, 2005 similarly provides that the insurance contract or the draft contract is worth a briefing note for insurance contracts a value of surrender or transfer value, whilst the box is present.

It must be inserted at the beginning of insurance proposal or draft contract and in bold specify the nature of the contract.

The nature of the contract must be inserted in bold at the beginning of insurance proposal or the draft contract. This duty to advise is combined with the duty to inform of which the subscriber is the beneficiary. This duty had to take into account all the qualities of the subscriber to get all the subjective information that is best suited to their needs.

The duty to advise due by the insurer requires knowledge of personal

situation of the insurant in order to give him advice best suited to his situation and requests. The insurer thus inquires about the subscriber so that the latter gives his personal information allowing him to prepare a contract tailored to the client's needs. It is important that the insured understands the risks relating to the contract he signed.

The duty to provide sound advice is the subjective information that the debtor must provide according to the qualities of the subscriber. This duty to provide sound advice is not thus compulsory when all the elements are combined so that the subscriber, the insurant can understand the stakes and the risks of the contract.

Forewamed is forearmed

The duty to warn is to allow the lay to fill their inability to appreciate the risks of operation they will perform. Consequently, the Court of Cassation requires the insurer to inform the insured "of the least favourable characteristics and risks of the selected dynamic option".

Therefore, it is important to assess whether informed criterion or not of the insured-to-be by a concrete analysis on the basis of information provided by the customer, on their knowledge and investment experience, their financial situation and aim.

Namely, the "informed" customer quality was not clearly defined by the Court of Cassation, thus, assessment criteria are somewhat left to the discretion of judges.

The insurer may hold the proof of the fullfilment of their duty back by a written, the best way is a questionnaire.

II. Penalties relating to the duty to provide information

The common insurance law requires that there is written contract. The question of proof of delivery of the contract documents was raised after the Act of March 1, 2006 and following the judgment of the final Court of Appeal on 7 March 2006, which held invalid the provision of "general terms constituting the information note".

The nature of the misconduct affects the reserved penalty. There are two situations: the waiver of the contract and the extension of the waiver in the case of failure to provide contractual documents.

Article L.132-5-1 of the French insurance code allows the subscriber to cancel the contract within the period of 30 days following the delivery of the contract documents. The article is therefore of public order.

The option of waiver is stated in article L 132-5-2. The law of December 15th, 2005 has established this. Before this law, the right of renunciation was without limits to the subscriber.

After the law of December 15th, 2005, the insured person may cancel his life insurance policy within 30 days following the delivery of documents. This waiver entails the refund of the full amount by the company to the subscriber (purchaser) within 30 days of receipt of the registered letter with acknowledgment of the receipt. The extension is more a penalty implemented by the legislator. In fact, a failure to submit documents such as the information note or the contract draft leads to an extension of right of cancellation period up to 30 days following the date of actual submission of such documents, within 8 years from the date on which the subscriber is informed that the contract has been concluded.

The caselaw is tough on insurance companies since the good faith of the applicant is not required. This provision, which is protective, can be misused by experienced subscribers (Experienced investors), that plead an extended time period, when losing their invested funds in the financial markets.

This right of cancellation is an individual action. The total redemption is a limit of these penalties.

Some individuals try to bring an action for nullity of the contract on the basis of common law obligations.

Concerning the actions relating to the mistake, the trial judges excluded the actions almost systematically, as it is only allowed in cases where:

- It relates to the essence,
- or, as shown in the recent cases, it is considered that the fact of not receiving economic life insurance, did not amount to an error in the essence of the law.

Moreover, for the fraud to be established the fraudulent activities have to be deliberate or the final Court of Appeal considers there is only need to address this issue if insurer fails his obligation to provide information.

Thus, the only possible common law action is the obligation to bear civil liability.

Firstly, only the banker may be held individually liable for the contract on the grounds of a breach of his duty to warn and only to secular clients because when this latter is considered to be informed, the banker has no particular obligation to implement. The breech of this failure amounts to a lack of opportunity to subscribe to an investment that is too risky and therefore not be able to meet the expectations that better fit the customer's profile.

Second, the liability of the insurer is committed solely on the basis of tort law because it blames the professional for a fault committed prior to the conclusion of the contract. The assessment by the final Court of Appeal states the fault is attached to the nature of the information that has not been delivered and not its form. The failure to do so by the insurer amounts to a loss of opportunity not to invest in the contract and it is therefore necessary to compensate the policyholder.

So, this is very surprising, because the banker and the insurer see their responsibilities committed on two different grounds whilst they are both the in same type of relationship.

Information and Disclosure Duties in Portugal

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Contents

1. Legal basis of insurers information duties

In Portugal, the legal basis of the duty of the insurer to inform may be found essentially in Statutory law, namely in:

(a) The Insurance Contract Law (Decree-Law no. 72/2008, of 16 April)

(b) The Insurance Mediation Law (Decree-Law no. 144/2006, of 31 July)

(c) Others, such as

i. Law no. 24/96, of 31 July – Consumer protection law;

ii. Decree-Law no. 94-B/98, of 17 April – governs the taking up and pursuit of the insurance activity;

iii. Decree-Law no. 446/85, of 25 October – Unfair terms;

iv. Decree-Law no. 95/2006, of 29 May – Distance Marketing of financial services;

v. Decree-Law no. 384/2007, of 19 November – Life insurance registry (information duties towards the beneficiary);

vi. Decree-Law no. 222/2009, of 11 September – Special information duties under mortgage insurance;
vii. Decree-Law no. 57/2008, of 26 March – Unfair market practices;
viii. CMVM Regulation no. 2/2012, on complex financial products.

Notwithstanding the significant number of statutes that govern the information or disclosure duties of insurance undertakings, the truth is that the enactment of the Insurance Contract Law in 2008 resulted in an increase in the level of information that is now required to be disclosed.

In particular, one may question if in fact this level of information is useful for the consumer and inclusively if it is to his or hers advantage. At the moment of entering into the insurance agreement, the consumer is provided with a "wall" of text that he or she does not read and, afterwards, if there is a problem in a certain clause that the consumer states that he or she does not understand/did not read, the insurance undertaking will be covered by the fact that it disclosed the clause in advance and the consumer acknowledged receipt and having understood it (after being able to ask all the questions he or she deemed useful).

2. Contents of information

a) General principle

Going into the actual contents of the information to be provided, we may say that there is a general principle. In fact, according to Portuguese law, i.e. the Civil Code, whoever negotiates to enter into a contract must, both in the preliminary stage and when entering into the contract, act in good faith, subject to liability for damages caused by faulty behavior.

This general principle may also be found in Consumer Protection Law, namely in article 8 (Particular right to information), that states the following: "1 – The supplier of goods or services shall, both in terms of negotiations and entering into the agreement, clearly, objectively and adequately inform the consumer, notably of the characteristics, composition, and price of the good or service, as well as of the duration of the contract, security, and deadlines for delivery and assistance following the legal business transaction and also the consequences arising from the nonpayment of the price of the good or service".

It may also be found throughout the life of the insurance contract in the Insurance Contract Law, for example in article 91, that reads as follows: "In addition to the information elements to be included in the insurance policy, the insurer is required to disclose during the life of the

agreement any changes in the covered risk relating to the information elements provided pursuant to the law".

b) Common rules

In terms of common rules, the first subtopic to address is that of pre-contractual information duties, foreseen in articles 18 *et seq.* of the Insurance Contract Law.

In fact, prior to entering into the contract, the insurer must inform the following:

a) name and legal status (the insurer must inform the policyholder of the place and the name of the State where its registered office is located, as well as, if that is the case, of its branch upon which the agreement is entered into and its respective address;

b) covered risks;

c) exclusions and limitations of the coverage;

d) the total amount of the premium or its calculation method, as well as the payment means and the consequences arising from the failure to pay;

e) aggravations or bonuses and how to calculate them (if applicable);

f) the minimum insured amount (compulsory insurance);

g) the maximum insured amount;

h) the term of the agreement and its renewal and termination regime;

i) the applicable assignment regime;

j) the complaints system;

k) governing law.

Pursuant to article 21, all such information must be disclosed in a clear and written manner, in Portuguese language (except if the policyholder has agreed with the insurance undertaking on the use of a foreign language), prior to the moment when the policyholder becomes bound to the policy[1].

Furthermore, the application form shall in include a reference attesting that all information elements that the insurer is required to provide were made available to the policyholder in advance.

Besides pre-contractual information duties, there is also a special

[1] In insurance agreements concluded by distance means, Decree-Law 95/2006 governs the manner pursuant to which these information duties shall be abided by.

clarification duty impending on the insurer. In fact, according to article 22 of the Insurance Contract Law, the insurer must provide clarification on the more appropriate types of covers. Furthermore, said clarification duty must be proactive, in the sense that the insurer is required not only to answer all clarification requests but also to actively draw the insured's attention to the scope of the cover, exclusions, hardening periods, relationship between covers and the termination events of the policy that are left in the discretion of the insurer.

The Insurance Contract Law also provides for the actual mandatory contents of the insurance policy, e.g. in articles 36 and 37. So, once the contract has been entered into, the policy must include all the content agreed by the parties, namely the applicable general conditions, special conditions and particular conditions. And it must also contain:

a) the designation "policy" and the identification of all of the documentation it includes;

b) the full identification of the parties (including, if applicable, the insured, beneficiary and the insurer representative data, for claim purposes);

c) the nature of the insurance;

d) the risks covered;

e) the territorial and temporal scope of the agreement;

f) the rights and obligations of the parties, as well as of the insured and the beneficiary;

g) the insured capital or its calculation formula;

h) the premium or its calculation formula;

i) the commencement date, stating the day and the hour and its term;

j) the contents of the insurer obligation in case of claim or its calculation formula;

k) the governing law and the arbitral conditions.

Portuguese language is to be used when drafting the insurance policy, unless the policyholder has requested that the policy is drafted in another language, following an agreement of the policyholder with the insurer prior to the policy being issued. In case of mandatory insurance, a Portuguese policy must be delivered to the policyholder. This Portuguese policy shall prevail over any mandatory insurance policy drafted in another language.

Furthermore, and pursuant to article 37 of the Insurance Contract Law, the policy must include certain clauses in bold and with a larger font, namely the following:

a) Clauses which establish the causes of invalidity, the extension, the suspension or the termination of the agreement by the initiative of any party;

b) Clauses that establish the scope of the coverage, namely its exclusion or limitation;

c) Clauses which impose to the policy holder or to the beneficiary warning duties upon term.

This may be considered as a questionable option as it may be construed in the eyes of the consumer that the other clauses are not that important.

c) Special Rules

i. Life insurance

Besides and in addition to all the common rules mentioned above, the Insurance Contract Law has established several additional information duties when dealing with life insurance.

Firstly, and according to article 178, there are specific duties when insurance involves medical exams, as follows:

"1 – When there are medical exams to be carried out, the insurer shall deliver to the applicant, prior to those exams: a) the detailed information about the exams, tests and labs to be done; b) information about the entities in which those exams can be performed; c) information on who supports the expenses with the exams and, if applicable, how the cost will be reimbursed to whom has financed those exams; d) identification the person or entity to whom those results or medical reports should be sent.

2 – It is for the insurer to prove that the duties mentioned in the previous paragraph were fulfilled.

3 – The result of the medical exams must be communicated, when required, to the insured person or to whom the latter expressly indicates.

4 – The prior communication must be done by a doctor, except if the circumstances are already known by the insured or if is reasonable to assume that he already knew given common experience.

5 – Paragraph 3 is also applicable to the communication to the policy holder or the insured in what concerns the effect of the result of medical exams in the insurer's decision, namely regarding the non acceptance of the insurance or its acceptance under special conditions.

6 - The insurer cannot refuse to provide the insured with all the information that it is provided about the insured's health, and must, when required, give that information by adequate means from an ethical and human point of view."

The pre-contractual information is also increased, under article 185, that provides for the need of supplying additional information, such as, when applicable: a) the means of calculation and attribution of a profit share; b) the definition of each coverage and option; c) the indication of the redemption and withdrawal amounts, as well as the nature of its coverage and penalties in case of redemption, reduction or transfer of the agreement; d) the indication of the premiums regarding each coverage, the main or the supplementary one; e) the minimum income assured, including information regarding the minimum interest rate assured and the term of this coverage, f) the indication of the reference values used in the variable capital agreements, as well as the number of the units; g) the indication of the nature of the representative actives of the variable capital agreements; h) the indication of the tax regime; i) in the agreements with a capitalization component, the expenses quantification, its way if incidence and the moment in which they are charged; j) the possibility of the insured person's access the performed medical exams.

This additional duty also applies in case of operations of management of collective pension funds. Also, information and publicity duties adapted to the insurance's specific characteristics, in terms to be regulated by the competent supervisory authority, may accrue if deemed necessary to the effective comprehension by the policy holder of the main elements of the agreement. It may even be required that the information must be given through an informative prospectus, which content and means are regulated by the competent supervisory authority.

The Insurance Contract Law also provides for the content of the Life Insurance policy, e.g. in article 187. As such, and when applicable, and in addition to the general information indicated above, a life insurance policy must contain: a) the conditions, the term and the frequency of the premiums payment; b) the suicide clause; c) the information given under the article 185; d) the maximum period in which the policy holder may exercise his or hers faculty to restore the agreement after its termination or reduction; e) the maintenance conditions of the agreement by the beneficiary in case of death, or by the heirs; f) if the agreement gives or not the right to profit share, and, if yes, which is the calculation and distribution formula of these results; g) if the agreement does or does not allow an autonomous investment of the

representative actives of the mathematical provisions and, in the first case, indication of the nature and rules for the investment portfolio of these actives.

Furthermore, when dealing with collective life insurance agreements, the general conditions or special conditions must include, apart from the elements referred in the previous paragraph, the following: a) the obligations and rights of the insured persons; b) the transfer of the possible right to the redemption amount, at least in the part corresponding to its contribution to the premium, if it is a group insurance with payment of premium by the insured; c) the commencement date for each insured person; d) the eligibility conditions, stating the requirements for the candidate to insured person to be a part of the group.

While the life insurance agreement remains in force, the insurer must, according to article 186, inform the policy holder of any amendments concerning the information given at the time of entering into the agreement which might have influence on its execution. Upon its term, the insurer must inform the policy holder about the amounts to which he or she is entitled by reason of termination, as well as the steps and the necessary documentation to receive such amounts.

ii. Group Insurance

Still in the domain of special rules, the insurance contract law has also established additional information duties when dealing with group insurance.

There are specific information duties, such as the one stated in article 78, according to which the policyholder must inform the insured persons about the covers and their exclusions, the applicable rights and obligations in case of a claim, as well as the regime for the appointment of beneficiaries. It is up to the policyholder to prove that it has provided the insured persons with all these information elements. A breach of these information duties shall trigger civil liability.

There is also a special duty to inform, pursuant to articles 87 and 88. As such, and in addition to the information given under the article 78, the policy holder of a contributive group insurance, which simultaneously is its beneficiary, must inform the insured persons of the remuneration amount which might be attributed to him or her as a result of his or hers intervention in the agreement, regardless of the form and the nature that such remuneration may have, and also about the relative dimension of such remuneration in proportion to the total amount of the premium referred in the agreement. Furthermore, the policyholder of a

contributive group insurance must provide to the applicant a copy of the application form or of the documents containing material information for the risk assessment, with the date of receipt, as it will be from this date that the 30 day period for formal rejection will count.

3. Sanctions

The breach of pre-contractual information or clarification duties will, in first place, lead to civil liability. In fact, the insurer shall be held civilly liable in case of a breach of any of these duties, pursuant to article 23 of the Insurance Contract Law.

Moreover, the policyholder shall be entitled to terminate the agreement within 30 days counting from the receipt of the policy (with the reimbursement of the premium paid), except if the breach of the insurer has not affected, in a reasonable manner, the policyholder's decision to take out the insurance or the cover has been exercised by a third party. This termination right shall also apply whenever the terms and conditions of the policy are not in line with the pre-contractual information.

Finally, a number of potential Administrative offences should be considered:

i. Taking-up and pursuit of the insurance activity

A breach of the information duties towards the policyholders, insured or beneficiaries shall be deemed as a very serious administrative offence subject to a fine ranging from EUR 30.000 to EUR 5.000.000, plus ancillary penalties (article 214(h) of Decree Law 94-B/98).

In this respect, please note that if the double of the economic gain is more than the maximum amount of the applicable fines, then the highest value shall prevail. On the other hand, the determination of the actual fine and ancillary sanctions is done in consideration of, *inter alia*, the material illegality of the act, the agent's fault, the benefits obtained and his or hers previous conduct.

It should be noted that the legal person may be responsible for the administrative offence even when the facts are carried out by the members of the corporate bodies, attorneys or employees in the exercise of their functions, or in name or on behalf of the legal entity. However, the liability of the legal person does not exclude the corresponding individual liability.

Failure to provide the policyholder with information on the remuneration of the insurance intermediary following the request of the policyholder

shall be deemed as a serious administrative offence (contra-ordenação grave) subject to a fine ranging from EUR 1.500 to EUR 250.000, plus ancillary penalties (art 77(i) of Decree Law 144/2006). The same penalty shall apply to a breach of the information duties of the insurance intermediaries towards the policyholders, insured or beneficiaries (art. 77(h) of Decree Law 144/2006)

ii. Market conduct

A breach of the information duties set forth in the distance marketing regulation shall be deemed as an administrative offence (contra-ordenação) subject to a fine ranging from EUR 2.500 to EUR 1.500.000, plus ancillary penalties (art 35(c) and (d) of Decree Law 95/2006).

4. Insurance mediation

Besides the Insurance Contract law one may find other duties when insurance is sold through intermediaries.

As such, and firstly, there are several general information duties that must be abided by pursuant to article 31 of Decree Law 144/2006, by the intermediary, who must: a) inform on the rights and obligations of the policyholder; b) advise the policyholder, in a correct and detailed manner, about the type of insurance agreement that is more appropriate to the cover of the risk or the investment; c) transmit all relevant information to the insurer, upon request; d) clarify any doubts relating to the insurance contract throughout its term.

Further to the general information, article 32 of Decree Law 144/2006 foresees for specific information duties. So, prior to entering into a contract, the intermediary must inform the client: a) of its identity and address; b) of the register in which it is registered, the registration date and the means to check if it is in fact registered; c) of any stake, direct or indirect, over 10% of the voting rights or of the capital that he might hold in a certain insurance undertaking; d) of any stake, direct or indirect, over 10% of the voting rights or an insurance intermediary held by a certain insurance undertaking or by the parent company of a certain insurance undertaking; e) whether the insurance intermediary is authorized or not to collect premiums; f) whether its intervention ends with the conclusion of the contract or if it may involve the assistance throughout the insurance agreement; g) of the title of worker in an insurance undertaking, if applicable; h) of the right of the customer to request information about the remuneration which the insurance intermediary will receive for providing the service and, accordingly, provide upon requirement, such information; i) of the complaints

system against the insurance intermediary.

Additionally, the insurance intermediary shall indicate to the customer, regarding the proposed agreement, if it bases its advice in the obligation of providing an independent analyses or if it has the contractual obligation to exercise the insurance intermediation activity exclusively for one or more insurance undertakings or for other insurance intermediaries. If it does, then the insurance intermediary must inform the customer about his or hers right to require information about the name of the insurance undertaking(s) and the insurance intermediaries with which it works with and, accordingly, provide, upon request, such information.

All this information is to be provided in paper or any other durable means[2] accessible to the customer and in a clear and accurate manner comprehensible by the customer.

Even when intermediation is involved, certain information duties impend on the insurer. In fact, upon the customer's request, the insurer must inform about the correct remuneration amount which the intermediary will receive by providing the intermediation services provision and also disclose, on an annual basis, to the *Instituto de Seguros de Portugal*, the identification of the insurance intermediaries with which it cooperates and the remunerations paid by the insurance undertaking to such intermediaries.

5. Distance marketing

Finally, when selling insurance by distance marketing means, the following information must be provided regarding the insurer, pursuant to Decree Law 95/2006:

a) full identification;

b) full identification of the insurance intermediary (if applicable);

c) Reference to the fact that the insurer is subject to the necessary authorization and identification regime of the corresponding supervisory authority.

Regarding the insurance agreement, the following information must be provided:

a) Description of the main characteristics, the price due by the

[2] Durable means include, according to article 33 of Decree Law 144/2006, notably, floppy disks, CD-ROMs or DVD-ROMs and the hard drive of the customer's computer in which the electronic mail is stored, but do not include internet websites, unless they allow the customer to store the information which is personally addressed to him, in a way that it might be accessed afterwards for an appropriate period of time given the purpose of that information and which enables an accurate copy of the stored information.

consumer, the applicable taxes, additional costs, validity of the information provided, payment instructions, reference that there are risks associated to the financial service and that the price may depend on market fluctuations (if applicable);

b) Description of the terms of the free right to terminate the agreement (cooling off period);

c) Information about the protection mechanisms (compensation systems and deposit guarantees to the investors and existence and access to alternative dispute resolution methods).

Such information shall be provided also on paper or any other durable means[3]. If the distance means selected by the policyholder does not meet such requirements, the insurer/insurance intermediary shall comply with the same upon the conclusion of the agreement. Also, the consumer has the right to request a paper copy at any time. The burden of proof for having provided such information lies with the insurer/intermediary.

[3] Durable means is defined, according to this statute, as a form which allows for the storage of information directly addressed to the consumer, allowing in the future, for the appropriate period of time, an easy access to that information and its unaltered copy.

Information Duties Towards the Insured in Group Insurance Contracts

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- Polish bancassurance market developments

A group insurance contract is a common form of cooperation between banks and insurers on the Polish market. Such an insurance contract is based on the civil law concept of a contract on account of a third party and a group insurance contract. In bancassurance contracts this means that the bank acts as the policyholder while the bank's clients are the insureds, covered by the relevant insurance. As a general rule, a policyholder in a group insurance contract does not act as an insurance agent – its activity is not aimed at concluding or exercising an insurance contract for the insurer. Therefore, in such a case, the Polish regulations on insurance mediation[1] do not apply.

In group insurance contracts (including bancassurance), most of the rights and obligations of the insurers remain the same as in individual insurance contracts. However, due to the fact that the policyholder and the insured are different entities, the information obligations are extended in relation to the insured (the bank's clients).

Although the insured is not a party to the group insurance contract (within the concept of bancassurance) he/she usually takes the financial burden of the premium. In fact, the premium is paid by the policyholder upon the payment of the relevant fee by the insured to the policyholder, usually equal to the amount of the premium. Due to the fact that the financial burden is borne by the insured, he/she may be particularly interested in having full access to the information on the insurance cover he/she is subject

[1] Act dated 22 May 2003 on Insurance Mediation (Journal of Laws of 2003, No 124, item 1154, as amended).

to. This is also why Polish law imposes certain information obligations in group insurance contracts towards the insured on both the insurer and the policyholder. These relevant obligations were imposed by the Polish Civil Code[2] and the Insurance Activity Act[3]. These obligations are, however, of quite a general character. This general character of information obligations has led the insurance supervisory authorities to the conclusion that the insureds in a group insurance contract are not fully and properly informed concerning the conditions of the insurance cover.

The fact that the bank's clients are usually the insured has a significant impact on the scope of their protection. Such protection, in terms of bancassurance contracts and insurance cover, can be recognised on several levels. Two of the most important are: (1) pre-contractual disclosures and the guarantee of access to information for the insured, imposed by the provisions of law in terms of civil (insurance contract) law, and (2) non-statutory regulations that lead to the development of consumer protection in terms of market or regulatory requirements. Currently there are two main concepts concerning the development of the non-statutory obligations that can be observed in Poland: the influence of the actions taken by the insurance supervisory authorities, and "soft laws" established by entities (professionals) acting on the Polish bancassurance market.

The previously mentioned statutory information obligations of the insurer, that may be crucial from the perspective of the insured, have been included mainly in the Polish Civil Code and the Insurance Activity Act. Regardless of the fact that both legal acts impose the relevant obligations on the parties to the insurance contract, and the complexity of the entire legal regulations relating to the insurance contract, it should be mentioned that there is no "automatic" information obligation towards the insured imposed directly on the insurer. Any information obligations require the prior request of the insured.

According to Article 808 § 4 of the Polish Civil Code, the insured may request from the insurer information on the provisions of the contract that has been concluded and the general terms and conditions of the insurance within the scope applicable to the insured's rights and duties. The final wording of this provision makes it clear that only the rights and obligations of the insured can be subject to the request and duty to inform, as imposed on the insurer. Similar obligations regarding life insurances to submit the most relevant and most important information to the insured has also been

[2] Act dated 23 April 1964 – the Civil Code (Journal of Laws of 1964, No 16, item 93, as amended).

[3] Act dated 22 May 2003 on Insurance Activity (uniform text in: Journal of Laws of 2010, No 11, item 66, as amended).

included in Article 13 section 3c of the Insurance Activity Act. Although in this case it is the policyholder, not the insurer, that is obliged to provide the insured with the relevant information regarding the insurance contract; the insured, however, may request the same information from the insurer, if he/she wishes that such information is to be provided by the insurer.

Although the legal provisions in respect of information duties towards the insured are quite clear, the Polish Financial Supervisory Authority, the ("**KNF**"), in its letter dated 21 February 2012, ref. DLU/606/33/1/2012, found the regulations on the information obligations towards the insured as insufficient for the protection of their interests. The KNF claimed that the insured have limited access to the content of a group insurance contract under the current wording of the statutory obligations of Article 808 § 4 of the Civil Code. This standpoint was presented on the basis of the fact that in group insurance contracts the insured and the policyholder are different entities and the duty to inform the insured of his/her rights and obligations does not correspond with all the rights and obligations arising out of the insurance contract. The KNF also indicated that the insured may be interested in having far greater access to the wording of the insurance contract as this may be important from the point of view of his/her interests. It even suggested changes in the legislation which would result in the improvement of the rights of the insured.

The KNF's standpoint has been questioned by the Polish insurance market for at least two reasons. The first reason observed the fact that, even if the insured was potentially interested in having knowledge concerning the conditions of the insurance contract as a whole, such a solution would not improve his/her contractual position in the slightest. The insurer has an obligation duty towards the insured in relation to the insured's rights and obligations for a reason - presenting other conditions of the insurance contract that do not directly relate to the insured as such, may not only cause misunderstandings, but may also be treated as imposing additional obligations on the insured, that is, an obligation to review and understand the entire contract of insurance. It may be especially difficult for the insured to meet such a requirement since this type of agreement usually constitutes a very comprehensive document with many attachments including details of no practical use or legal significance for the insured, e.g. details of a highly technical nature. According to the market, providing the insured with such irrelevant information would effectively worsen, rather than improve, their position.

The second reason brought up questioning the KNF's standpoint was that, especially in bancassurance, group insurance contracts tend to comprise of confidential data constituting the trade secrets of both the insurance

company and the policyholder, which the partners would not wish to be made available to their business competitors. This could potentially endanger the safety of the insurance market. Also, being realistic, the general openness of the information document of the group insurance contract would be "automatically" circumvented by the cooperating parties by placing the majority of the important provisions in other documents other than the standard agreement which would be provided to the customers.

With the aforementioned in mind, the Polish Insurance Ombudsman has also raised doubts in terms of the information duties of the insurer in group insurance contracts. It claimed that although the information duties of the insurer towards the insured itself is a good solution, the data regarding the insurance cover provided to the insured can be, in actuality, insufficient[4]. In providing an example, the Insurance Ombudsman claimed that the insured tend not to receive the general terms and conditions of the insurance due to the fact that there is no direct obligation imposed on the insurer to provide such documents to the insured in group insurance contracts.

The market responded to the aforementioned objections in terms of the information duties of the insurer as indicated by the KNF and the Polish Insurance Ombudsman with a set of three Recommendations of Good Practices[5], aimed at the transparency of the rights and obligations of the insured. The recommendations do not constitute a generally applicable law, but influence the market practice as a soft law. They were prepared by the Polish Bank Association (*Związek Banków Polskich, ZBP*) and the Polish Insurance Association (*Polska Izba Ubezpieczeń, PIU*) in consultation with the KNF, the Insurance Ombudsman, the Office of Competition and Consumer Protection (*Urząd Ochrony Konkurencji i Konsumentów, UOKiK*), the Ministry of Finance, the Banking Arbitrator, as well as representatives from various banks and insurance companies. The Recommendations introduce standards to be maintained by those banks and insurers that consider the interests of the insured with their major part focusing on the provision of information to bank customers. The documents states that the insurance contractual documentation should be made in a format which factually enables the client to become acquainted with the content of such documentation and its conditions, prepared in an easy-to-understand way, as well as containing the minimum quantity of information which is equal to

[4] The Insurance Ombudsman published a report in 2007 regarding the basic problems of bancassurance in Poland.

[5] II Edition of Recommendation of Good Practices on the Polish bancassurance market regarding insurances linked to bank products of 10 July 2012, Recommendation of Good Practices regarding financial insurances linked to bank products secured by mortgage of 22 December 2010, Recommendation of Good Practices on the Polish bancassurance market regarding insurances with a savings or investment component of 10 July 2012.

the client's statement on entering the insurance, and a receipt confirming the cover and its extent with an emphasis on the sum insured and the costs incurred by the client, e.g. whether these costs are to be incurred on a one-off basis, or periodically, and the deadline for making said payments, etc. The, most recent, third Recommendation focuses special attention on the rules for determining the amount of benefits payable to the customer, a detailed method for their calculation, and the potential risk associated with the investment accompanying the insurance cover. Under these provisions, the consumer should also receive a clear indication of whether the bank is acting as the policyholder, or the insurance intermediary. Although the principles set out in the Recommendations are not generally applicable law, which means they are not legally binding, they are respected in the bancassurance market.

The recent developments on the Polish bancassurance market in relation to group insurance contracts do not affect the elementary and most important obligation duties of the insurer attached to the status of the insured as a customer. Specifically, Article 808 § 5 of the Civil Code imposes the obligation to apply the pro-consumer provisions of Articles 385^1-$385^3$of the Civil Code, including the regulations on unfair terms (abusive clauses). This requires the insurer to pay special attention to the wording of the insurance contract in relation to the duties and obligations of the insured, as well as the way of exercising the obligation duty towards the insured. Any infringement of such obligations causes the liability of the insurer under the provisions of the Act on Competition and Consumer Protection[6], as well as the Act on Combating Unfair Commercial Practices[7]. Therefore, the utmost care must be taken to maintain the quality of the clauses included in the standard agreements so as not to be abusive, and the practices of the sales assistants not to be misleading.

The legal regulations concerning group insurance contracts, in particular in the bancassurance sector in Poland, are neither direct nor detailed, but definitely not meagre. The activity of the insurance supervisory authorities has become quite intense recently, instigating the issue of various relevant guidelines and standpoints. Regardless of the number of proceedings initiated towards insurers in relation to violations of their duty to inform towards the insured may lead to the conclusion that the bancassurance market is not sufficiently regulated. However, the fact that the increasing number of proceedings mirrors the fact that bancassurance products have

[6] Act dated 16 February 2007 on Competition and Consumer Protection (Journal of Laws of 2007, No 50, item 331, as amended).

[7] Act dated 23 August 2007 on Combating Unfair Commercial Practices (Journal of Laws of 2007, No 171, item 1206, as amended).

become more and more common should also be taken into account. This may also lead one to the conclusion that the development of market self-regulation seems to be sufficient. It deserves positive feedback as being relevant, functional and effective. The banks and insurers have adopted the system, realising that it is better to respect the rights of the insured rather than have stricter regulations imposed on them from the outside. The new editions issued, and the new problems embraced by the subsequent Recommendations show that they have responded to the challenges of the Polish market.

Pre-contractual Information Duty of the Insurer

Dr. Ana Keglević LL.M. *(London), Croatia*

A. Duty to Inform

a) Who is under a duty of information (Insurance undertaking? Insurance intermediary? Or both?)

Yes, duty to inform is prescribed for both, insurance undertaking and the insurance intermediary.

b) Insurance undertaking to inform on what? Insurance intermediary to inform on what?

Under Art 89 of the Croatian Insurance Act 2005 (herein after: IA) insurance undertaking is under obligation to inform the prospective policyholder in writing before concluding the contract about the following information:

1. the name of insurance undertaking, its legal form and the seat (address) as well as the name of the agency or branch concluding the contract and its seat (address),
2. applicable policy terms, law applicable to the contract,
3. the term of the contract,
4. the means of terminating the contract,
5. the amount of premium, place and mode of payment, amount of taxes and other costs calculated besides the premium, and the amount of costs in total,
6. the term of the insurance proposal for the policyholder,
7. right to cancel or to withdrawal from the contract,
8. the dispute resolution mechanisms,
9. the body competent for supervision of the insurance undertaking. (Art 89 para. 1 IA)

In case of life-insurance policies the insurance undertaking must additionally inform the prospective policyholder about the following information:

1. the base amount and the criteria for the participation in profits,
2. the tables of surrender values,
3. the right to paid-up sum assured under the life insurance contract and extension of their rights in that respect,
4. information on the tax arrangements applicable to the type of policy. (Art 89 para 2 IA)

In the case of life insurance contracts with investment funds linked policies, the insurance undertaking is under an obligation prior to the conclusion of the contract in addition to the information listed in previous paragraph, point 1-4, to inform in writing the prospective policyholder about the investment fund's prospectus and, in particular, about the structure of its investments. (Art 89 para. 3 IA)

Under Art 256 IA the insurance intermediary is under an obligation to inform the prospective policyholder sufficient time before concluding the contract about the following information:

1. his name (identity) and the address,
2. the register in which he has been included and the means for verifying that he has been registered,
3. the name of the insurance undertaking (insurance or reinsurance company) where he is employed,
4. the name of the insurance undertaking (insurance or reinsurance company) with which he is contractually bound,
5. dispute resolution mechanisms and arrangements for handling complaints concerning contracts by policyholders, lives assured and beneficiaries under the contracts including other out-of-court complaint and redress procedures.

c) Form to observe (in written, in text form, verbally, on the website)

The text and the content of the information must be communicated to the policyholder in a clear and accurate manner, in writing, and in the Croatian language (Art 91 IA). This is a general rule for insurance undertaking.

However provisions for insurance intermediary hold more detailed provision. Information must be served in writing or in any other durable medium available to the policyholder, lives assured and beneficiaries under the contracts, in a clear and understandable way for a policyholder and in the Croatian language, if not otherwise agreed. (Art 257 para. 1 IA).

d) When to fulfil the duty? (sufficiently in advance or simultaneously with the acceptance of the insurer which may be expressed by handing over the insurance policy = policy model = policy + information)

The information must be served before concluding the contract, or latest at the moment of concluding the contract (Art 89 IA - for insurance undertaking, Art 256 IA - for insurance intermediary). In 2005 the Croatian legal system abandoned the "policy model" of conclusion of insurance contracts. Now, the contract is concluded at the moment of the acceptance of an offer. The delivery of policy only serves as the proof that the contract has actually been concluded (Art 925 paras. 1-2 Code of obligation).

e) **Exceptions to the duty (contracts concluded by phone, preliminary cover, mandatory insurances, large risks, when the policyholder is assisted by a broker**)

Exemption from this duty exist when the contract has been concluded by phone or other means of distance communication at the explicit request of a consumer. However, in that case, the insurance undertaking (provider of financial service) is under an obligation to deliver the contract and prescribed information immediately after conclusion of contract (Art 62 para. 2 Consumer Protection Act).

If the contract is concluded via an intermediary or a broker, at the explicit request of a policyholder, information listed above in point b (Art 256 IA) may be served orally, under obligation of an intermediary to deliver all information in writing immediately after concluding the contract (Art 257 paras. 2-3 IA).

f**) On whom is the onus of proof?**

There is no clear provision, but in practice the onus of proof is on the insurance undertaking.

B. Duty to Advise

There are no rules on duty to advise for the insurance undertaking but they do exist for insurance intermediaries.

The insurance intermediary is under obligation to give his advice on the basis of a fair analysis, he is obliged to give that advice on the basis of an analysis of a sufficiently large number of insurance contracts available on the market, to enable him to make a recommendation, in accordance with professional criteria, regarding which insurance contract would be adequate to meet the customer's needs. Prior to the conclusion of any specific

contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product (Art 256 paras. 2-3 IA). These provisions result from the implementation of the EU Directive on insurance mediation (2002/92/EC) into the Croatian legal system. It would be desirable to introduce such rules for insurance undertakings as well.

C. Duty to Warn

There are no rules on duty to warn for either insurance undertaking or intermediaries, but it would be desirable introduce such rules into the Croatian legal system.

D. Special Rules (insurance investment products).

There are no special rules for insurance investment products.

Pre-contractual Information Duty and Unfair Contract Terms

- Open questions and dilemmas -

Dr. Ana Keglević, LL.M. *(London)*[1]

1. Introduction

Pre-contractual information duty consists of the duty of the insurer to inform the prospective policyholder of relevant information concerning the elements of the contract and the contract terms. Information must be given in writing, usually in the form of a pre-contractual information document, based on the applicant needs and previous negotiation between the parties about the content of the contract. The intention is to put the prospective policyholder in a position to check all relevant information about the insurance contract and to reach an informed decision.

Unfortunately, the consumer insurance contract today belongs more and more to that type of contract not individually negotiated. Often, when negotiating the conditions of the contract in the pre-contractual (information) phase, consumers are not in a position to influence either the elements of the pre-contractual information (elements of the contract) or the policy terms and conditions. Thus, in both cases, there is a higher probability for unfair contract terms to occur.

All this creates significant imbalance between the rights and obligations of the parties and diminishes equality in their bargaining positions. It also has a negative effect on the whole business sector. In order to protect the consumer, eliminate imbalance between the bargaining positions of the parties, and to ensure equal risk sharing the European legislator has adopted specific rules regarding the protection of consumers against unfair contract terms in consumer contracts. These rules are particularly important because not only do they protect the consumer in question, but also the functioning of the whole insurance sector in the territory of one

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Member state as well as the functioning of the EU Internal Market on a supranational level.

This paper deals with the relationship between pre-contractual information duty of the insurer and the unfair contract terms in the European context. The main point of discussion will be the application of the *Directive 93/13/EC on the unfair contract terms in consumer contracts* (herein after: UCT Directive, amended by the Directive 2011/83/EU)[2] to information duty in insurance contracts. All this as far as insurance contracts qualify as consumer contracts defined by the UCT Directive. Directive was transposed in all member States.[3] *Principles of European Insurance Contract Law* will be examined as well (herein after: PEICL).[4]

2. Information Duty and Unfair Contract Terms

2.1. Pre-contractual information duty of the insurer

Pre-contractual information duty is one of the main mechanisms of consumer protection on the EU level.[5] The insurer (insurance undertaking) and/or insurance intermediary is under duty to inform the prospective policyholder about the core elements of the insurance contract and to serve the policyholder with the policy terms and conditions of that particular insurer. Information duty extends to information regarding: 1. parties such as information about the name and address of the insurance undertaking,

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[2] *Council Directive 93/13/EEC of 21 April 1993 on unfair terms in consumer contracts*, OJ L 95, 21.4.1993., 29-34*., amended by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights,* OJ L 304, 22.11.2011, 64-88; Directive 2011/83/EU amended Directive 93/13/EEC only in the part relating to duty of the Members States to inform the European Commission about the content of national gray/black lists.

[3] For transposition of the Unfair Contract Term Directive 93/13/EC into laws of the member States see Schulte-Nölke et al., *EU Consumer Law Compendium - Comparative Analysis*, Universität Bilefeld, 2008, 341-437. (herein after: *Compendium*) See http://ec.europa.eu/consumers/rights/docs/ consumer_law_compendium_comparative_analysis_en_final.pdf, 30.6.2013.

[4] Basedow, J., *et al.* (Ed.), *Principles of European Insurance Contract Law* (PEICL), Sellier, 2009, (herein after: PEICL), for good overview and discussion see *European Contract Law*, ERA-Forum, Special issue, 2008, 95-182. http://www.uibk.ac.at/zivilrecht/restatement/sprachfassungen/peicl-en.pdf, 30.6.2013.

[5] Development of the EU law over the last 40 years showed how information became "paradigm of consumer protection". Today, according to the Art 169 of the Lisbon Treaty, "right to information" is one of the five main rights of every consumer. More Weatherill, S., *EU Consumer Law and Policy*, Edward Elgar Publishing Inc., UK, 2005.,1-33., Micklitz, H-W. *et al*. (Ed.), *Cases, Materials and Texts on Consumer Law,* Hart Publishing. Oxford and Portland, Oregon, 2010., 11-19; Nebbia, P., Askham, T., *EU Consumer Law,* Richmond Law & Tax Ltd, Richmond, 2004., 5-66., Micklitz, H-W., Reich, N., *The Basics of European Consumer Law*, Centro de Formação Jur. e Judiciária, Macao, 2007., 7-25.

intermediary and the policyholder, 2. elements of the contract such as duration of the contract, subject matter of the insurance, description of the insured risk, cover, insured sum, amount and the number of premiums and the respective method of calculation, applicable law, right of withdrawal, right to revoke from the contract, guaranteed funds and compensation arrangements, information about the applicable policy terms and conditions etc. and, finally, 3. about the dispute resolution mechanisms, such as the insurers complaint mechanism or other out-of court redress mechanisms. The content of this information (duty) is similarly transposed in all EU Member States due to the provisions of the Third generation of life and non life insurance EU directives.[6] The abovementioned informations are core elements of the insurance contract and are subject to the parties' wishes and previous negotiation process.[7]

The purpose of this concept is to put the policyholder in such position that he is able to read the core elements of the contract and compare similar offers (insurance products) on the market, so that he can make an informed decision about the contract he is about to conclude. At the same time this is the reason why such information is usually prescribed in the form of a list, more or less detailed depending on the jurisdiction in question.[8]

Even if all information from the abovementioned list is provided to the policyholder this still does not mean that he will be able fully to understand the content of all delivered information. The proper understanding depends not only on the intellectual abilities of that particular policyholder, but also

[6] In particular: Art 36. and Annex III(a)1-3 Life insurance Directive 2002/83/EC (Third Life Insurance Directive - Consolidated version) and Art 31 Non-life insurance Directive 92/94/EEC (Third non-life insurance Directive). Three generations of life and non-life insurance law directives are: Directive 73/239/EEC (First non-life insurance Directive), Directive 79/267/EEZ (First life insurance Directive), Directive 88/357/EEZ (Second non-life insurance Directive), Directive 90/619/EEZ (Second life insurance Directive), Directive 92/94/EEZ (Third non-life insurance Directive), Directive 92/96/EEZ (Third life insurance Directive) in connection to Directive 83/2002/EZ (Third life insurance Directive - Recast Version). All versions of Insurance law Directives are available on the web page: http://ec.europa.eu/internal_market/insurance/legislation/index_en.htm, 30.6.2013.

[7] Comparatively a lot has been written on the duty to inform. For example Fleischer, H., *Vertragsschlußbezgene Informationspflichten im Gemeinschaftsprivatrecht*, ZEuP, 2000., 772-798., Twigg-Flesner, C., *Pre-contractual duties - from the acquis to the CFR*, in: Schulze, R., *CFR and the existing EC contract law,* Sellier, München, 2008., 97-127., Heiderhoff, B. S., *Grundstrukturen des nationalen und europäischen Verbrauchervertragsrechts,* Sellier, Munich, 2004., 366-371., Wilhelmsson, T., *European Rules on Pre-Contractual Information Duties,* ERA-Forum, Special issue, 2006., 17-20, Micklitz, Reich, supra, note 5, 26-31., Rott, P., *Information obligations and withdrawal rights,* in: Twigg-Flesner, C., *The Cambridge Companion to European Private Law*, Cambridge University Press, Cambridge, 2001., 186-200.

[8] For comparative analysis and the overview of the insurance law of the Member States including the alignment with the EU *acquis* see Basedow, J., Fock, T., *Europäisches Versicherungsvertragsrecht*, Band I -II, Mohr Siebeck, Tübingen, 2002-2003.

on the form, characteristics and complexity of the information and the moment they are delivered. Information about the insurance product, as one type of financial service, is by definition very complex and not easy to understand. If it is served to a policyholder in a non-explicit way or with the use of a professional language, it is to be expected that the policyholder will not properly understand it. The information should not be served to the policyholder in a large quantity. Too much information could lead to information overload and thus have a negative effect.[9]

That is why pre-contractual information must be served to the prospective policyholder in written form, in clear and intelligible language, usually in the form of a special informational document (usually one sided and in reasonably large letters).[10] Information should also be delivered sufficient time before the conclusion of the contract, ideally at the moment when the consumer is actually making the decision.[11] General or special policy terms and conditions should be also delivered together with the informational document, stating in the document that they were received by the policyholder. The onus of proof that the information was served is on the insurer.[12]

In that way, legal theory and especially the advocates of functional analysis of law, established some main functions of pre-contractual information

[9] Abut the concept of "information overload" see Sefton-Green, R., *Mistake, Fraud and Duties to inform in European Contract Law,* Cambridge University Press, Cambridge, 2005., 396., Schimikowski, P., *Die Neuregelungen zum Vetrieb Versicherungsprodukten im Fernabsatz*, ZfV, 2005., 279-280.

[10] Delivery of informational document is one of the main proposals of the PEICL. See Art 2:201(1) PEICL.

[11] This would also eliminate problems of conclusion of contract at the moment of the delivery of the policy terms and conditions (*Policy Model*). For example in Germany this model was abandoned as old fashioned and not right for the consumers. More about the critique and the reform Römer, W., *Fünf Thesen zur Reform des Versicherungsrechts*, VuR, 2005., 131-133; Gaul, E. R., *Zum Abschluss des Versicherungsvertrags – Alternativen zum Antragsmodell?,* VersR, (1)2007, 21-26.

[12] Exception to this exists with the insurance contracts negotiated and concluded at a distance (e.g. by telephone, fax or over the Internet). The *Directive 2002/65/EC concerning the distance marketing of consumer financial services* (OJL 271, 9.10.2002) gives the consumer the right to reflect before concluding a contract with a supplier. "The supplier is thus required to transmit a draft contract to the consumer, in writing or on a durable medium (e.g. floppy disk, CD-ROM or e-mail), including all the contractual terms and conditions. The reflection period is 14 days, during which all the terms and conditions remain valid. The parties are nonetheless free to agree on a longer period or to negotiate other conditions. When the contract has been signed before the consumer has received prior notice of the contractual terms and conditions, or when the consumer has received the contractual terms and conditions but has been unfairly induced to conclude the contract during the reflection period, the consumer has the right to withdraw within 14 days (30 days in the case of life assurance and personal pension operations)." http://europa.eu/legislation_summaries/consumers/protection_of_consumers/l32 035_en.htm, 30.6.2013.

duty. These are namely: 1. ensuring the consent of the will of the parties and balance of their interests, 2. ensuring transparency of the offer and 3. ensuring the protection of the parties.[13] The latter function, protection of the parties, operates in both ways. It protects the policyholder against future misunderstandings regarding the content of the contract such as the amount of the insured sum and the reasons for the exclusion of the insurers liability. At the same time, pre-contractual information duty and the delivery of the information document protects the insurer against future complaints by the policyholder that some information was not delivered at the moment of the conclusion of the contract. The most usual complaint from the policyholder in the phase of the payment of the insured sum is: "But I did not know about this information!". If the information document was served to the policyholder, the insurer is protected against such complaints.[14] The same is with the delivery of the policy terms and conditions of that particular insurer.

One way to avoid such misunderstandings and to eliminate negative consequences of information duty is the specific insurers duty to advise the prospective policyholder. Duty to advise would help to determine the needs and wishes of the prospective policyholder and to shape the core elements of the insurance contract to policyholders individual requirements.[15] Duty to advise should include duty to warn the policyholder about the inconsistencies of the cover and is dependant on the circumstances of each

[13] More about the functions of the pre-contractual information duty see Wilhelmsson, T., Twigg-Flesner, C., *Pre-contractual information duties in the acquis communautaire,* ERCL, (4)2006, 449-452., Wilhelmsson, supra, note 7, 17-20., Sefton-Green, supra, note 9, 11-17.

[14] According to the "law and economics" theories, developed in the USA in the 60-es, pre-contractual information duty should help with the elimination of the problems of information asymmetry, adverse selection, moral hazard and professional information risk. For the development of the law and economics reasoning see Parisi, F., *The Economic Structure of the Law: The Collected Economic Essays of Richard A. Posner*, Vol I, Vol II, Edward Elgar Publ., Chaltenham UK, 2000., 1-129., Rothschield, M., Stiglitz, J. Eq*uilibrium in Competitive Insurance Market: An Essay on the Economics of Imperfect Information,* QJE, 90(1976), 629-650., for information asymmetry see Pindyck, R. S., Rubenfield, D. L., *Microeconomics,* Prentice-Hall International, New Jersey, 1995., 593., for adverse selection and moral hazard see Akerlof, G., *The market for "lemons": Quality, Uncertainty and the Market Mechanism*, JE, 84(1970), 2-15., Cooter, R., Ullen, T., *Law and Economics*, Addison Wesley Longman, USA, 1999., 50-52; about the economic position of consumer on the market in general see Mackaay, E. *Economics of Information and Law*, Kluwer, USA, 1987.

[15] Reference should be made to *Insurance Mediation Directive 2002/92/EC* (OJ L 009, 15/01/2003) according to which and intermediary should determine the demands of the client and give reasons for advise (Art 13(3) Directive 2002/92/EC). The tendency on a European level is to expand duty to advice from insurance intermediaries to insurers.

particular case.[16] This would help to eliminate the inequality of knowledge and experience of the parties in the insurance contract[17] and would allow the policyholder to ask questions about the unclear elements of the contract and information document as well as the general or special policy terms and conditions.

2.2. The notion of the unfair contract term within the context of insurance contract

Unfair contract terms are closely connected to the pre-contractual information duty of the insurer. They could either be part of a content of the pre-contractual information document, wherein the parties did not negotiate the elements of the contract, and the required pre-contractual information was only served to the prospective policyholder without the possibility to influence them, or, more usually would take the form of a standard pre-formulated contract. A third option, if the parties actually negotiated the elements of the contract, could be an unfair contract term hidden in the policy terms and conditions of that particular insurer and would usually have been delivered together with the contract. Protection against such behaviour on a general level is offered either through the application of general standards of unfairness or through the gray or black list of unfair contract terms.[18]

Under the general standards, a contractual term which has not been individually negotiated **shall be regarded as unfair** if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. A term shall always be regarded as not individually negotiated where it has been **drafted in advance** and the consumer has therefore

[16] Duty to advice is explicitly prescribed in Germany (*§ 6 VVG)*, England (*Rule 6.1. FSA Handbook - ICOBS)* and Sweden (Ch. 2 and 10 ICA), as well as PEICL (Art 2:202). Some countries such as Austria and France require presence of particular circumstances and in some like Greece, Poland or Belgium duty to wand is not obligatory. Art 2:202 PEICL, N2-4, supra, note 4, 99-100.

[17] Art 2:202 PEICL, C1, supra, note 4, 96.

[18] A lot has been written on the topic of Unfair contract terms. See for example Micklitz, Reich, supra, note 5, 157-199., Heiderhoff, B. S., *Gemeinschaftsprivatrecht*, Sellier, München, 2007., 167-173., Pfeiffer, T. *Non-Negotiated Terms*, in: Schulze, R., *CFR and the existing EC contract law,* Sellier, München, 2008., 177-189., Tichy, L., *Unfair Term in Consumer Contracts*, in: Schulte-Nölke/Tichy, *Perspectives for European Consumer Law*, Sellier, München, 2010, 59-77., Nebbia, P., *Unfair Contract Terms in European Law*, Doctoral Thesis, Hart, Oxford/Portland, 2007., Wolf, M., *Party Autonomy and Information in the UCT Directive*, in: Grundmann *et al., Party Autonomy and the Role of Information in the Internal Marke*t, De Gruyter, Berlin/New York, 2001, 313-331., Ferrante, E., *Contractual Disclosure and remedies under the UCT Directive*, in: Howells *et al*., *Information Right and Obligations*, Ashgate, Aldershot, 2005. 115-135.

not been **able to influence the substance** of the term, particularly in the context of a pre-formulated standard contract.[19] UCT Directive is a directive of minimal harmonisation.[20] Many Member States thus adopted additional and stricter rules either as a matter of general contract law or insurance contract law (for example Scandinavian countries, Germany, Italy Austria etc.).[21] Some countries offer protection against unfairness no matter whether the terms have been negotiated or not (for example Scandinavian countries, Denmark, Sweden, Belgium, The Netherlands and France under the precondition that the contract was a consumer contract.).[22] So even if the insurer offers to the policyholder pre-contractual information without the possibility for the policyholder to influence the substance, such information may be considered as unfair. In other words, if the policyholder has no possibility in the pre-contractual phase to influence the subject matter of the insurance and the risk cover, the amount of the premium, contract period, dispute resolution etc. such information may be considered as unfair under above conditions and thus null and void.[23] Where the insurer (seller or supplier) claims that a standard term has been individually negotiated, the burden of proof in this respect shall be encumbent on him.[24] Simply having a choice of a few terms or sets of terms is not equivalent to negotiation.[25]

The UCT Directive additionally contains an indicative and non-exhaustive **list** of the terms which may be regarded as unfair.[26] Depending on the jurisdiction they are adopted as gray or black list[27] and could be short

[19] Art 3(1-2) UCT Directive. For transposition of Art 3. UCTD (assessing the fairness of contract term) into national laws of Member States see Schulte-Nölke et al., *Compendium*, supra, note 3, 385-394. Also Alpa, A *glance of Unfair Contract Terms in Italy and the UK*, EBLR, (15)2004, 1123 et seq,, Reich, *The implementation of the Directive 93/13/EEC on Unfair Terms in Consumer Contract in Germany,* ERPL, (5)1997, 165 et seq.

[20] Art 8 and Preamble para 12 UCT Directive.

[21] Art 2:304 PEICL, N4-7, supra, note 4, 123-124; for comprehensive overview of transposition into laws of member Satets see Schulte-Nölke et al., *Compendium*, supra, note 3, 387-394.

[22] Art 2:304 PEICL, N10-11, supra, note 4, 24.

[23] Contrary some Member States allow the unfairness test even if the contractual term was individually negotiated such as Finland, Sweden, Denmark, Belgium and even France under the condition the subject matter relates to consumer contract only. Art. 2:204 PEICL, N10-11, supra, note 4,124.

[24] Art 3(2) UCT Directive.

[25] Clarke, *The Law of Insurance Contracts*, Informa, London 2006, 529.

[26] Art 3(3) UCT Directive.

[27] "*Grey list*" contains clauses that are presumed to be unfair, "*black list*" clauses that are always unfair and "*indicative list*" clauses that may be unfair. Micklitz, supra, note 5, 291.

or very long and exhaustive.[28] Therefore, if some of the pre-contractual information of the insurer falls within the gray/black list such pre-contractual information could be considered as unfair or is unfair. The same is with the general or specific policy terms and conditions of that particular insurer.[29]

If the pre-contractual information of the insurer (contract term) is assessed as being of unfair nature, such pre-contractual information shall be invalid and shall not be binding for the policyholder, the insured or the beneficiary. But, invalidity of the term only partly influences the validity of the contract. The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term. This is a general rule deriving from the Directive and such a concept is more or less transposed in all European jurisdictions as a consequence of alignment with the *acquis*.[30]

PEICL offers a different and very specific solution to this matter. The unfair term shall be substituted by a term which reasonable parties would have agreed upon had they known the unfairness of the term.[31] The contract shall remain in force on condition that the unfair term is replaced with the fair one. In judging this, the court should use the test of the reasonable policyholder and the reasonable insurer. The drafters of the PEICL agreed that sometimes this "exceptionally burdens the court" in the task of drafting a new term of the contract. But at the same tame they agree that this is a clear consequence of the concept of judicial control over the unfair contract terms core to the agreement of the parties.[32]

3. Open Questions And Dilemmas

3.1. Application *Personae Materiae*

This question concerns the application *personae materiae* of the UCT legislation on the prospective policyholder in pre-contractual phase. Could the prospective policyholder be protected under the UCT legislation? The problem derives from the core concept of the consumer and the policyholder

[28] For example in Austria, Belgium, Bulgaria, Czech Republic etc. the provisions of UCTD has been transposed as black list. In Cyprus, France, Poland, United Kingdom, Ireland, Slovakia they have been transposed as gray lists. For full overview of transposition of the Annex of the UCTD into laws of Member States see Schulte-Nölke et al., *Compendium*, supra, note 3, 395-403.

[29] See infra 3.2.2.

[30] Art 6(1) UCT Directive; Art 2:304 PEICL, N13, supra, note 4, 125. For transposition Art 6 of UCTD into national laws of Member States and legal consequences of unfairness see Schulte-Nölke et al., *Compendium*, supra, note 3, 403-411., Ferrante, *Contractual Disclosure and remedies under the UCT Directive*, supra, note 18, 115-135.

[31] Art 2:304(2) PEICL.

[32] Art 2:304 PEICL, N14, supra, note 4, 125.

in national jurisdictions. Generally the most common definition of the consumer in the general contract laws of the Member states is whereas "… consumer means any natural person who, in contracts … is acting for purposes which are outside his trade, business or profession…".[33] This definition is less broad than the definition of a consumer policyholder generally accepted in the insurance laws of the member States. There, consumer as the policyholder commonly means "... any natural person ... concluding insurance and/or reinsurance contract ..."[34] or in PEICL any "... person whose interest is protected against loss in indemnity insurance ...".[35] This (broader) definition of a consumer would also include small and single occupational trades, such as a small florist or a baker, as the consumer - policyholders when concluding contracts outside their trade or profession (such as insurance contracts).[36]

Such difference in concept between the general contract law and insurance contract law results in the narrower or broader concept of consumer protection within one national legislation. The differences between the notion of a consumer exist not only in the EU consumer *acquis*, but also between the legal regimes of Member States and sometimes also within one legal system. This is a consequence of the fragmentation of the *acquis*

[33] For example Germany § 13 BGB, Italy Art 3.1.(a)(b) Consumer Code, Spain Art 1(2)-(3) Consumer Protection Act, Slovenia Art 1(2) Consumer Protection Act, Croatia Art 3(9) Consumer Protection Act, UCT Directive (93/13/EC) Art 2(b) etc.

[34] For example England Art 1 Consumer Insurance (Disclosure and Representations) Act, Croatia Art 267 Croatian Insurance Act etc.

[35] Art 1:202(1) PEICL.

[36] The "broader" concept of consumer policyholder emerges from three generations of life and non-life insurance Directives. The Directives are not providing for the definition of a consumer or a policyholder, but they are differentiate protection against "large risks" and "mass risks". The latter are excepting the notion of a consumer policyholder as a contracting party. "Large risks" are risk under special classification, where the policy-holder is engaged professionally in an industrial or commercial activity or in one of the liberal professions, and the risks relate to such activity, with the certain balance-sheet total, net turnover, average number of employees during the financial year (Art 5a and Preamble Second non-life insurance Directive 88/357/EEZ, amending Art 5(d) First non-life insurance Directive 73/239/EEC). "Mass risks" are defined as risks "other than" large risks (Art 13 Directive 88/357/EEZ). Therefore, mass risks are arising from the contracts concluded with the natural persons (consumers) or from the contracts with no high value of dispute. Because of their weaker position, this type of policyholders (natural persons - consumers) require special protection from the state on whose territory insurance is offered. The protection rules for insurance contracts regarding mass risks should be therefore more strict and more protective to natural persons. Benacchio, G., Pasa, B., *The Harmonization of Civil and Commercial Law in Europe*, CEU Press, Budapest/New York, 2005, 168-169; Paul, N., Croly, R., *EC Insurance Law,* Chancery Law Publishing, London, 1991., 41., Weber-Ray, D., *Harmonisation of the European Insurance Contract Law*, in: Vogenauer/Weatherill, *The Harmonisation of European Contract Law - Implications for European Private Laws*, Hart, 2006, 217.

communuautaire.[37] On the European level there is no single definition of the consumer (but every directive uses its own concept) and consequently nor is there any single definition of a consumer in the national jurisdictions of the Member States as well.[38]

This raises the question of protection of the consumer policyholder under the national rules regarding unfair contract terms. In other words, could the rules of the UCT Directive (and corresponding national rules) be applicable to the broader concept of consumer in insurance contracts, such as the shoe maker or the small florist, when concluding insurance contract? A strictly technical interpretation of the Directive leads us to the conclusion that this would not be possible. The UCT Directive applies only to the consumers falling within the scope of a consumer defined by Art 2(a) of the UCT Directive.[39] The same position was accepted in the rulings of the EU Court (then European Court of Justice).[40.] Not all Member States accepted such a narrow concept.[41] Some Members States such as the Spain, France, Belgium or Latvia, offer broader protection under certain preconditions.[42] Others, such as Croatia, offer a solution through the technical interpretation

[37] Difference in the definition of the consumer is not only the characteristic of national laws of the Member States, but also the consequence of the characteristic of the fragmentation of the *acquis* itself. Every EU Directive is defining consumer for its own purpose. For example Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market defines consumer as the "... natural person who, in commercial practices covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession." Similar definition is could be found through all consumer *acquis*. But some countries offer consumer protection to sole legal persons (acting outside its business), non-profit organisations, non-professionals, private investors etc. The protection is offered because "... they lack the sufficient knowledge when they enter into a transaction with a professional or because they have no bargaining power ..." Micklitz, supra, note 5, 29.

[38] For discussion on the notion of the consumer Micklitz, supra, note 5, 29-34., Hesselink, M., *European Contract Law: A Matter of Consumer protection, Citizenship or Justice?,* ERPL, 17(2007), 232-348., about the need to protect the weaker party Hesselink, M. W., *CFR & Social Justice*, Sellier, München, 2008., 29-41., Schulze, R., *New Features in Contract Law*, Sellier, München, 2007., 25-139., Micklitz, Reich, supra, note 5, 7-25., Nemeth, K., *European Insurance Law - A Single Insurance Market?,* EUI, Florence, 2001., 49., 67-68, Reich N., in: Grundmann, S., *Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts*, Mohr Siebeck, Tübingen, 501. *et seq.*

[39] "… any natural person who, in contracts with the scope of this Directive is acting for purposes which are outside his trade, business or profession…" Art 2(a) UCT Directive.

[40] For example Judgment of the Court (Third Chamber) of 22 November 2001 - *Cape Snc v Idealservice Srl* (C-541/99) et *Idealservice MN RE Sas v OMAI Srl* (C-542/99), ECR I-09049.

[41] For transposition of the concept of "consumer" into laws of the Member States see Schulte-Nölke et al., *Compendium*, supra, note 3, 379-397.

[42] For example in France *Cour de Cassation* decided that "The small professional is not excluded from the protection against unfair contract terms", Case: Cass civ, 15 March 2005, No 02-13285, D 1948.

of the provisions. For example, the Croatian Insurance Act 2005 holds a special technical provision stating that in all other matters regarding the protection of consumers not regulated by the Insurance Act, the provisions of the Consumer Protection Act will apply.[43] This includes protection against UCT. Thus, it could be observed that insurance legislation *de facto* extends the personal application of UCT protection rules to a broader concept of consumer defined by the insurance legislation. Natural persons (policyholders) should be protected because they lack the professional knowledge of the complex elements of insurance contracts. Even if they are small professional or businessmen they are still in a weaker position in relation to the insurer. Of course the legislations with a single definition of consumer such as Germany face no such problems.[44]

PEICL clearly follows this concept. PEICL accepts rules from the UCT Directive and adapts them to the environment of the insurance contract. It clearly extends personal application of the UCT rules to a "broader" concept of the consumer policyholder. The drafters of PEICL explained that "… the restriction of UCT test to consumer contract only is not appropriate in insurance contracts because policyholders need protection against the insurer, no matter whether they are consumers or not. Insurers commonly draft the terms of insurance contracts in advance, so that the policyholders have no opportunity to negotiate the terms."[45] In that way PEICL accepts the principles from the UCT Directive but adopts and expands them to the environment of insurance contracts.[46]

3.2. Application Rationae Materie

3.2.1. Content of the pre-contractual information duty and restrictions of the assessment of unfairness

Before concluding the contract the insurer is under an obligation to inform the policyholder about the basic elements of the contract. Content wise this duty includes information about the parties to the contract (insured, insurer or its branch office, intermediary), about the particular elements of the contract (description of the risk and matter of insurance, insured sum, amount of premium and method of calculating it, duration of contract, right of withdrawal, right to terminate the contract, applicable law etc.) and finally about the dispute resolution mechanisms (complaint and out

[43] Art 269 Croatian Insurance Act.

[44] Germany § 13 BGB and § 1 VVG, Wandt, *Versicherungsrecht*, Academia Iuris, Carl Heymans Verlag, Köln/München, 2009, 16.

[45] Art 2:304 PEICL, C2, supra, note 4, 116.

[46] Ibid.

of court redress mechanisms, arbitration etc.).[47] If the content of this information has not been individually negotiated and if other elements of the unfairness test are met, these terms may be declared as unfair, and therefore null and void.[48]

On this subject, both Art 4.2. and Para 19. of the Preamble of the UCT Directive prescribe certain restrictions. As a rule, the fairness test could not be applicable to the main/core subject matter of the contract (*essentalia negotii*), on condition that the information is given to the consumer in plain intelligible language. On the other hand, if the in formation is given in a very complex way, written in small letters and with the use of very complex and professional language it could be subject to the fairness test as well. In consumer contracts main/core terms are mostly related to the subject matter of the goods and services and the price. Thus, according to the UCT protection legislation, an assessment of the unfair nature of the terms shall not apply to the price and the main subject matter of goods and services in question, under the pre-condition that are given in plain intelligible language to the consumer.[49] This exclusion is accepted in many European countries (for example France, the Netherlands, Germany etc).[50]

In the context of insurance contracts it follows from the Directive that "… in insurance contracts, the terms which clearly define or circumscribe the insured risk and the insurer's liability shall not be subject to such assessment since these restrictions are taken into account in calculating the premium paid by the consumer…".[51] Thus, core terms of insurance contract such as the price, description of the insured risk and the insurer liability are exempted from the fairness test and court intervention, on condition that they are given in plain intelligible language. At the same time this would mean that those elements of the pre-contractual information duty of the insurer relating to the description of risk and the insurers liability, insured sum and payment of premium, even though they might be unfair, can not

[47] Art 36. and Annex III(a)1-3 Life insurance Directive 2002/83/EC (Third Life Insurance Directive - Consolidated version) and Art 31 Non-life insurance Directive 92/94/EEC (Third non-life insurance Directive), and for example in Germany 7 VVG and § 1-5 VVG-InfoV, England ICOBS 6, Italy Art 166, 182-187 Code of Private Insurance, France Art 112-2 Insurance Code, Poland Art 13(a) Insurance Code, Croatia Art 89-91 Insurance Act etc.

[48] See chapter 2.2.

[49] For reasoning of the requirement of "plain intelligible language" and transposition into laws of the Member States see Schulte-Nölke et al., *Compendium*, supra, note 3, 412-421.

[50] Art 2:304 PEICL, N12, supra, note 4, 125, for overview see Schulte-Nölke et al., *Compendium*, supra, note 3, 412-421

[51] Preamble 19 UCT Directive; Art 2:304 PEICL, C3, supra, note 4, 116-117.

be declared null and void because they are exempted from the unfairness test.[52]

This concept is clearly to the detriment of the policyholder who would then be bound by the unfair contract term arising from the pre-contractual information duty of the insurer.[53] This imbalance between the positions of the parties is clearly acknowledged by PEICL. PEICL clearly states that the UCT Directive did not mean that every term that deals with the insured risk and insurers liability is exempted from the unfairness test. "While the English text of the Directive gives the impression that every term that defines the insured risk and insurers liability is already taken into account in calculating the premium and thus has to be exempted from the fairness test," the German text[54] of the Directive is much clearer. "Exemption should be made only if the term has been considered in calculation of the premium."[55],[56]

PEICL offers a more comprehensive explanation of what are to be considered as restrictions and modifications of core terms of the contract. PEICL explains that the core terms or as the Directive would say "main subject matter of the contract" are, in the context of insurance contracts, those terms that "give a crucial definition or circumscription of the type

[52] Preamble 19 UCT Directive, see Micklitz supra, note 5, 297., Clarke, supra, note 25, 591.

[53] Reference here should be made to other possible unfair contract terms from the gray/black list. The term irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract could be regarded as unfair. See chapter 3.2.2

[54] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31993L0013:DE:HTML,30.6.2013.

[55] Art 2:304 PEICL, C3, supra, note 4, 117.

[56] In that respect, the same question was asked before the German Courts. Whether one should distinguish between the contractual terms where the description of risk and the risk cover was positively formulated and the contractual terms describing exclusion of insurers liability in certain cases? In that context German BGH (*Bundesgerichtshof*, German Supreme Court) analysed unfairness of the provisions regarding exclusion of insurers liability. BGH decided that only those essential elements of any insurance contract without which the contract would seize to exist are exempted from the unfairness test. If the insurance contract may continue its existence without restriction of liability clause, such clause may be subject to fairness test. See BGH, 21 April 1993 (1993) NJW-RR 1094, BHG, 23 Juni 1993 (1993) NJW 2396; BGH, 23 November 1994 (1994), BGHZ 128, 54, 59. More Kieninger, *BGB Münchener Kommentar*, 2010., § 307 BGB, Rdn. 157. *et seq*. Contrary to this decision English courts shared different opinion. English Courts stated that contractual terms regarding exclusion of insurers liability could not be subject of fairness test because they are part of the description and specification of risk. The decision on this issue is thus arbitrary. See *Bankers Insurance Co Ltd v South and Gardner*, High Court, 7 March 2003, [2003] EWHC 38 (QB), Eggers, P. M. et al, *Good faith in insurance contracts*, Informa Professional, London, 2004., 123., Clarke, supra, note 25, 594.; Art 2:304 PEICL, C3, supra, note 4, 117.

and subject of insurance, the insured risk, the insurers' liability, the insured benefit and sum, the insured interest or value."[57] By definition they are matters of negotiation and agreement of the parties. On the other hand, any term which changes, restricts and elaborates the insurers responsibility is not part of the core terms and therefore is subject to a review under the Article 2:304 PEICL, unless it is actually taken into the calculation of core elements. For example, in the case of professional indemnity insurance, a core element would be the exclusion of general liability as part of the definition of the "type and subject of insurance". This contractual term would not be subject to a review. However the terms implying the exclusion of insurers liability for pure economic loss, is not an essential element of the insurance contract and therefore could be subject to a review.[58] I agree, sometimes it is not easy to determine whether a term excluding the insurers liability falls within the essential elements of the contract or whether it is a term that simply waives insurers liability.

This is an extremely important issue in insurance practice. It provides the answer as to whether certain elements of the insurance contract, especially exclusion of insurers liability, provided to the policyholder through information duty of the insurer, could actually be assessed as unfair or not. Many European regimes actually provide exceptions to such review in insurance contract (for example France, the Netherlands, Poland, Germany etc).[59] The purpose is protective from the position of a policyholder.

3.2.2. Policy terms and conditions as part of information duty and restrictions of the assessment of unfairness

Delivery of the general and/or special policy terms and conditions of the insurer usually form part of the pre-contractual information duty. Content-wise policy terms and conditions provide for explanation of some elements of the contract as well as reasons and procedure for realisation of the rights and obligations of the parties. Policy terms and conditions do not influence the conclusion of insurance contract, but form part of information duty and bind the policyholder once they are served.[60] In many cases the policyholder actually does not negotiate policy terms and conditions and therefore there is a fruitful ground for unfair contract term to occur.

[57] Art 2:304 PEICL, C4, supra, note 4, 117.

[58] Ibid.

[59] France Art L 132-1 para 6 Consumer Code, the Netherlands Art 6:231 Concumer Code, Poland Art 385(1) para 1 Consumer Code, Germany § 307 BGB. Art 2:304 PEICL, N12, supra, note 4, 125.

[60] This is deffirent from the "*Policy Model*" of conclusion of the contract. See supra, note 11.

The general requirement of unfairness is supplemented by a gray or black list of terms and conditions that may be regarded as unfair.[61] Art 1 of the Annex of the UCT Directive lists 17 clauses which are considered to be unfair unless proved otherwise.[62] Not all are relevant for insurance contracts. Some that are relevant in the context of consumer insurance law are the following:

> " … (b) inappropriately excluding or limiting the legal rights of the consumer vis-à-vis the seller or supplier or another party in the event of total or partial non-performance or inadequate performance by the seller or supplier of any of the contractual obligations;
>
> (f) authorizing the seller or supplier to dissolve the contract on a discretionary basis where the same facility is not granted to the consumer, or permitting the seller or supplier to retain the sums paid for services not yet supplied by him where it is the seller or supplier himself who dissolves the contract;
>
> (g) enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice except where there are serious grounds for doing so;
>
> (i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract;
>
> (j) enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason being specified in the contract;
>
> (k) enabling the seller or supplier to alter unilaterally without a valid reason any characteristics of the product or service to be provided;
>
> (o) obliging the consumer to fulfil all his obligations where the seller or supplier does not perform his own;
>
> (q) excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or

[61] For example in Austria, Belgium, Bulgaria, Czech Republic the provisions of UCTD has been transposed as black list. In Cyprus, France, Poland, United Kingdom, Ireland, Slovakia they have been transposed as gray lists. For full overview of transposition of the Annex of the UCTD into laws of the Member States see Schulte-Nölke et al., *Compendium*, supra, note 3, 395-403.

[62] PEICL holds no gray list of the Unfair contract terms, bur relates and reprints the grey list from the UCT Directive, with the note that it could be relevant for the insurance contracts and it should be considered as appropriate guideline for the interpretation of the Art 2.304. See Art 2:304 PEICL, C9, supra, note 4, 118.

imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract."[63]

Some of these terms mislead the insured consumer about the contract, some are hidden surprises (written in small letters and not clearly visible), some excuse improper performance of contractual obligation, or oblige consumer to fulfil his obligation even though the insurers (supplier) is not ready to perform his duty as well, some exclude consumer right to a redress and right to terminate contractual relationship.[64] All in all these situations are common in insurance practice and are important for the proper fulfilment of information duty.

Due to the special characteristics of financial services, Art 2 of Annex of the UCT Directive offers certain restriction in the scope of application of the abovementioned grey list (Art 1). Three contract terms are exempted from the list in case of financial services and these apply insurance services as well (Annex Art 2).They are namely: 1. The supplier of financial services reserves the right to **terminate unilaterally a contract** of indeterminate duration without notice where there is a valid reason, or 2. to **alter the rate of interes**t payable by the consumer, or the **amount of other charges** for financial services without notice where there is a valid reason, in both cases provided that the supplier is required to inform the other contracting party or parties thereof at the earliest opportunity and that the latter are free to dissolve the contract immediately. 3. Finally, the provider of the financial services reserves the right to **alter unilaterally the conditions** of a contract of indeterminate duration, provided that he informs the consumer with reasonable notice and that the consumer is free to dissolve the contract.[65] All three exemptions are important from the perspective of pre-contractual duty of the insurer. Content wise all three connect to the key elements of the contract usually negotiated by the parties. In this way the abovementioned alterations to the contract initially negotiated in the pre-contractual phase, which are at the same time subject of the information duty of the insurer, are exempted from the gray list of unfair contract terms.

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[63] Art 1 Annex of the UCT Directive. For transposition of Annex Art 1 into laws of the Member States and the correlation table see Schulte-Nölke et al., *Compendium*, supra, note 3, 397-402.

[64] Clarke, supra, note 25, 598-599.

[65] These exemptions do not apply to: transactions in transferable securities, financial instruments and other products or services where the price is linked to fluctuations in a stock exchange quotation or index or a financial market rate that the seller or supplier does not control; contracts for the purchase or sale of foreign currency, traveller's cheques or international money orders denominated in foreign currency. See Art 2 (c) Annex of UCT Directive.

When facing these exemptions for financial services it is questionable whether the particular Member State actually implemented these three exemptions from the gray list UCTD. The research showed that not all Member States implemented these exceptions.[66] Due to their practical importance they should certainly be taken into consideration. This is not just because the Member States are under obligation to align with the *acquis* under the principle of solidarity and loyalty, but also because of the binding effect of EU case law. Another problem is if some parts of Annex of UCTD are transposed and others are not. The consumer policyholder might then be confused about the limitations of his rights.

3.2.3. Restrictions of the assessment of unfairness according to the Commission Regulation No 358/2003 and Regulation (EC) No 267/2010

In addition to this topic one must not forget the European Commission Regulation No 358/2003.[67] The Regulation additionally provided for the specific list of terms/clauses which are exempted from ex. Art 81(1) of the Treaty because they impose undue restrictions on the parties. The objective of the Regulation is to exempt, subject to certain conditions, certain categories of agreement, decision and concerted practice among insurers.[68] According to Art 6, the exception does not apply "where the standard policy conditions contain clauses which:

(a) contain any indication of the level of commercial premiums;

(b) indicate the amount of the cover or the part which the policyholder must pay himself (the "excess");

(c) impose comprehensive cover including risks to which a significant number of policyholders are not simultaneously exposed;

(d) allow the insurer to maintain the policy in the event that he cancels part of the cover, increases the premium without the risk or the scope of the cover being changed (without prejudice to indexation clauses), or otherwise alters the policy conditions without the express consent of the policyholder;

(e) allow the insurer to modify the term of the policy without the express consent of the policyholder;

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66 For transposition of Art 2 (a-b) Annex of UCT Directive into laws of the Member States and the correlation table see Schulte-Nölke et al., *Compendium*, supra, note 3, 402-403.

67 *Commission Regulation (EC) No 358/2003 of 27 February 2003 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector,* OJ L 53, 28.02.2003.

68 http://europa.eu/legislation_summaries/other/l26097_en.htm, 30.6.2013.

(f) impose on the policyholder in the non-life assurance sector a contract period of more than three years;

(g) impose a renewal period of more than one year where the policy is automatically renewed unless notice is given upon the expiry of a given period;

(h) require the policyholder to agree to the reinstatement of a policy which has been suspended on account of the disappearance of the insured risk, if he is once again exposed to a risk of the same nature;

(i) require the policyholder to obtain cover from the same insurer for different risks;

(j) require the policyholder, in the event of disposal of the object of insurance, to make the acquirer take over the insurance policy;

(k) exclude or limit the cover of a risk if the policyholder uses security devices, or installation or maintenance undertakings, which are not approved in accordance with the relevant specifications agreed by an association or associations of insurers in one or several other Member States or at the European level."[69]

After expiry of Regulation No 358/2003 in March 2013[70] the Commission adopted a new Regulation (EU) No 267/2010[71] with the same goal. In accordance with the Art 101(3) of the Treaty on the Functioning of the European Union[72] the Regulation prescribes restrictions in the insurance sector to certain categories of agreements, relating to the compilation of statistical information necessary for the purpose of calculating risks, and to the common coverage of certain types of risks. The objective is threefold: ensuring competition within EU, providing benefits to consumers and ensuring adequate legal security for undertakings.[73]

Unfortunately, whereas Regulation (EC) No 358/2003 "granted an exemption for the establishment of standard policy conditions and the testing and acceptance of security devices" as listed above, it "was not considered necessary to include such agreements in a sector specific block exemption regulation and therefore is not included in Regulation

[69] Art 6(1) Regulation No 358/2003.

[70] Regulation No 358/2003 expired on 31 March 2013.

[71] *Commission Regulation (EU) No 267/2010 of 24 March 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of agreements, decisions and concerted practices in the insurance sector*, OJ L 83, 30.3.2010.

[72] All versions of the Treaty are available on http://www.lisbon-treaty.org, 30.6.2013.

[73] http://europa.eu/legislation_summaries/competition/firms/cc0005_en.htm, 30.6.2013.

(EU) No 267/2010."[74] It was considered that the same effect could be gained through the provisions of the establishment and exemptions of pools of risks. "Pools can involve restrictions of competition, such as the standardisation of policy conditions and even of amounts of cover and premiums. It is therefore appropriate to lay down the circumstances in which such pools can benefit from exemption."[75]

3.3. EU Case Law

In the following paragraph two cases of the EU Court involving unfair contract terms will be analyzed. They are usually part of the content of the pre-contractual information duty of the insurer. The first one relates to the unilateral termination of the contract by the supplier and the second one relates to the term agreeing on arbitration clause.

3.3.1. Duty of national courts to *ex officio* examine the unfairness of a contractual term before them even if not specifically requested to do so

In the case *VB Pénzügyi Lízing Zrt. v Ferenc Schneider,* as of 9 November 2010,[76] the EU Court decided that the national court is under obligation to examine *ex officio* whether a term of a contract submitted for its assessment is unfair even if not specifically requested to do so. This decision goes deeply into the relationship between per-contractual information duty and unfair contract clauses.

In this case the parties to the main proceedings concluded a loan contract to finance the purchase of a car. When Mr *Schneider* ceased to fulfil his contractual obligations, *VB Pénzügyi Lízing* terminated that loan contract and brought an action before the referring court for the repayment of a debt with interest on the outstanding amount and costs. Loan contracts, together with insurance contracts, belong to financial services and the clause about unilateral termination of the seller with the full repayment of debt together with interest and the cost constitutes one of the elements of pre-contractual information duty.

One of two questions asked in the proceeding was: "If the national court itself observes, where the parties to the dispute have made no application to that effect, that a contractual term is potentially unfair, may it undertake, of its own motion, an examination with a view to establishing the factual and legal elements necessary to that examination where the national

[74] Ibid.

[75] Para 14 Preamble of Regulation (EC) No 358/2003.

[76] Case C 137/08, *VB Pénzügyi Lízing Zrt. v Ferenc Schneider*, 9 November 2010.

procedural rules permit that only if the parties so request?"[77] EU Court replied positively.

> "The national court must investigate of its own motion whether a term conferring exclusive territorial jurisdiction in a contract concluded between a seller or supplier and a consumer, which is the subject of a dispute before it, falls within the scope of Directive 93/13 and, if it does, assess of its own motion whether such a term is unfair."[78]

The reasoning of the EU Court was as follows. According to settled case-law, the system of protection introduced by the UCT Directive is based on the idea that the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. This leads to the consumer **agreeing to terms drawn up in advance** by the seller or supplier **without being able to influence the content** of those terms. The Court of Justice has also held that, on account of that weaker position, Article 6(1) of the Directive provides that unfair terms are not binding on the consumer. In order to guarantee the protection intended by the Directive, the Court has also stated that the imbalance which exists between the consumer and the seller or supplier may be **corrected only by positive action unconnected** with the actual parties to the contract. Thus, in order to safeguard the effectiveness of the consumer protection intended by the European Union legislature, the national court must in all cases and whatever the rules of its domestic law, ascertain whether a contractual term which is the subject of the dispute before it falls within the scope of that Directive. If it does, that court must assess that term of its own motion, in the light of the requirements of consumer protection laid down by that Directive.[79]

The EU Court stated that such examination must be performed in three stages. 1. As regards the first stage of the examination, the national court must determine whether or not the contested term was individually negotiated between a seller or supplier and a consumer. 2. Second stage, the investigation must than confer exclusive jurisdiction on a court in the territorial jurisdiction of which the seller or supplier has his principal place of business, which is not the court in whose jurisdiction the defendant lives or the one with jurisdiction for the place where the applicant has its registered office but the one which is situated close to the registered office of the applicant both geographically and in terms of transport links. 3. Third stage, the Court must examine whether such a term thus falls within

[77] C 137/08, Judgement, para 25.

[78] C 137/08, Judgement - Ruling on question no. 3, para 57.

[79] C 137/08, Judgement, para 46-49.

the category of terms of the Annex of the Directive. It follows that such a term must be regarded as unfair within the meaning of Article 3 of the Directive in so far as it causes, contrary to the requirement of good faith, a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[80]

3.3.2. Right of a national court to assess of its own motion whether an arbitration clause in consumer contract is unfair in the enforcement proceeding

In the case *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, as of 6 October 2009,[81] the EU Court (than ECJ) decided that the national court hearing an action for enforcement of an arbitration award which has become final and was made in the absence of the consumer can assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair.

In this case the parties to the main proceedings concluded a subscription contract for a mobile telephone. The contract contained an arbitration clause.[82] Since Mrs *Rodríguez Nogueira* failed to pay a number of bills and terminated the contract before the agreed minimum subscription period had expired, *Asturcom* initiated arbitration proceedings against her before the arbitral tribunal. By arbitration award she was ordered to pay specified sum. Since the award became final, *Asturcom* asked for its enforcement before the First Instance Court in Spain. Arbitration clause in consumer contracts is clearly one of the elements of the pre-contractual information duty (information about dispute settlement).

In this case the question asked was: "In order that the protection given to consumers by Directive 93/13/EEC should be guaranteed, is it necessary for the court hearing an action for enforcement of a final arbitration award, made in the absence of the consumer, to determine of its own motion whether the arbitration agreement is void and, accordingly, to annul the award if it finds that the arbitration agreement contains an unfair arbitration clause that is to the detriment of the consumer?"[83] The EU Court (than ECJ) gave a positive answer:

> "… national court or tribunal hearing an action for enforcement of an arbitration award which has become final and was made in the absence

[80] C 137/08, Judgement, para 51-54.

[81] Case C-40/08, *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira*, 6 October 2009.

[82] Arbitration before arbitral tribunal: *Asociación Europea de Arbitraje de Derecho y Equidad* (European Association of Arbitration in Law and Equity - AEADE).

[83] C 40/08, Judgement, para 27.

> of the consumer is required, where it has available to it the legal and factual elements necessary for that task, to assess of its own motion whether an arbitration clause in a contract concluded between a seller or supplier and a consumer is unfair, in so far as, under national rules of procedure, it can carry out such an assessment in similar actions of a domestic nature. If that is the case, it is for that court or tribunal to establish all the consequences thereby arising under national law, in order to ensure that the consumer is not bound by that clause."[84]

The reasoning of the Court regarding the purpose and the interpretation of the unfairness according to the Directive 93/13/EC is the same as in the previous case. The consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge. That is why the consumer is agreeing to terms drawn up in advance by the seller or supplier without being able to influence the content of those terms. In this case the arbitration clause was questionable. Such imbalance between the parties may be corrected only by positive action of the court unconnected with the actual parties to the contract. For those reasons the Court held that the national court is required to assess of its own motion whether a contractual term is unfair.[85]

4. Conclusion

The text shows that there is a clear connection between the pre-contractual information duty and the unfair contract terms. Unfair contract terms could be either part of an information document containing the core elements of the contract or could be hidden in the policy terms and conditions of that particular insurer. On a European level protection is offered either through the general standards of unfairness or through the grey/black list of the most usual unfair contract terms. In the context of insurance contracts and in particular in the light of the content of the pre-contractual information, it is the duty of the insurer to inform the policyholder about the information regarding parties, regarding elements of the contract and about the dispute resolution mechanism. Additionally the insurer is under an obligation to deliver to the policyholder policy terms and conditions so that policyholder is aware of the terms that will bind him in future. Every single element/term may be subject of the fairness test.

When assessing the unfair nature of the term in the insurance sector there are certain restrictions. The restrictions on a European level are twofold. First, restrictions to the unfairness test exist in terms of core elements of

[84] C 40/08, Ruling, para 50.

[85] C 40/08, Judgement, para 29-32.

the insurance contract such as the description of goods and services and payment of the premium and insured sum. These elements are at the same time the core elements of the pre-contractual duty of the insurer. Second, restrictions to the unfairness test exist in terms of specific unfair terms listed in the national grey/black lists, such as the right of the insurer to unilaterally terminate contract, alter the interest rate or change conditions of the contract provided that he has informed the policyholder and that the policyholder is free to dissolve the contract. These are common core elements of the general and/or specific policy terms and conditions, and also the most important elements of the pre-contractual duty of the insurer.

Under the general standards, a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. One of the elements in judging the unfairness is that the information is given to the prospective policyholder in clear and intelligible language. The same requirement is followed by the pre-contractual information duty.

If the contract term is found to be unfair it is null and void and will not bind the policyholder. The contract shall continue to bind the parties if it is capable of continuing in existence without the unfair term. PEICL here offers an exception. Through court intervention, the unfair contract term shall be replaced with a fair one. In judging this, the court should use the test of the reasonable policyholder and the reasonable insurer.

The review of the elements or the content of the pre-contractual information duty of the insurer through the rules of unfair contract terms is of utmost importance. It aims directly at the hart of consumer protection and the sustaining of an adequate balance between the rights and obligations of the parties. The protection is so important that, as we have seen in the analysed EU case law, the national courts have a right *ex officio,* to examine the unfairness of a contractual term before them even if not specifically requested to do so, and even in the final enforcement proceeding. The pre-contractual information duty of the insurer and the delivery of the pre-contractual document serves both parties. The prospective policyholder will be put into position to read one more time the elements of the contract and make an informed decision about the contract. The insurer will therefore conclude the contract based on elements on which both parties agree, and will not risk the danger of the policyholders withdrawal from the contract.

Still, there are still many other open questions such as the standards to be considered in assessing the unfair nature of the term. What are the standards of good faith in dealing in consumer contracts? Could terms

in insurance contracts be written in plain and intelligible language to a consumer policyholder, for example to a florist or a small baker? What is the influence of Directive 2005/29/EC on unfair B2C commercial practices on unfair contract terms? These are all questions for future discussion.