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„Plain and intelligible language" of consumer insurance contracts under the light of the Greek jurisprudence

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Abstract

According to the Community Legislation all the Terms in Consumer Contracts must be plain and intelligible so that the consumer could understand the kind and the depth of his contractual obligations. This doctrine is integrated in all the member states in EU. It is integrated in the Greek legal system by the Law 2251/1994 (Consumer Protection). The Greek jurisprudence designates the interpretation of this doctrine in the consumer insurance contracts and produces a stable example of judicial application of the norm for plain and intelligible terms in this kind of contracts.

Keywords: consumer insurance contracts, transparency and intelligibility of terms

1. THE UNFAIR TERMS IN CONSUMER CONTRACTS DIRECTIVE 93/13/EEC

The Unfair Terms in Consumer Contracts Directive 93/13/EEC is a European Union Directive governing the use of surprising or misleading terms used by business in pre-formulated contracts with consumers. The Directive places a list of examples of terms that may be regarded as unfair and a doctrine according to which many terms in a consumer contract could be held as unfair. Unfair terms are invalid and not binding for consumers. The aim of such a Directive is to protect the consumer from terms that he accepted despite the significant imbalances that these terms impose in the rights and obligations in favor of the counterparty of the consumer.

The Directive is been incorporated in the Greek legal system by the Law 2251/1994 regulation the consumer protection. The Law 2251/1994 is been implemented in the light of the Directive 93/13/EEC and the Greek jurisprudence is seeking to introduce to the Greek legal system every doctrine or principle that arises by the articles and the teleological interpretation of this Directive[1]. One of these principles is the principle of transparency regulating every consumer contract.

2. THE NEED AND THE REASON FOR CONSUMER PROTECTION IN GREEK LAW

The general contract terms of insurance contracts are pre-formulated contractual clauses, binding on the consumer without the possibility of their negotiation. In accordance with Article 2 para. 1 of Law 2251/1994 the general contract terms are those „which have been drafted in advance for an indefinite number of future contracts."[2] The general contract terms are terms unilaterally drafted in advance and are not subject to negotiation at the conclusion of the contract. As pre-formulated terms they are intended to represent standard and uniform content of an „indeterminate" number of contracts, and made by the insurance company to the consumer when the contract is drawn for their mandatory acceptance.

The general contract terms, as imposed by one party (insurance company) to th
e other contracting party (consumer) contribute to „reverse the conventional justice at the expense of the counter party" (Dellios, 2001a, 13). This is because the consumer is distinguished from the „inherent lack of influence potential in developing the content of the contract" (Dellios, 2001a, 17) and does not decide on a scheme which ensures absolutely the „calm and rational

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[1] Cf. Areios Pagos 561/2014 NOMOS, Areios Pagos 430/2005 NOMOS, Areios Pagos 1001/2010 NOMOS, Piraeus Court of Appeal 72/2011 NOMOS.

[2] Indicatively see Athens Multi Member Court of First Instance 711/2007 Companies Law 2007, 1336; Athens Multi Member Court of First Instance 119/2002 Companies Law 2003, 424.

choice" (Perakis, 1996, 114). Moreover, the consumer is at a disadvantage against the insurance company which is contractually more experienced, organizational complete and staffed with qualified personnel. Instead the consumer is in a position of negotiating weakness[3], transactional inequality[4] and epistemic deficit (Dellios, 2008a, čl. 2, st. 3, 28)[5] as to the formulation of the contractual terms and in respect of the legal and economic importance of their implementation.

These lead to negative multiplier effects if combined with the ignorance of the consumer of the actual content of the contract terms, i.e. the results of the application of the general contract terms bring about to the economic and legal position as counter party of the insurance company. The consumer of insurance services is contracted and bound. The consumer is aware of this but not sufficiently aware of the extent of his commitment, the consequences and most importantly: what are the practical economic and legal effects of the application of the clauses in the insurance contract.

One solution to the above weak position of the consumer is given by the principle of transparency in the terms of insurance contracts. The principle of transparency when effectively applied shall ensure that the consumer of insurance services accurately identify the contents of the contract terms and the results of their application[6]. The consumer cannot declare ignorance and is not entitled to disregard the effects of transparent conditions of an insurance contract. The principle of transparency is to cover the uncertainty that pervades the consumer for non pre-contractual negotiation of the general terms and imparts to the consumer a conventional and transactional weapon. This brings the "equality of arms"[7] between Parties and balances the relationship restoring the contractual position of the consumer on a more equal position.

3. THE CONCEPT OF TRANSPARENCY IN THE GREEK CONSUMER LAW

The Greek consumer law is based on the principle of transparency, which includes both integration in the drafting, and the interpretation and control of the general contract terms (Mentis, 2000, 67). The principle is required by EU Directive 93/13/EEC Articles 4 II and 5, which requires control of supply and remuneration, provided the relevant clauses are not clear and comprehensibly formulated (Article 5) (Council Directive, 1993, čl. 5). The transparency principle has been incorporated into the Greek legal system by Article 2 para. 1–3 and Article 5 of Law 2251/1994, Article 2 para. 6 and cases e, g, h, j, k of para. 7 of Article 2 (Dellios, 2001a, 377; Mentis, 2000, 65; Dellios, 2008b, par. 245, 312; Dellios, 2008a, par. 25; Dellios, 2013, par. 265; Efthymiou, 2013, 30).

The transparency of the general contract terms requires clarity on the legal implications of the contractual provision as to the rights and obligations of the consumer. Based on said clarity the consumer needs to know „what awaits him" in the contract, "where he stands", under what conditions and with what content he will face a contractual obligation or a financial charge (Derleder, 2001, 2036). Vague or ambiguous contract terms are deemed illegal and abusive (Reich, Micklitz, 2003, 508). Therefore vague or ambiguous clauses may not be used by the supplier to strengthen its position against the consumer (Reich, Micklitz, 2003, 508). Particularly adverse economic consequences and charges should be clearly visible. Therefore the principle of transparency serves to prohibit the concealment of consumer charges and directs the contractual relations to clarity as to the exact content of rights and obligations (Stoffels, 2004, Rn. 562, 565).[8]

The principle of transparency retracts into a threefold of individual guidelines which should distinguish the general contract terms.[9] The first aspect

[3] For disadvantaged bargaining position speaks and Areios Pagos Plenary 6/2006 Companies Law 2006, 665.

[4] See Athens Court of Appeal 4788/2008 Arm 2009, 1204. About negotiating inequality see and Piraeus Single Member Court of First Instance 5794/2005 NOMOS.

[5] Consumer Ombudsman 12/2009 TNP DSA, Consumer Ombudsman 29/2009.

[6] See the German jurisprudence since the decade of 1980, „Treu und Glauben verpflichten die Verwender allgemeiner Geschäftsbedingungen, die Rechte und Pflichten ihrer Vertragspartner eindeutig und verständlich darzustellen, damit diese sich bei Vertragsschluß hinreichend über die rechtliche Tragweite der Vertragsbedingungen klar werden können (vgl . BGHZ 97, 65 (73) = NJW 1986, 1335 = LM § 535 BGB Nr. 102 = WM 1986, 458; BGH, NJW 1983, 159 = LM § 138 (Bb) BGB Nr. 50 = WM 1982, 1354 (1358); NJW 1984, 171 = LM § 3 AGBG Nr. 6 = WM 1983, 1281 (1282, 1283); NJW 1988, 1726 = LM § 8 AGBG Nr. 12 = WM 1988, 821 (824); NJW 1989, 222 = WM 1988, 1780 (1783))."

[7] So see BVerfG NJW 1998, 3216.

[8] BGH NJW 1999, 2779, BGH NJW 2000, 519.

[9] Areios Pagos 15/2007 NOMOS, Areios Pagos 652/2010 Companies Law 2010, 943; Areios Pagos 430/2005 Hellenic Justice 2005, 802; Areios Pagos 1030/2001 Companies Law 2001, 1125; Areios Pagos 296/2001 Hellenic Justice 2001, 1329; Athens Court of Appeal 2386/2006 Hellenic Justice 2006, 1467; Athens Court of Appeal 5253/2003 Commercial Law Review 2003, 643; Athens Court of First Instance 2856/2013 NOMOS, Athens Court of First Instance 840/2008 NOMOS.

is that of clear and understandable wording (Mentis, 2000, 66; Dellios, 2013, 266, 377; Efthymiou, 2013, 32), so that the consumer of insurance services is able in plain and understandable language to distinguish the meaning of the clause. The second aspect relates to a fixed or determinable content of terms, so that the consumer is able to anticipate his legal position when the insurance clauses will be applied (Dellios, 2013, 266; Efthymiou, 2013, 33). The third aspect is the prohibition of unexpected, unannounced and misleading terms. These overthrow for the consumer the moral foundation of the contract and refute the unreasonable expectations (Leletzis, 2002, 285) and impressions as to the actual legal consequences and implications of the clauses signed. Based on this principle, the general contract terms depict the rights and obligations of the parties in a way that is definite, correct and clear.[10]

If the term is not transparent, it reintroduces and intensifies the phenomenon of the deficit of the consumer's knowledge, multiplies the transaction inequality, while not allowing the consumer to understand and weigh the consequences of his commitment from such a condition (Dellios, 2001b, 1517). The consumer must fully understand the transaction position at the conclusion of the contract. The transparency of terms must be such as to allow him to understand sufficiently, whether the conduct of the supplier (here the insurance company) is lawful and consistent with what was agreed (Habersack, 2001, 757; Reifner, 1995, 873; Fuchs, 2006, § 310, Rn 1087). The non transparent contractual term intensifies the insecurity in which the consumer is found due to his deficient knowledge against the more experienced insurance company and does not allow the consumer to understand and weigh the consequences of his commitment (Dellios, 2001, 1517).

In practice, the non transparent clauses which conceal the real, legal and financial situation create the risk that the consumer either refrains from certain actions (exercise of rights) or succumbs to rights or claims, which in effect the supplier has (Stoffels, 2004, Rn 562).[11] Under this light non transparent clauses lead, precisely because of their non transparency to the upset of the conventional balance in accordance with Article 2 para. 6 of Law 2251/1994 (Stoffels, 2004, Rn 562). Such terms are per se invalid (Stoffels, 2004, Rn 562).

Transparency directly affects the contract between supplier and consumer and contributes to the comparison of offers and general trading conditions between different suppliers (macroscopic dimension of transparency). It is included in the role which the legal system reserves to the consumer, as a kind of arbitrator, rightly and correctly informed, who decides which offer will be checked (Marinos, Venieris, 1994, 464). The transparency principle, when applied effectively puts the consumer in the trading position he deserves, i.e. the position of the emancipated party who is aware of the consequences of his actions. The consumer is no longer helpless, to the contrary the principle of transparency, is an expression of the updated and informed consumer with conventional self-responsibility which is based on the high level of information he has when dealing about the consequences of his contractual commitments (Dellios, 2013, par. 265).

Essentially transparency, especially in the sector of insurance, reveals the actual effect of insurance coverage, the economic consequences for both parties and brings to the consumer: what the particular insurance company offers and on what terms. Thereby averted is the misleading of the consumer with conventional „wrappings" of products that are expensive, ineffective or useless for his insurance needs, with characteristics and conditions that were not disclosed during the preparation of the insurance contract. A corollary of the obligation of the transparency of insurance clauses is to combat misleading advertising (Marinos, 2002, 266).

4. THE PRINCIPLE OF TRANSPARENCY IN GREEK JURISPRUDENCE

Several recent decisions of the Greek courts base the legality of general contract terms on the obligation to comply with the principle of transparency, especially after the *Areios Pagos* decision no. 430/2005 which fully founded the basic elements of the principle of transparency. This decision held that „the law of general contract terms is based on the principle of transparency, which is a fundamental principle of consumer protection... It has two aspects. Clarity and understandable terms. The clarity concerns the legal implications of a clause on the rights i.e. the consumer's obligations. Therefore vague or ambiguous clauses may not be used by the supplier to strengthen its position against the consumer. Particularly adverse economic consequences and charges should be clearly visible. Opaque clauses, which conceal the real, legal and financial situation create the risk that the consumer either refrains from certain actions (exercise of rights) or succumbs to rights or claims, which in effect the

[10] Areios Pagos 652/2010 Companies Law 2010, 943; Areios Pagos 430/2005 Hellenic Justice 2005, 802.

[11] See indicatively Areios Pagos 430/2005 NOMOS which consistently repeats the jurisprudence on the above statement.

supplier has. Under this light non transparent clauses lead, precisely because of their non transparency to the upset of the contractual balance, in accordance with Article 2 para. 6 of Law 2251/1994... the consumer should understand with complete clarity the obligation undertaken on the charge... Transparency and clarity is needed as to the cause of the benefit, and as to its content. Transparency concerns the clear and comprehensible formulation, to the principle of fixed or definitive content and the principle of predictability of the existence of terms. In this sense must be derived from the general contract terms the reason of the obligation..., the final amount of the charge and the criteria by which this charge appears and is calculated" (Marinos, Venieris, 1994, 464)…

But even before this decision two others formulated conditions of validity of general contract terms which are related to the transparency of the related contractual clause. The decision of the *Areios Pagos* no. 1030/2001[12] held that „the general contract terms must present the rights and obligations of the parties in a way that is definite, correct and clear (principle of transparency" which should govern the formulation of the terms which although not expressly enshrined in law, but is clear from the whole contents). Thus when concerning a general term that is subject to the insurer's right to unilaterally proceed, during the term of the agreement, to an increase in premiums which is the policyholder's basic obligation, it must be formulated in the policy in a transparent manner in the sense that the insured already in the conclusion of the contract must be able to understand the extent of the increase and in the case of an increase to be able to assess conformity to the relevant clause which provides for it."

Towards the predictability required by the principle of transparency relative to the non-surprise of the insured consumer the decision of Areios Pagos no. 1219/2001[13] has held that „The regulation of Article 2 para. 7 case k is explained by the need to protect the consumer's legitimate expectations in so-called unexpected clauses or surprise clauses, i.e. those clauses that alter the image that has been justifiably created in the consumer as to the size of the price or scope of the main service, i.e. elements which are usually the only ones actually examined by the customer at the conclusion of the contract."

[12] Areios Pagos 1030/2001 Companies Law 2001, 1125 = Commercial Law Review 2001, 740 = Companies Law 2001, 1127.

[13] Areios Pagos 1219/2001 Hellenic Justice 2001, 1603 = Nomiko Vima 2002, 354 = Companies Law 2001, 1128.

5. THE PRINCIPLE OF TRANSPARENCY IN GREEK JURISPRUDENCE ESPECIALLY WITH REGARD TO INSURANCE CONTRACTS

The Greek jurisprudence has assessed general contract terms of insurance contracts especially under the light of the principle of transparency. In Athens Court of Appeal decision no. 1407/2002[14] an insurance contract clause was examined which during the term of the insurance relationship allowed the insurance company the right to unilaterally reduce the indemnity. The relative clause was evaluated as invalid and unlawful as it was considered that „when it is a general term that relates subject to the right of the insurer to proceed unilaterally, during the validity of the insurance contract, to ... reduce the indemnity, the term should be expressed in the policy in a transparent manner, in the sense that the insured at the conclusion of the contract, should understand the measure of the term ... so, if carried out unilaterally ... the reduction, respectively, to be able to assess whether it is consistent with the relevant clause. Accordingly, if the contract provides to deduct a certain amount from the amount of indemnity in favor of the insurance company (deductible), and the possibility of adjusting the amount unilaterally by the insurance company, should be specified in a certain manner as much as possible, the conditions and the context of the adjustment, in order to provide the consumer with adequate knowledge of the extent of his insurance coverage."

Otherwise the jurisprudence[15] evaluated the Table of Values with which the insurance company accompanied the insurance contract. The claim was upheld that this table is an non transparent contract term inasmuch as there is no mention in the table of the fact that the insurance premiums for the two (2) first years are not deposited in their entirety and does not present the cause of their non-deposit, on the other that it does not present, what is the nature and amount of expenses that are deducted by the defendant, resulting in the contracts for the first two (2) years of the validity of the insurance have no cash value.

In the findings of the Consumer Ombudsman 16/2009[16] it was considered that „the condition of the validity of insurance terms is their transparency as regards the coverage and the conditions under which

[14] Athens Court of Appeal 1407/2002 Companies Law 2002, 1136 = Hellenic Justice 2004, 877 = EpiDikIA 2004, 426 = Commercial Law Review 2004, 553.

[15] Athens Multi Member Court of First Instance 840/2008 NOMOS. However, that decision was annulled in the next trial stage.

[16] Consumer Ombudsman 16/2009 TNP DSA.

it is provided, and the possible financial consequences for the insured of their application." Based on this assumption a clause was evaluated in a car insurance contract, which provided that the liability of the insurer is exhausted at the insurance amount in force at the date of damage. Of this amount deducted under the relative clause, each insurance period what was paid and left as the remaining sum insured. Based on this clause the insured becomes co-insurer of his own losses in proportion to the original insurance amount minus the amount paid.

The findings concluded that the clause is invalid as non-transparent since „the consumer has concluded a complete insurance with the defendant company against fixed premium payment which is due for the entire six-month period of the insurance. From the wording of Article 9 of the insurance policy, the consumer cannot safely diagnose the state of the insurance relationship as it stands by the company invoking the pro rata condition of average... This finding, however, of the pro rata condition of average and much more the application of the pro rata condition, is outside the reasonably anticipated and expected knowledge base of the average prudent consumer who made the conclusion of a typical car insurance for the same damage. Therefore, it is observed that this particular term suffers in wording due to lacking the clarity of the determination of the insurance benefit, in addition, it will worsen the trading relationship and charge the consumer for the extent of which he becomes aware of the first on the occurrence of the insured event. The consumer is found in the unpleasant position of surprise, when in drafting the contract the insurance company speaks of maximum insurance liability for one or more accidents, while the exercise of the right of the insured to cover the second accident further limits the liability of the insurance company in application of the pro rata condition of average. The wording of the Article does not allow the consumer to diagnose such developments in the provision, whereas the image justifiably created in the consumer as to the extent of the benefit is substantially altered by the use of the clause by the insurance company."

Jurisprudence has dealt adequately with the question of exemptions from insurance coverage and the compatibility of such conditions with the principle of transparency. Jurisprudence evaluated as unfair the general contract term that introduced the insurance coverage exemption if the event causing the insured event is due directly or indirectly, in whole or in part in driving or using airplanes, gliders or other airborne means, not performing regular air transport routes. The decision held that „The No. 3 clause in the general terms of business, inasmuch exempts without any way of specificity of the respective declarations of intention of the parties to the non-scheduled flights without and reporting and even some other adequate and unreasonable cause, denies in this particular case and in accordance even with the general experience and logic, for similar as the contested transactional cases the standard – beyond and the essential- transactional expectations of the client, as the average consumer and life insurance customer who reasonably believes that, intrinsically, the nature of the flight as irregular, does not render any similar flight an extraordinary event that will justify an exemption to the coverage of the insurance contract and therefore this term, is controlled by the general criterion." Essentially the disproof of the expectations of the consumer / insured is due to the fact that such a clause is sudden and unexpected application (Efthymiou, 2013, 133).

In the same direction was the decision on the exemption from the insurance coverage in case of damage.[17] Judged as unfair was the general contract term, under which were excluded from the insurance coverage any losses or damage from ruptured pipes, water supply, sewage etc. The reason of arbitrariness in the decision lies in the fact that under this term is excluded from the activation of insurance coverage occurrence of insurance risk is in context with the cause of flooding from the above cause of ruptured pipes etc. Thus the term limits the coverage in these uncommonly observed cases of floods, caused by factors acting outside the insured premises. And in this case introduced to the insurance contract was a term which surprised the insured and unexpectedly overthrew the legitimate expectations, which would not happen if the principle of transparency had been applied (Efthymiou, 2013, 134).

Assessed was a clause that introduced exemption from insurance coverage if the damage occurred because some insured objects were stolen from an outdoor and partially unfenced area.[18] Specifically, the general contract term provided that „covered are the above-described material objects ... provided that the risk of theft of materials is covered if they are in enclosed storage areas and in accordance with Article 1.4 of this Annex." The decision stated that the latter term (relating to Article 1.4 of the Annex) indicated different storage areas and not however sheltered. It was noted in the grounds of the decision that if the area was a closed covered area, guarded and supervised there was no reason for insurance against theft. There was no

[17] Areios Pagos 1597/2011 TNP DSA.

[18] Athens Multi Member Court of First Instance 735/2004 NOMOS.

specific reference to the principle of non-transparency, although this was possible. However, the court recognized the ambiguity of the relevant terms and contradictory as to the expectation of the insured to receive insurance coverage without the above exception and vindicated the insured.

The decision of the Plenary of the Areios Pagos no. 6/2006[19] assessed the issue of interest income from default interest of insurance for as long as the insurance company delays the payment to the insured. In particular the clause in the insurance contract provided that the insurer is not liable to pay interest before the expiry month of the adoption of a final decision which requires the payment of the indemnity. The court held that „the relevant clause, when present in General Terms and Conditions and even insurance against fire, which have been made in advance without prior individual negotiation, generally not without knowledge or understanding of their content by the insured, who is the weaker of the Parties and is in weaker bargaining position, causing significant disruption of contractual balance within the meaning of the above provision, a fortiori is abusive in any available general trading conditions clause for full exemption of the insurer from any interest."

6. SPECIFICALLY THE ISSUE OF THE ADJUSTMENT OF PREMIUMS UNDER THE LIGHT OF THE TRANSPARENCY PRINCIPLE

An important issue in the general terms of insurance contracts is the premium adjustment clause. The decision of the Areios Pagos no. 1030/2001[20] was the first decision of the Areios Pagos that assessed the issue of adjustment of premiums under the light of the principle of transparency. It held that „when concerning a general term that is subject to the insurer's right to unilaterally proceed, during the term of the agreement, to an increase in premiums which is the policyholder's basic obligation, it must be formulated in the policy in a transparent manner in the sense that the insured already in the conclusion of the contract must be able to understand the extent of the increase and in the case of an increase to be able to assess conformity to the relevant clause which provides for it. In case of the supplier right for redefinition of premiums should be reported in a certain way as much as possible the conditions of this and the given context of configuration. From the principles of good faith it is required that the specific general contract term must offer to the consumer sufficient knowledge of the financial burden he undertakes to the extent that under the circumstances this can be required. The supplier is acting in an unfair manner, if not complying with those requirements. Such features has the general contract term that allows the insurer as a supplier to make this unilateral change in premiums on any date of renewal of the insurance contract. In such a case (unilateral adjustment) the counter party-consumer surrenders to the judgment of the supplier for the correctness and necessity of the adjustment without him being able to predict under what conditions and to what extent he will suffer additional charges."

In a more recent decision[21] was the same issue on the adjustment of premiums. Repeated was the judgment that unfair due to non-transparency is the term in an insurance contract that gives the insurer the right to adjust at each annual contract renewal the premium, if the conditions and criteria with which the adjustment is made are not specified in the contract. The decision reiterated the view that the adjustment should be done with the set from the beginning in the contract criteria which give the consumer the ability to understand both the size of the increase and the corresponding financial burden and also the cause of the charge and the agreement itself and the calculation thereof with specified criteria. However, the importance of this decision is that it demonstrated the following conclusion: the gap that occurs in the way the premium is adjusted because of invalidity / non transparency of the corresponding clause should be complemented by adjustment in the health index of the Hellenic Statistical Authority. The conclusion drawn is the result of forced interpretation of the insurance contract by covering any gap from the above nullity of the relevant term.

The adjustment of premiums is actually done to enable the insurance company to incorporate inputs enjoyed by insured events that increase costs or decrease the value of the premiums. The insurance company is legitimately trying to adapt the conventional, continuous and long, relationship to the insured based on some facts and considerations that were not present during the preparation of the contract or there but changed later. Or it endeavors to integrate in the contractual relationship conditions and circumstances which vary and affect the rights and obligations of the parties during the term of the contractual relationship. This need is similar to the need for banks to adjust the

[19] Areios Pagos Plenary 6/2006 Hellenic Justice 2006, 419 = Commercial Law Review 2006, 623 = Companies Law 2006, 665 = EpiskED 2006, 90.

[20] Areios Pagos 1030/2001 Companies Law 2001, 1125 = Commercial Law Review 2001, 740 = Companies Law 2001, 1127.

[21] Athens Court of Appeal 4108/2012 NOMOS.

floating rate on loan agreements in variable market conditions. In the same vein, banks adjust the floating rate to changes in the cost of money and market conditions. In the case of insurance premiums, as in the case of variable interest rates, there should be clear and safe adjustment criteria that will respect the principle of transparency and will not surprise the consumer.

The conventional term for adjustment of the premium must not result in an audit to be made only by the same insurance company without absolutely clear criteria. In other words the terms in the contract must identify and make explicit the limits and conditions under which the insurance company is entitled to adjust the interest rate. The term is non transparent, if the insured is in need of additional explanations and information beyond the contract to understand when and what kind of adjustment should be expected.[22] Transparency is ensured when the general contract term has such a formulation that gives the consumer the right to "contradiction" in the calculations of the insurance company.[23] That is when it entitles the consumer to make himself the calculation, to challenge or correct the calculation of the supplier or at least to await the new height of their obligation after the adjustment.

Based on the principle of transparency, as stated above, the contractual term of the insurance company that imposes and determines the adjustment of the premium must:

a) Describe the causes of the adjustment. The consumer should understand not only the amount but also the cause of extra charges in accordance with the explicit requirement of the transparency principle.[24]

b) Specify the factors that determine the adjustment on the basis of which the adjustment shall be verified.

c) Adequately describe the requirements, conditions and scope of the adjustment of the premium to be able again to verify the adjustment.

d) State the time of adjustment to avoid surprise of the insured.

e) State the method of notification of the adjustment to the insured.

f) Not lead to achieving opportunistic profit for the insurance company. The adjustment of the premium is for the insurance company to incorporate in the legal relationship the changes in its operational costs and general changes in the conditions of coverage and the market. The adjustment cannot be cause for the insurance company to increase its profit or the occasion to change the conventional balances. If the insurance company uses the adjustment of premiums to achieve opportunistic profit, then it disturbs the balance of rights and obligations to the detriment of the consumer. This is in violation of Article 361 CC (pacta sunt servanda) and not only of Article 2 para. 6 and 7 case e of Law 2251/1994.[25] In such a case, i.e. the insurance company makes no adjustment of the premium but makes an unjustified change to achieve opportunistic profit and not for incorporation of exogenous changes, which alters the agreed terms.

7. NULLITY OF THE UNFAIR CONTRACT TERM DUE TO NON-TRANSPARENCY IN GREEK LAW

If the insurance company has integrated in the insurance contract a clause contrary to the principle of transparency, as above, the insured may exercise his rights and claim a) cancellation of the term and b) unjust enrichment with the reimbursement of the additional amounts illegally paid under the term[26] and restoration of any damage suffered by the consumer[27] c) payment of the amounts, the payment of which prohibit the application of the illegal / non transparent term. Once it is found that a particular general contract term is unfair, comes as a legal consequence the invalidity thereof in accordance moreover with Article 174 of the Civil Code.[28] The cancellation request is introduced by Article 18 of the Code of Civil Procedure in the court of first instance while the other two requests to the overall competent court depending on the amount of the request.

The nullity however of one term in the insurance contract causes gaps in the implementation of the obligations of the parties and the development of the contractual relationship. If invalid, the term of the

[22] Cf. as to the floating rate in BGH WM 1990, 1367.

[23] Cf. so as to floating rate in BGH ZIP 2007, 915.

[24] See so expressly in Areios Pagos 430/2005 Hellenic Justice 2005, 802.

[25] It indirectly altering the relationship between benefit and contribution (Reifner, 1995, 872).

[26] Cf. Athens Magistrate's Court 726/2004 Companies Law 2005, 200; Athens Magistrate's Court 3179/2005 Companies Law 2006, 520; Athens Magistrate's Court 2175/2004 Companies Law 2005, 74; Thessaloniki Magistrate's Court 810/2006 NOMOS.

[27] Cf. Areios Pagos 959/2006 NOMOS, Athens Court of Appeal 2386/2006 Hellenic Justice 2006, 1467; Athens Court of Appeal 2319/1999 Companies Law 1999, 1175.

[28] Indicatively see Areios Pagos 1030/2001 Companies Law 2001, 1125 = Commercial Law Review 2001, 740 = Companies Law 2001, 1127, Areios Pagos 1219/2001 Hellenic Justice 2001, 1603 = Nomiko Vima 2002, 354 = Companies Law 2001, 1128, Athens Court of Appeal 1407/2002 Companies Law 2002, 1136 = Hellenic Justice 2004, 877 = EpiDikIA 2004, 426 = Commercial Law Review 2004, 553.

insurance contract in all reasonable expectations would be either the absence of agreement between the parties relating to the regulated matter or the invalidity of the agreement as lacking essential part of the contract (Fuchs, 2006, § 310, Rn 1078).

However, Article 2 para. 8 of Law 2251/1994 stipulates that the supplier may not invoke the nullity of the entire contract if one or more terms of the contract is void. This makes sense because otherwise the supplier will be able to cause the nullity of the contract or set any terms in the contract that would work as heresy. Either the term would be valid and would regulate the contract or the nullity of the term would apply to the entire contract and release the supplier (Gardounis, 2004, 34). Therefore, the abuse of one contract term due to non-transparency does not invalidate the entire contract.[29] This also derives not only from Article 2 para. 8 of Law 2251/1994 but also from Article 181 of the Civil Code (Dellios, 2008a, Article 2, par. 94).

As a result the insurance contract is valid. But the question remains as to how to regulate the contractual relationship between the parties in the absence of the relevant term. If the contract term may be omitted in view of the fact that it regulates ancillary questions of the insurance contract, then the invalidity thereof does not require coverage of conventional vacuum as such in practice does not occur. But if conventional void arises under the light of Articles 200, 281 and 288 of the Civil Code, jurisprudence requires the following. Filling the void resulting from such invalidity will be made either by applying soft law rules where the abuse consists in violating the guiding function of soft law (i.e. the gap is then covered by the submissive rules which the introduction of the invalid contract terms had waived) or through further interpretation, where the unfairness of the general contract terms is to restrict the fundamental rights and obligations that lead to endangerment of the typical scope of the contract.[30]

Towards the above, the court must take account of the nature, purpose of the contract, the circumstances and agreements of the parties. The court will move within the limits of good faith, business and morality but also the economic and social function of the contract, taking a hermeneutic coverage of any conventional vacuum.[31] The court nevertheless should demonstrate adaptability and practice in addressing the problem as in the above mentioned case, in which the nullity of the contract term on adjustment was covered by application of the health index of the Statistical Authority.[32]

[29] Cf. Piraeus Court of Appeal 773/2005 Maritime Law Review 2006, 20.

[30] Cf. Athens Multi Member Court of First Instance 711/2007 Companies Law 2007, 1336; Athens Multi Member Court of First Instance 961/2007 ChriD 2008, 112; Athens Multi Member Court of First Instance 1119/2002 Companies Law 2003, 424 (obs. M. Asikis, E. Perakis) Athens Multi Member Court of First Instance 3229/1996 Companies Law 1997, 75; Athens Single Member Court of First Instance 4954/1998 Companies Law 1999, 1182; Athens Single Member Court of First Instance 2772/2002 Commercial Law Review 2002, 805.

SUMMARY

The above implementation of the Greek Law 2251/1994 and the European Directive 93/13/EEC offers few guidelines to the legal practitioners in other EU Countries regarding the transparency of terms in consumer contracts and especially in insurance consumer contracts. The application of the principle of transparency in Greek law by Greek jurisprudence is a national jurisprudential example of the doctrine of transparency regarding the invalidity of terms that impose a significant imbalance in the rights and obligations of the insurance-consumer through a language that is not plain and intelligible.

The above analysis highlights the importance of transparency in insurance contracts. It highlights the protection provided to the insured against contractual terms which are imposed by the insurance company resulting in deviation from what is set forth by soft law as to the rights and obligations of the insured. Adherence to the principle of transparency with transparent and clear contract terms overcomes the possibility that the insured undertake significant contractual obligations and lose contractual rights. The contractual commitment in the above manner in the light of the transparency principle allows the insured consumer the contractual commitment with complete knowledge of the extent of the consequences and economic and legal significance of the contractual terms of insurance.

REFERENCES

Αστικός Κώδικας (Greek Civil Code), Π.Δ. 456/1984 ΦΕΚ Α-164/1984.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, *Official Journal of the European Communities*, L 95, 21. 4. 1993. 29–34.

Dellios, G. (2013). *Γενικοί Όροι Συναλλαγών* (*General Terms and Conditions).* Athens, Thesalloniki: Sakkoulas.

[31] See. Moreover and Athens Court of Appeal 4108/2012 TNP DSA.

[32] Athens Court of Appeal 4108/2012 NOMOS.

Dellios, G. (2008a). in Alexandridou, *Δίκαιο Προστασίας Καταναλωτή* (*Consumer Protection Law)*, Article 2. Athens: Nomiki Vivliothiki.

Dellios, G. (2008b). *Ατομική και συλλογική προστασία των καταναλωτών από την έλλειψη ουσιαστικής διαπραγμάτευσης των όρων της σύμβασης* (*Individual and Collective Protection of consumers from the lack of meaningful negotiation of the contract terms)*. Athens, Thesalloniki: Sakkoulas.

Dellios, G. (2001a). *Προστασία των καταναλωτών και σύστημα του Ιδιωτικού Δικαίου* (*Consumer protection and system of private law Consumer protection and system of private law)*, vol. II. Athens, Thesalloniki: Sakkoulas.

Dellios, G. (2001b). Τομές της σύγχρονης αρεοπαγιτικής νομολογίας στα ζητήματα του συλλογικού ελέγχου των γενικών όρων καταναλωτικών συμβάσεων (Aspects of modern Areios Pagos jurisprudence on issues of collective control of the general terms of consumer contracts), *Hellenic Justice,* 42, 1495–1526.

Derleder, P. (2001). Transparenz- und Äquivalenz bei bankvertraglicher Zinsanpassung, *Werpapiermitteilungen*, 59, 2029–2041.

Efthymiou, E. (2013). *Η Αρχή Διαφάνειας στο δίκαιο των ΓΟΣ* (*The principle of transparency in law of general contract terms)*. Thesalloniki: Dikaio kai Oikonomia.

Fuchs, A. (2006). *AGB-Recht Kommentar*. Berlin: Dr. Otto Schmidt Verlag.

Gardounis, E. (2004). Οι καταχρηστικές ρήτρες που σχετίζονται με το τίμημα καταναλωτικών συμβάσεων: 10 χρόνια εφαρμογής της κοινοτικής οδηγίας 93/13 του Συμβουλίου της 5ης Απριλίου 1993 σε Ελλάδα και Γαλλία (Unfair terms relating to consumer price: 10 years of Application of the EC Directive 93/13 of the Council of 5 April 1993 in Greece and France), *Private Law Chronicles,* 4, 23–35.

Habersack, M. (2001). Zinsänderungsklauseln im Lichte des VerbrKrG, *Wertpapiermitteilungen*, 59, 753–762.

Κώδικας Πολιτικής Δικονομίας (The Code of Civil Procedure), Π.Δ. 503/1985 ΦΕΚ Α-182/1985.

Leletzis, A. (2002). Ο έλεγχος του περιεχομένου των γενικών όρων συναλλαγών (άρθρο 2 §§ 6 και 7 Ν. 2251/1994) κατά την πρόσφατη νομολογία του Αρείου Πάγου (Controlling the content of the general trading conditions (Article 2 §§ 6 and 7 Law 2251/1994) during the recent jurisprudence of the Areios Pagos), *Nomiko Vima*, 50, 274–301.

Marinos, M. (2002). *Αθέμιτος Ανταγωνισμός* (*Unfair Competition)*. Athens: Dikaio kai Oikonomia.

Marinos, M., Venieris, I. (1994). Η ποινή για την *πρόωρη* εξόφληση στεγαστικού δανείου – Η φύση, ο υπολογισμός και ο έλεγχος αυτής υπό το πρίσμα του Ν. 2251/1994 (The penalty for early repayment of a mortgage loan – The nature, the calculation and the review thereof under the light of Law 2251/1994), *Private Law Chronicles*, 5, 459–467.

Mentis, G. (2000). *Γενικοί όροι συναλλαγών στις καταναλωτικές και εμπορικές συμβάσεις (General trading conditions in consumer and commercial contracts)*. Athens,Thesalloniki: Sakkoulas.

Perakis, E. (1996). Η *σχέση* του *δικαίου* προστασίας του *καταναλωτή* με το *δίκαιο* του αθέμιτου ανταγωνισμού (The relationship of consumer protection law to the law of unfair competition), *Companies Law*, 2, 113–119.

Reich, N., Micklitz, H-W. (2003). *Europäisches Verbraucherrecht*. Karlsruhe: Nomos Auflage.

Reifner, U. (1995). Die Anpassung variabler Zinssätze im Kreditverhältnis, *Juristen Zeitung,* 50, 866–874.

Stoffels, M. (2004). *AGB-Recht*. Berlin: C.H.Beck Verlag.