

Angelo BORSELLI, LL.M.*

Cognosceat emptor: on the insurer's duty to inform the prospective policyholder in Europe

UDC: 368(4-672EU)
Received: 20. 12. 2011.
Accepted: 5. 3. 2012.
Scientific debate

Abstract

The article addresses the insurer's duty to inform the prospective policyholder with regard to the European context. The analysis deals with the rules introduced on the matter by Directive 2002/83/EC for life insurance and Directive 92/49/EEC for non-life insurance. The provisions laid down by Directives 2002/65/EC and 2000/31/EC for the cases of distance and electronic insurance sales respectively will be considered as well, along with the requirements set out by Articles 2:201 – 2:203 of the Principles of European Insurance Contract Law.

The paper highlights that the insurer's precontractual information duty is quite highly regulated in Europe. The information requirements set out by Directive 92/49/EEC for non-life insurance, however, are not comprehensive enough and should be aligned with those provided for life insurance, which are more detailed. Further, considering also the precontractual information rules established by the Distance Marketing Directive and the E-Commerce Directive, it emerges that there may be overlapping requirements in the event of distance or electronic insurance selling. Thus, it is advisable to simplify the existing legal framework and to consolidate all the information requirements in a single text applying to insurance dealings, in order to ensure more legal certainty.

Finally, acknowledging the absence of rules at Community level on the insurer's duty to advise the applicant, the need to introduce European legislation in this respect is emphasized. Where insurance products are not offered through intermediaries, the prospective policyholder may need specific advice to make an

informed decision on the policy that he underwrites. In the context of the revision of the Insurance Mediation Directive, the approach of the Commission services that tends in the direction of establishing similar requirements for insurance undertakings and insurance intermediaries, taking into account the specificities of existing distribution channels, should be looked on with favour.

Key words: Insurance, insurer, precontractual information, disclosure, duty to advise, prospective policyholder, Directive, PEICL

1. INTRODUCTION

During negotiations the parties to a contract exchange information to determine the convenience of the proposed deal. The parties share a common interest in information disclosure, because this way they can save negotiation costs when a deal proves not to be profitable for one or for both.¹

The duty of disclosure is part of the general duty of good faith.² Unlike other contracts where mandatory disclosure may be less common, insurance contracts are said to be *uberrimae fidei* since they are based upon the utmost good faith of both parties.³ Thus, the duty of disclosure in insurance law has been considered a mutual duty that applies to both parties to the insurance contracts: the insurer as well as the insured.⁴ The insurer

¹ De Geest, Gerrit. *Contract Law and Economics*, Edward Elgar, Cheltenham and Northampton, 2011, p. 23-24.

² Clarke, A. Malcom. *The Law of Insurance Contracts*, London, 1994, p. 549; Park, Semin. *The Duty of Disclosure in Insurance Contract Law*, Dartmouth Publishing Company, 1996, p. 1, 8; Boivin, Denis. *Insurance Law*, Toronto, 2004, p. 111.

³ Boivin, D. *Ibidem*, p. 99; Park, Semin. *Ibidem*, pp. 1, 180.

⁴ Clarke, A. M. *Ibidem*, p. 551-552; Park, Semin. *Ibidem*, pp. 1, 180; Birds, John, *Birds' Modern Insurance Law*, 7th edition,

* PhD Candidate in Law of Business and Commerce, Università Bocconi, Italy. LL.M. with honors in Insurance Law, University of Connecticut School of Law. E-mail: angeloborselli@alice.it.

and the prospective policyholder are bound to disclose every material fact affecting the risk to the other.⁵ The duty has to be performed at different time: before the insurance contract is concluded, on renewal of the policy and during the term of the contract with respect to any change in current insurance.⁶

This paper focuses on the duty of disclosure owned by the insurer in the precontractual stage. Information disclosure represents a regulatory approach through which consumer protection is achieved. The insurer's duty of disclosure in the precontractual stage fosters transparency for the prospective policyholder and permits him to consider the proposed coverage in order to reach an informed decision on whether or not to sign the contract. Insurance companies have a duty to deal fairly with the applicant and to fully disclose all facts material to the risk and the essential characteristics, benefits and other conditions of the proposed coverage.⁷ The principle of *cognosceat emptor* or "let the buyer know" should be the reference standard in the precontractual relationship between the insurer and the applicant.⁸

In order to present a picture of the law governing the subject at the European level, the study will examine the rules introduced on the matter by European legislation and by the Principles of European Insurance Contract Law (PEICL).

2. THE INSURER'S PRECONTRACTUAL DUTY TO INFORM THE APPLICANT ACCORDING TO THE INSURANCE DIRECTIVES

The insurer's precontractual duty of disclosure is regulated at the European level by Directive 2002/83/EC⁹ as for life insurance and by Directive 92/49/EEC

London, 2007, p. 140; Buckley, J. Austin, *Insurance Law*, 2nd edition, 2006, Dublin, p. 121.

⁵ Lowry, J. et Rawlings, P. *Insurance Law, Doctrine and Principles*, Oxford, 2010, p. 77-78 (pointing out that the mutuality of the disclosure obligation was recognized by Lord Mansfield in *Carter v. Boehm* (1766) 3 Burr 1905 over two centuries ago. In that case Lord Mansfield stated that "[T]he policy would equally be void, against the underwriter, if he concealed; as, if he insured a ship on her voyage, which he privately knew to be arrived: and an action would lie to recover the premium". See also Tarr, J. A. et al., *Disclosure and Concealment in Consumer Insurance Contracts*, London, 2002, p. 37.

⁶ Clarke, A. M. *Ibidem*, p. 557.

⁷ Park, S. *Ibidem*, p. 1; Eggers, Peter MacDonald et al., *Good Faith and Insurance Contracts*, 2nd edition, London, 2004, 285.

⁸ See Black, Kenneth, Jr. et Skipper, Harold D. *Life Insurance*, 12th edition, 1994, Englewood Cliffs, N.J.: Prentice-Hall, p. 180; Park, S. *Ibidem*, p. 1.

⁹ European Parliament and Council Directive 2002/83, 2002 O.J. (L345) 1 [hereinafter Life Directive]

(third non-life insurance Directive)¹⁰ with regard to non-life insurance.¹¹

The Preamble of Directive 2002/83/EEC recognizes that the consumer has a wide choice of contracts in the internal insurance market. In order to permit him to fully profit from the competition in the market, appropriate information must be provided. It is emphasized the need to give "whatever information" is necessary to permit the prospective policyholder to choose the contract best suited to his needs.¹²

The above-mentioned Directives expressly require that the insurer communicates specific information to the prospective policyholder before concluding the contract. In particular, Directive 2002/83/EC aims at coordinating the minimum provisions to make sure that consumers receive clear and accurate information on the essential characteristics of the products proposed to him and the particulars of the bodies to which address any complaints.

Article 36 cross-refers to Annex III(A) for a list of minimum information that the insurer is required to communicate to the prospective policyholder before the insurance contract is concluded.¹³ The information listed in Annex III(A) is divided into two groups depending on whether it concerns the insurance company or the commitment.

As to the former group, the policyholder should be informed about (i) the name of the undertaking and its legal form; (ii) the name of the Member State in which the head office and, where applicable, the agency or branch concluding the contract is situated; (iii) the address of the head office and, where applicable, of the agency or branch.

With regard to the latter group, the insurer has to convey information on: (i) the definition of each benefit and each option; (ii) the term of the contract; (iii) the means of terminating the contract; (iv) the means of payment of premiums and duration of payments; (v) the means of calculation and distribution of bonuses; (vi) the surrender and paid-up values and the extent to which they are guaranteed; (vii) the premiums for each benefit, both main and supplementary benefits, where appropriate; (viii) the definition, for unit-linked policies, of the units to which the benefits are linked;

¹⁰ Council Directive 92/49, 1992 O.J. (L228) 1 [hereinafter Third Non-Life Directive]

¹¹ Directive 2002/83 and Directive 92/49 hereinafter together referred to as Insurance Directive.

¹² See Life Directive, paragraph 52 of the Preamble.

¹³ Life Directive, Article 36, paragraph 1. Paragraph 2 of Article 36 cross-refers to Annex III(B) for a list of information that must be communicated to the policyholder during the term of the contract.

(ix) the nature of the underlying assets for unit-linked policies; (x) the arrangements for application of the cooling-off period; (xi) the tax arrangements applicable to the type of policy; (xii) the arrangements for handling complaints concerning the contracts, including, where appropriate, the existence of a complaints body, without prejudice to the right to institute legal proceedings; (xiii) the law applicable to the contract or, in case the parties are free to choose the law applicable, the law the insurer proposes to choose.

The information must be clear and complete, in writing¹⁴ and in an official language of the Member State. However, information may be in another language at the request of the policyholder, if the law of the Member State so permits or the policyholder is free to choose the law applicable.¹⁵ Member States may adopt stricter rules than those of the Directive only if it is essential for an adequate understanding by the policyholder of the essential elements of the commitment.¹⁶

¹⁴ See Basedow, Jürgen "Insurance Contract Law as Part of an Optional European Contract Act", *Lloyd's Maritime and Commercial Law Quarterly*, Vol. 498, 2003, stating that «the frequent reference to information provided "in writing" in the insurance rules would require a definition of what this particular form means in the time of electronic communication». On this issue, see Basedow, Jürgen et al. *Ibidem*, p. 94, according to which the reference to written documents should include means of communication that provide a record readable by both parties, like messages sent by telegram, telex, telefax and e-mail.

¹⁵ Life Directive, Annex III.

¹⁶ Life Directive, Article 36, paragraph 3. See the judgment of the European Court of Justice (Sixth Chamber), 5 March 2002, in case C-386/00 (*Axa Royale Belge SA v. Georges Ochoa and Stratégie Finance SPRL*). In that case, the Court of Appeal of Brussels referred for a preliminary ruling a question concerning the interpretation of Council Directive 92/96/EEC of 10 November 1992 (third life assurance directive). The national court was concerned with the compatibility with that directive of the obligation to include in life insurance proposals or, in the absence of a proposals, in life insurance policies, a warning exceeding the minimum requirements of the directive as to consumer information. According to a national provision, indeed, the proposal or, in the absence of a proposal, the policy had to inform a policyholder that termination, reduction or surrender of an existing life-assurance contract for the purpose of subscribing to another life-assurance contract is generally detrimental to the policyholder. The issue is whether the above-mentioned information, in addition to that required by Annex III of the Directive, may be considered "necessary for a proper understanding by the policyholder of the essential elements of the commitment", as Article 31(3) provided for. The EU Court of Justice stated that the warning was not conform with the objective sought by Article 31 of the Directive, which is to provide the policyholder with the information necessary to enable him to choose the coverage best suited to his needs so that he can fully profit from the greater choice of contracts and the increased competition in the single assurance market. The Court ruled that the vague and general information provided by that warning was inappropriate for the purposes of informing the policyholder since it may dissuade the policyholder

In addition to the disclosure requirements mentioned above, it should be noted that Directive 2009/138/EC (so-called Solvency II) which recasts and will repeal, *inter alia*, Directive 2009/138/EC lays down other precontractual information. The insurance undertaking is required to communicate to the applicant a concrete reference to the report that he has to disclose publicly every year on his solvency and financial condition, in order to allow the policyholder easy access to this information.¹⁷ Moreover, the insurer has to give specific information to provide a proper understanding of the risks underlying the contract which are assumed by the policyholder.¹⁸ Finally, where, with relation to an offer of a life insurance contract, the insurer provides figures concerning the amount of potential payments above and beyond the contractually agreed payments, the insurer has to provide the policyholder with a specimen calculation whereby the potential maturity premium is calculated applying the basis for the premium calculation using three different rates of interest. The policyholder should be informed in a clear and comprehensible manner that the specimen calculation is only a model of computation based on notional assumptions, and that he does not derive any contractual claims from the calculation.¹⁹

As to non-life insurance, Directive 92/49/EEC requires the insurance company to give less information compared to that established for life insurance. According to Article 31, paragraph 1 of the Directive, before concluding the contract the insurer has to inform the prospective policyholder of the law applicable to the contract or the fact that the parties are free to choose the law applicable and, in the latter case, the law the insurer suggests to choose. Further, the applicant shall receive information about the arrangements for handling policyholder's complaints concerning contracts, including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings. The information requirements, however, apply only if the policyholder is a natural person.²⁰ Further, Article 43, paragraph 2 provides that if the insurance coverage is offered under the right of establishment or the freedom to provide services, the policyholder has to be informed of the Member State in

from terminating an existing contract, although the conclusion of a new one might be in his favor.

¹⁷ European Parliament and Council Directive 2009/138, 2009 O.J. (L335) 1, Article 185(2)(d) [hereinafter Solvency II Directive].

¹⁸ Solvency II Directive, Article 185(4).

¹⁹ Solvency II Directive, Article 185(5), specifying that the procedure does not apply to term insurances and contracts.

²⁰ Third Non-Life Directive, Article 31, paragraph 2.

which the head office or, where appropriate, the branch with which the contract is to be concluded is situated.

Article 36 of Directive 2002/83/EC and Article 31 of Directive 92/49/EEC provide that the implementation rules shall be established respectively by the Member State of the commitment or the Member State in which the risk is situated.²¹

With regard to precontractual information required for non-life insurance, it seems advisable to reach a higher degree of harmonization in order to facilitate the functioning of the internal insurance market. In particular, it has been emphasized the need to align the information required by Directive 92/49/EEC with that set out for life insurance.²² In this regard, the Comité Européen des Assurances (CEA) suggested to complete the information requirements for non-life insurance by adding information on the insurance undertaking, information concerning the life of the contract (date of entry into effect and duration of the contract) and information about the object of the contract (sums declared, sums insured, premium to be paid, methods of payment of the premium, essential features of the cover, amount of excesses).²³

Although the higher degree of information disclosure for life insurance may be justified considering that the duration of the commitments can be very long compared to non-life contracts which are usually short-

term contracts, however, it seems that precontractual information required by Directive 92/49/EEC is insufficient. In this respect, the introduction of more detailed rules at Community level would permit insurers to benefit from more legal certainty in conducting business across the internal market.²⁴ Solvency II Directive that recasts and will repeal also Directive 92/49/EEC missed this opportunity because merely reproduces the content of the third non-life insurance Directive on this point without making any substantial change.²⁵

Waiting for a second chance, Member States should draw inspiration from Directive 2002/83/EC in regulating precontractual non-life information requirements in order to create a level playing field for all consumers and all contracts relating to insurance. This is in line with the policy recently proposed by Directive 2011/83/EU on consumer rights, which, with regard to financial services, encourages Member States to consider existing Union legislation in that area when legislating in areas not regulated at Union level, so that a level playing field for all consumers and all contracts concerning financial services is ensured.²⁶

3. OTHER EU REGULATIONS RELEVANT TO THE ISSUE

Insurance companies carrying out business at distance or over the internet are also subject to precontractual information duties set out by Directive 2002/65/EC concerning the distance marketing of consumer financial services²⁷ and by Directive 2000/31/EC on electronic commerce.²⁸

The Distance Marketing Directive establishes rules applicable to financial transactions conducted by means of distant communication techniques. According to paragraph 22 of the Preamble, the Directive covers information of a general nature applicable to all kinds of financial service, insurance included. It is recognized,

²¹ See Life Directive, Article 36, paragraph 4; Third Non-Life Directive, Article 31, paragraph 3. For the implementation of the information requirements of the Life Directive and the Third Non-Life Directives, see Basedow, Jürgen et al. *Principles of European Insurance Contract Law (PEICL)*, Sellier European Law Publishers, Munich, 2009, 94-95, pointing out that some Member States, like Italy (see Article 185 of the Code of Private Insurance on the information note), set stricter requirements than the Directives, while others, like Finland and Sweden, lay down a general duty of pre-contractual information, sometimes illustrated with examples.

²² European Commission, *Electronic Commerce and Insurance*, MARKT/2541/03-EN, 24 October 2003, Discussion Paper for the working group meeting on 2 December 2003, 26, available at: http://ec.europa.eu/internal_market/insurance/docs/markt-2541-03/markt-2541-03_en.pdf [hereinafter Discussion Paper on Electronic Commerce and Insurance, 2003]; European Commission, *Electronic-commerce and insurance (discussion paper for the working group)*, MARKT/2522/02 of December 2 2002, 10, available at http://ec.europa.eu/internal_market/insurance/docs/markt-2522/markt-2522-02-rev1_en.pdf, [hereinafter Discussion Paper on Electronic Commerce and Insurance, 2002].

²³ CEA, *Policy Report on Prospects for Simplifying European Insurance Legislation*, 2004, 13 and Annex 3, available at: <http://www.cea.eu/uploads/Modules/Publications/CEA%20Report%20on%20Prospects%20for%20simplifying%20European%20Insurance%20Legislation.pdf> [hereinafter CEA Policy Report for Simplifying European Insurance Legislation].

²⁴ *Discussion Paper on Electronic Commerce and Insurance*, 2003, p. 26.

²⁵ Solvency II Directive, Articles 183-184.

²⁶ See paragraph 32 of the Preamble of the Directive 2011/83/EU of the European Parliament and of the Council on consumer rights 2011 O.J. (L304) 64, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:304:0064:0088:EN:PDF> It should be noted, however, that according to Article 3(3)(d), the Directive does not apply to contracts for financial services.

²⁷ European Parliament and Council Directive 2002/65, 2002 O.J. (L271) 16 [hereinafter Distance Marketing Directive].

²⁸ European Parliament and Council Directive 2000/31, 2000 O.J. (L178) 1 [hereinafter E-Commerce Directive].

however, that other information requirements about a given financial service, like insurance coverage, are not solely specified in that Directive; therefore this type of information should be provided in conformity with relevant Community law or national legislation in accordance with Community law.²⁹

The Distance Marketing Directive sets out comprehensive rules on precontractual information. The Directive applies only to contracts concluded with consumers, defined as any natural person who is acting for purposes which are outside his trade, business or profession.³⁰ In particular, Article 3 of the Directive states that, in good time before the consumer is bound by any distance contract or offer, he has to be provided with a series of information concerning the supplier, the financial service proposed, the distance contract and the redress. The supplier shall also inform the consumer that other information is available on request and of what nature this information is.

The information must be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used.³¹ Further, due regard shall be given to the principles of good faith in commercial transactions.³² The supplier has to communicate to the consumer all the contractual terms and conditions and the information required on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract.³³ The Directive allows Member States to maintain or introduce more stringent provisions on prior information requirements provided that they are in accordance with Community law.³⁴

Article 4(1) of the Directive specifies that, where there are other provisions in the Community law on financial services containing rules on prior information

²⁹ See *Discussion Paper on Electronic Commerce and Insurance*, 2002, 3, stating that the Directive achieves a high level of consumer protection, so contributing to increase the confidence of consumers in using new techniques for the distance marketing of financial services.

³⁰ See Article 2(d) of the Distance Marketing Directive.

³¹ Article 3, paragraph 2 of the Distance Marketing Directive, providing also that the commercial purpose of the information must be made clear.

³² Article 3, paragraph 2 of the Distance Marketing Directive, adding that the protection of those who are unable to give their consent (like minors) should be ensured.

³³ See Article 5 of the Distance Marketing Directive, also stating that the supplier has to communicate the information after the conclusion of the contract, if the contract has been concluded at the consumer's request using a means of distance communication which does not enable providing the information in good time before the consumer is bound.

³⁴ Article 4(2) of the Distance Marketing Directive.

requirements in addition to those listed above, these provisions shall continue to apply. It follows that the special provisions on precontractual information to the prospective policyholders established by the insurance Directives should also apply in case of insurance transactions at distance. Therefore, the insurer shall give precontractual information to the applicant in compliance with the Distance Marketing Directive and the insurance Directives.

Issues of coordination between these different Community legislations may arise because they sometimes contain overlapping requirements.³⁵ It should be noted, for example, that according to Article 3(2) (a) of the Distance Marketing Directive the consumer has to be provided just with a description of the main characteristics of the financial service, while, for life insurance, Annex III of Directive 2002/83/EC requires a definition of each benefit and each option of the proposed insurance contract.

According to Article 3(4)(4) of the Distance Marketing Directive, information on contractual obligations that has to be communicated to the consumer in the precontractual stage shall be in compliance with the contractual obligations resulting from the law presumed to be applicable to the distance contract. As to the law applicable to the insurance contract, Annex III of Directive 2002/83 and Article 31 of Directive 92/49 state that, where the parties are free to choose the law applicable to the insurance contract, the insurer has to give information on the law that he proposes to choose.³⁶ It ensues that, when negotiations between the insurer and the applicant result in a change of the law initially proposed by the insurer, the information on contractual obligations provided in conformity with Article 4 of the Distance Marketing Directive should be modified as well in consequence.

With regard to online transactions with consumers, the Distance Marketing Directive shall apply in

³⁵ For a comparison between the information requirements contained in the Directives analyzed in the text, see *Discussion Paper on Electronic Commerce and Insurance*, 2002, pp. 14-15; *CEA Policy Report for Simplifying European Insurance Legislation*, pp. 12-13. See also *CEA, European Contract Law*, Note of 8 March 2005, Annex II, pp. 1-4, available at: <http://www.cea.eu/uploads/Modules/Publications/position252.pdf> [hereinafter CEA, *European Contract Law*].

³⁶ See also Article 3(3)(e) and Article 3(3)(f) of the Distance Marketing Directive respectively requiring that the consumer shall be provided with information about the Member State or States whose laws are taken by the supplier as a basis for the establishment of relations with the consumer prior to the conclusion of the distance contract and with information about any contractual clause on the law applicable to the distance contract and/or on the competent court.

conformity with the E-Commerce Directive.³⁷ The E-Commerce Directive applies to financial services and therefore also to the insurance sector.³⁸ Article 3 of the Directive sets out the “internal market clause” according to which information society services³⁹ have to be provided freely throughout the European Union. In general, Member States may not restrict the freedom to provide information society services from another Member State.⁴⁰ Further, each Member State has to ensure that the information society services provided by a service provider established on its territory comply with the rules applicable in the Member State in question.⁴¹

However, the rule of the country of origin control does not apply to some fields referred to in the Annex to the Directive. The derogations include certain provisions of the insurance Directives.⁴² The rules of the insurance Directives on precontractual information to the prospective policyholders are not covered by the derogation to Article 3, paragraphs 1 and 2 of the E-Commerce Directive set out for the insurance sector. The Annex to the E-Commerce Directive, indeed, does not mention the provisions of the insurance Directives about the insurer’s precontractual information duty. Therefore, precontractual information to policyholders in case of online insurance transaction must be provided in accordance with the rules of the Member State where the service provider is established, since they are covered by the internal market clause of the E-Commerce Directive.

Member States, under some circumstances set out by Article 3(4) of the Directive, may restrict the provision of a given incoming information society service within its territory, provided, for example, that the measure is necessary for the protection of consumers and that it is proportionate.

³⁷ See paragraph 6 of the Preamble of the Distance Marketing Directive and paragraph 11 of the Preamble of the E-Commerce Directive.

³⁸ See paragraph 27 of the Preamble of the E-Commerce Directive.

³⁹ For “information society services” should be intended «any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services» (see Article 2(a) of the E-Commerce Directive which cross-refers to Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC).

⁴⁰ See Article 3, paragraph 2 of the E-Commerce Directive.

⁴¹ See Article 3, paragraph 1 of the E-Commerce Directive.

⁴² The Annex to the E-Commerce Directive provides for a derogation from Article 3 of the Directive, *inter alia*, for insurance activities falling under Article 30 and Title IV of Directive 92/49/EEC, Title IV of Directive 92/96/EEC, Articles 7 and 8 of Directive 88/357/EEC and Article 4 of Directive 90/619/EEC.

According to Article 5 of the E-Commerce Directive, Member States have to ensure that, in addition to other information requirements established by Community legislation, the service provider renders easily, directly and permanently accessible to the recipients of the service and competent authorities a series of information concerning, in particular, (i) the name of the service provider and his details; (ii) where the service provider is registered in a trade or similar public register, the trade register in which the provider is entered; (iii) where the activity is subject to an authorization scheme, the particulars of the relevant supervisory authority; (iv) any professional body with which the service provider is registered and his professional title and the Member State where it has been granted. Further, Member States shall ensure that, where information society services make reference to prices, these are to be indicated clearly and unambiguously, specifying whether they are inclusive of tax and delivery costs.

From the set of rules described above it turns out that the insurer’s precontractual information duty is quite highly regulated in Europe. Although this can foster the protection of the prospective policyholder, it should be noted, however, that excessive information requirements are not appropriate since they are likely to create, on the one hand, confusion for consumers and, on the other, to cause an increase in the price of insurance coverage by increasing the insurers’ cost of meeting the legal requirements. A proper balance in precontractual information disclosure should be reached; neither a large amount of information, nor an insufficient amount (like in the case of information laid down by the third non-life insurance Directive) permits the consumers to reach an informed decision about the insurance product to buy.

Further the Directives mentioned above often contain overlapping requirements due to their different scope.⁴³ Considering the fact that in the event of distance or electronic sales the insurer’s duty of disclosure in the precontractual stage is governed by more than one Directive, the insurer may encounter difficulties in knowing the rules to comply with. Problems for supervisory authorities and consumers may arise as well. Therefore, as the EU Commission services suggested, it is advisable to simplify the existing legal framework concerning the insurer’s precontractual information duty and consolidate all the requirements set by Directives 2002/83/EC, 92/49/EEC, 2000/31/EC

⁴³ *Discussion Paper on Electronic Commerce and Insurance*, 2003, pp. 14, 25. See also *CEA Policy Report for Simplifying European Insurance Legislation*, p. 12.

and 2002/65/EC in a single text.⁴⁴ In this regard, CEA suggested to rationalize all the existing precontractual information requirements by eliminating differences in the terminology and by establishing an uniform regulation applicable to insurance, the core of which should be represented by the provisions contained in the sectoral directives (Directives 2002/83/EC and 92/49/EEC).⁴⁵ This regulation should also include, for distance or electronic insurance sales, just the specific precontractual information laid down by the Distance Marketing Directive and the E-Commerce Directive in this respect, to the exclusion of that repeating the sectoral provisions. According to the CEA, the regulation should be based on strict harmonization and no derogation should be granted.⁴⁶

4. THE PEICL'S RULES AND THE INSURER'S DUTY TO ADVISE

Having described the precontractual information requirements laid down by the EU legislation, it is worthwhile making reference to those demanded by the PEICL.⁴⁷ That is convenient in order to clarify the basic information to be required in the perspective of simplifying the existing rules.

Article 2:201 PEICL presents the information which the insurer has to communicate to the policyholder in a way that is compatible with all branches of insurance.⁴⁸ According to the PEICL, the insurer shall provide the applicant with a copy of the proposed contract terms as well as a document containing the following information, if pertinent: (i) the name and address of

⁴⁴ See *Discussion Paper on Electronic Commerce and Insurance*, 2003, pp. 15, 25.

⁴⁵ CEA, *European Contract Law*, p. 4; CEA, *Financial Services Action Plan, European Financial Integration: Progress & Prospects*, Note of 28 December 2004, p. 4, available at: <http://www.cea.eu/uploads/Modules/Publications/position233.pdf>.

⁴⁶ CEA *Policy Report for Simplifying European Insurance Legislation*, p. 13.

⁴⁷ The Principles of European Insurance Contract Law 'shall apply when the parties, notwithstanding any limitations of choice of law under private international law, have agreed that their contract shall be governed by them' (see Article 1:101 PEICL; Basedow, Jürgen et al. *Ibidem*, pp.33-35. With regard to the PEICL, see Basedow, Jürgen et al. *Ibidem*; Hinchliffe, Peter "Review of Principles of European Insurance Law", *Era Forum*, 2008, available at: <http://www.springerlink.com/content/0x417gr061763786/fulltext.pdf>; Basedow, Jürgen "Insurance Contract Law as Part of an Optional European Contract Act".

⁴⁸ See Basedow, Jürgen et al. *Ibidem*, p. 93, specifying that in some branches, like life insurance, additional information is required.

the contracting parties, the insured, the beneficiary and of the insurance agent; (ii) the subject matter of the insurance and the risks covered; (iii) the sum insured and any deductibles; (iv) the amount of the premium or the method of calculating it; (v) when the premium is due and the place and mode of payment; (vi) the contract period and the liability period; (vii) the right to revoke the application or avoid the contract within the cooling-off period; (viii) the law applicable to the contract or, where the parties are free to choose the law applicable, the law proposed by the insurer; the existence of an out-of-court complaint for the prospective policyholder and the methods for having access to it; (ix) the existence of guarantee funds or other compensation arrangements.⁴⁹ If possible, the information shall be given in sufficient time to permit the applicant to consider whether or not to conclude the contract.⁵⁰ Further, if the applicant completes application forms or questionnaires provided by the insurer, the insurer shall supply a copy of the completed documents to the applicant, in light of the importance of that material for the *ex-post* assessment and determination of the contents of the concluded contract or in case of a breach of the policyholder's duty of disclosure.⁵¹ Unlike Article 31 of Directive 92/94/EEC, Article 2:201 PEICL does not limit the insurer's information duties to the case where the applicant is a natural person.

Overall, the insurer's information duty set by the PEICL is similar to that set by the insurance Directives, in particular by Directive 2002/83/EC which provides more detailed rules than Directive 92/49/EEC. It can be noted, indeed, that the information requirements in the PEICL and in Directive 2002/83/EC basically focus on the particulars of the insurance company, the essential characteristics of the insurance products and the proposed contract terms, in particular with regard to the law applicable to the contract and the arrangements for handling policyholder's complaints about the contract. This information should constitute the basis of the uniform regulation proposed above.

The insurance Directives merely address the insurer's precontractual duty of disclosure. Besides this duty, however, the insurer should also advise the prospective policyholder as regards his individual needs of insurance.⁵² A duty to advise the insured in connection with his demands and needs is set in Article 12 of Directive 2002/92/EC on insurance mediation

⁴⁹ Article 2:201(1) PEICL.

⁵⁰ Article 2:201(2) PEICL.

⁵¹ Article 2:201(3) PEICL. See Basedow, Jürgen et al. *Ibidem*, p. 93.

⁵² See Basedow, Jürgen et al. *Ibidem*, p. 99.

62

(IMD)⁵³ but the Directive applies only to insurance intermediaries and not to insurance companies.⁵⁴

The Member States have adopted different regulatory approach on the insurer's duty, as separate from that of the intermediary, to advise the prospective policyholders; indeed, while some States impose such a duty, some others do not.⁵⁵

For the purpose of the analysis, it is useful to examine the rule introduced by Article 2:202 PEICL

⁵³ European Parliament and Council Directive 2002/92, 2003 O.J. (L09) 3 [hereinafter Insurance Mediation Directive]. Article 12 of the IMD lays down a list of information that the insurance intermediary has to provide to the customer prior to the conclusion of the insurance contract and, if necessary, when the contract is amended or renewed. In particular, it has to be emphasized that the intermediary has to inform whether (i) he gives advice based on a fair analysis or (ii) he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings, or (iii) he is not under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings and does not give advice based on a fair analysis. When the insurance intermediary informs the customer that he gives his advice on the basis of a fair analysis, he has to analyze 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. Further, prior to the conclusion of a contract, the intermediary shall at least specify, in particular on the basis of information provided by the customer, the customer's demands and needs and the underlying reasons for any advice on a given insurance product. The information described above need not to be given when the intermediary mediates in the insurance of large risks, nor in the case of mediation by reinsurance.

See also Article 19, paragraph 4 of European Parliament and Council Directive 2004/39, 2004 O.J. (L145) 1, on markets in financial instruments, stating that when the investment firm provides investment advice or portfolio management, it has to obtain the necessary information in order to advise the client or potential client on investment services and financial instruments that are suitable for him. However, according to Article 2, paragraph 1(a), the Directive does not apply to insurance company. With regard to insurance mediation, see Marano Pierpaolo "Reinsurance Intermediaries: A Comparison of the EU and U.S. Regulatory Approach", *The Geneva Papers on Risk and Insurance - Issues and Practice*, vol. 35, 2010, pp. 200-216; Marano, Pierpaolo "The International Dimension of Insurance Mediation Under The EU Directive on Insurance Mediation. Present and Future", *Insurance Law Review*, 2011; Merkin, Rob, Lowry, John "Reconstructing Insurance Law: The Law Commission's Consultation Paper", *Modern Law Review*, vol. 71, pp. 95-113; Eckardt, Martina. *Insurance Intermediation. An economic analysis of the information services market*, Heidelberg, New York, 2007.

⁵⁴ Art. 1, paragraph 3, Directive 2002/92/EC.

⁵⁵ See Basedow, Jürgen et al. *Ibidem*, p. 99. For Italy, see art. 183 of the Code of Private Insurance that imposes the duty to advise on both the insurance company and the intermediary.

whose provisions reflect a compromise solution between the two opposite approaches mentioned above.⁵⁶ According to the Article, the insurer should warn the applicant of any inconsistencies between the coverage proposed and the applicant's requirements of which the insurer is aware or should reasonably have been aware.⁵⁷ Considerations shall be given to the relevant circumstances, the mode of contracting and, in particular, to whether the applicant was assisted by an independent intermediary.⁵⁸ Thus, the duty will be more extensive if the proposer makes a specific request for advice to the insurer or the parties negotiate for a long period. Conversely, it will be less extensive when the applicant is advised by an insurance broker or if the contract is negotiated at a distance.⁵⁹

The insurer's precontractual duty to assist stems from his greater knowledge and experience in insurance coverages⁶⁰ compared to the insured and from the more general duty of good faith and fair dealing. The insurer, indeed, as expert in the contents of insurance policies and in assessing risk, should advise the applicant and make recommendations, in compliance with professional standards, regarding the most adequate coverage to meet the applicant's needs.⁶¹ However, it is advisable that the duty is determined in connection with the complexity of the applicant's demands.

The insured's disclosure about his needs may be essential to permit the insurer to fulfill his duty to advise. The insured is obliged to disclose to the insurer prior to the conclusion of the contract all material information that affects the risk and that are relevant to the decision of the insurer as to whether to offer coverage and, if

⁵⁶ Basedow, Jürgen et al. *Ibidem*, p.100.

⁵⁷ Article 2:202(1) PEICL. See also Article 2:203 PEICL, according to which if the applicant reasonably but wrongly believes that the risk is covered at the time the application is made, and the insurer is or should be aware of this belief, the insurer has to warn the applicant immediately that the cover will not commence until the contract is concluded and, if applicable, the first premium is paid, unless preliminary cover is granted. In the event of a breach of the duty to warn, the insurer will have to indemnify the insured against all losses resulting from the breach of the duty unless the insurer acted without fault.

⁵⁸ Article 2:202(1) PEICL.

⁵⁹ See Basedow, Jürgen et al. *Ibidem*, p. 97, pointing out that in these cases the insurer will give «fairly routine assistance» and that a similar conclusion can be drawn by Article 3, paragraph 1(2)(a) of Directive 2002/65/EC on the distance marketing of financial services. According to that Article, before, the contract is concluded, the consumer shall be provided, *inter alia*, with information concerning a description of the main characteristics of the financial service.

⁶⁰ See Boivin, D. *Ibidem*, p. 112

⁶¹ But see Eggers, Peter MacDonald et al. *Ibidem*, p. 295-297.

so, on what terms.⁶² The fuller the insured's disclosure, the higher the capacity of the insurance company to propose the most suitable insurance coverage.

In case of a breach of the duty to assist, Article 2:202(2) PEICL sets that the insurer shall indemnify the policyholder against all losses resulting from the breach unless the insurer acted without fault. Further, the policyholder is entitled to terminate the contract by giving written notice within two months after the breach becomes known to him.⁶³

As to the recovering of damages, however, it should be highlighted that the insured has to prove that he would have bought alternative insurance had he known the gap in the coverage or that he would have avoided engaging in the activity involving the risk, if that risk was not insurable in the market.⁶⁴

In some countries the law provides for modification of the insurance contract in compliance with the doctrine of the insured's reasonable expectations.⁶⁵ The applicant reasonable expectations should be honored because he usually purchases coverage relying on insurance companies or agents since he does not have the skills to examine insurance policies.⁶⁶

In determining the reasonable expectations of the insured, considerations should be given to whether the insurer informed thoroughly and clearly the insured of relevant policy conditions or exclusions or to whether the point at issue is something generally known. The reasonable expectations doctrine may apply when the insurer misrepresents the contents of the policy or when he permits the insured to be under a misapprehensi-

⁶² Clarke, A. M. *Ibidem*, p. 549.

⁶³ See Basedow, Jürgen et al. *Ibidem*, p. 100 for examples of the sanctions imposed by the Member State that provide for the insurer's duty to warn the applicant about inconsistencies in the cover proposed.

⁶⁴ Basedow, Jürgen et al. *Ibidem*, p. 98, observing that the Member State's courts usually facilitate the insured's burden of proof by presuming that he would have reasonably reacted had he been informed by the insurer; thus, it may be presumed that the policyholder would have bought additional insurance coverage, if available in the market at a reasonable price.

⁶⁵ Basedow, Jürgen et al. *Ibidem*, p. 98.

⁶⁶ Keeton, Robert. *Insurance Law Rights at Variance with Policy Provisions*, *Harv. L. Rev.*, 83, 1970, p. 961 ss.; Keeton, Robert. *Insurance Law: Basic Text*, 1971, p. 351. With regard to the doctrine of reasonable expectations, see also Abraham, Kennet. *Insurance Law and Regulation*, 3rd edition, New York, Foundation Press, 2000, p. 44-56; Abraham, Kennet. *Distributing Risk: Insurance, Legal Theory and Public Policy*, New Haven Yale University Press, 1986, pp. 100-132; Henderson, C. Roger. *The Doctrine of Reasonable Expectations in Insurance Law After Two Decades*, *Ohio St. L. J.*, vol. 51, 1990, p. 823; Tarr, J.A. et al. *Ibidem*, pp. 117-125.

on.⁶⁷ The insurer should draw applicants' attention to provisions that insureds generally would not expect; this way, the insured's expectations in connection with provisions excluding coverage might be no longer reasonable.⁶⁸

Thus, in light of the particular nature and complexity of an insurance contract and of the different regulatory approach adopted by the Member States, it seems appropriate to introduce rules at Community level on the insurer's duty to advise the insured, independently of the duty to advise owned by the intermediaries. Where insurance products are not offered through intermediaries, indeed, the prospective policyholder may need specific advice to make an informed decision on the policy that he underwrites. In this regard, the rules set out by Article 2:202 PEICL may represent a model.

The ongoing debate about this issue in the context of the revision of the Insurance Mediation Directive should be looked on with favour.⁶⁹ The EU Commission highlighted that the Directive on insurance mediation in force does not ensure a real level playing field between the sales of insurance products through intermediaries and those sold by insurance undertakings, since direct writers are exempted from its scope.⁷⁰ The approach of the Commission services to the revision in this respect of the IMD seems to tend in the direction of establishing similar requirements for insurance undertakings and insurance intermediaries when distributing insurance products, taking into account the specificities of existing distribution channels.⁷¹ In order

⁶⁷ See Abraham, Kennet. *Insurance Law and Regulation*, *Ibidem*, p. 47-48; Abraham, Kennet. *Distributing Risk: Insurance, Legal Theory and Public Policy*, *Ibidem*, 104-109.

⁶⁸ See Abraham, Kennet. *Insurance Law and Regulation*, *Ibidem*, p. 49, 55-56, pointing out that generally when coverage expected is separately available elsewhere the insured's expectations may not be reasonable.

⁶⁹ Solvency II Directive requires the Commission to put forward a proposal for the revision of the IMD, taking into account the consequences of this Directive for policyholders (see paragraph 139 of the Preamble of Solvency II Directive).

⁷⁰ Internal Market and Services Directorate General of the EU Commission, *Consultation Document on the Review of the Insurance Mediation Directive (IMD)*, p. 6, available at: http://ec.europa.eu/internal_market/consultations/docs/2010/insurance-mediation/consultation-document_en.pdf [hereinafter Consultation Document on the Review of the IMD].

⁷¹ Consultation Document on the Review of the IMD, p. 8, 10, also stating that sales of insurance products by the means of distance marketing should be included as well in the scope of the Insurance Mediation Directive, taking into account the existing provisions in Directive 2002/65/EC. See also Marano, Pierpaolo. (2011) "Quale mercato per l'intermediazione assicurativa? Riflessioni sulle possibili modifiche all'IMD", *Assicurazioni*, 2, 213.

to strengthen policyholder protection, direct sales by insurance undertakings should be included in the scope of the IMD2.⁷² In particular, Article 12(3) of the IMD, requiring insurance intermediaries to, at least, specify consumers' demands and needs and the underlying reasons for any advice on a given insurance product, may be extended to insurers.⁷³ Unlike insurance intermediaries, however, insurers cannot be required to provide advice based on a fair analysis.⁷⁴

It should be noted that a trend towards establishing a duty of the seller to take into account the specific needs of consumers seems to appear in the recent Community legislation. Paragraph 34 of Directive 2011/83 on consumer rights provides for such a duty, although limited to some categories of consumers, by stating that the trader should consider the specific needs of consumers who are particularly vulnerable because of their mental, physical or psychological infirmity, age or credulity in a way which the trader could reasonably be expected to foresee.

5. CONCLUSION

The insurer's precontractual information duty is quite highly regulated in Europe. The analysis highlighted, however, that the information requirements laid down by Directive 92/49/EEC for non-life insurance are not comprehensive enough and should be aligned with those set out for life insurance, which are more detailed.

⁷² See CEIOPS, *Advice to the European Commission on the Revision of the Insurance Mediation Directive (2002/92/EC)*, 2010, p. 23, available at: https://eiopa.europa.eu/fileadmin/tx_dam/files/publications/submissionstotheec/20101111-CEIOPS-Advice-on-IMD-Revision.pdf [hereinafter CEIOPS, *Advice on the Revision of the IMD*]; CEA, *Response to the European Commission's Consultation on the Review of the Insurance Mediation Directive (IMD)*, 2011, p. 5-6, available at: <http://www.cea.eu/uploads/Modules/Publications/CEA%20IMD%20response.pdf> [hereinafter CEA Response to the EU Consultation on the Review of the IMD], emphasizing, however, the need to consider the specificities of existing distribution channels. According to CEA, with regard to some standardized insurance products, such as home, pet and private motor insurance, the further extension of information disclosure would only cause additional burden without providing any benefit to consumers, since applicants are price focused in their behavior and do not rely on the information given by the insurers.

⁷³ CEIOPS, *Advice on the Revision of the IMD*, p. 74; CEA Response to the EU Consultation on the Review of the IMD, p. 5. See also Consultation Document on the Review of the IMD, p. 8, asking whether a definition of "advice" should be introduced in the IMD2.

⁷⁴ CEA Response to the EU Consultation on the Review of the IMD, p. 5; CEIOPS, *Advice on the Revision of the IMD*, p. 74.

Further, considering also the precontractual information rules established by the Distance Marketing Directive and the E-Commerce Directive, it emerged that there may be overlapping requirements in case of distance or electronic insurance sales. Thus, it is advisable to simplify the existing legal framework and to consolidate all the information requirements in a single text applying to insurance dealings, in order to prevent the insurer to encounter difficulties in knowing the rules to comply with. The CEA's proposal to establish a uniform regulation the basis of which should be constituted by the sectoral provisions contained in the insurance Directives plus, for the case of distance or electronic insurance sales, just the specific precontractual information laid down in this respect by the Distance Marketing Directive and the E-Commerce Directive seems valuable.

Finally, the study emphasized the need to introduce rules at Community level on the insurer's duty to advise the applicant. The provisions laid down by Article 2:202 PEICL may represent a model. In the light of the particular nature and complexity of an insurance contract, indeed, where insurance products are not offered through intermediaries, the prospective policyholder may need specific advice to make an informed decision on the policy that he underwrites. In the context of the revision of the Insurance Mediation Directive, the approach of the Commission services that tends in the direction of establishing similar requirements for insurance undertakings and insurance intermediaries, taking into account the specificities of existing distribution channels, should be looked on with favour.

SUMMARY

This article focuses on the duty of disclosure imposed on the insurer in the precontractual stage with regard to the European context. The study examines the rules introduced on the matter by Directive 2002/83/EC for life insurance and Directive 92/49/EEC for non-life insurance. The provisions laid down by Directives 2002/65/EC and 2000/31/EC for the cases of distance and electronic insurance sales respectively are considered as well, along with the requirements set out by Articles 2:201 – 2:203 of the Principles of European Insurance Contract Law (PEICL).

Precontractual information established by Directive 92/49/EEC for non-life insurance seems not comprehensive enough. In this respect, it is advisable to reach a higher degree of harmonization in order to facilitate the functioning of the internal insurance

market. The analysis suggests to align the information laid down for non-life insurance with that set out for life insurance. Pending the introduction of more detailed rules at Community level, Member States should draw inspiration from Directive 2002/83/EC in regulating precontractual non-life information requirements in order to create a level playing field for all consumers and all contracts relating to insurance.

In addition to the information required by the insurance Directives, insurance undertakings carrying out business at distance or over the internet are also subject to the precontractual information requirements set out by Directive 2002/65/EC concerning the distance marketing of consumer financial services and by Directive 2000/31/EC on electronic commerce. The study highlights that the insurer's precontractual information duty is quite highly regulated in Europe. Although this can foster the protection of the prospective policyholder, it should be noted, however, that excessive information requirements are not appropriate since they are likely to create, on the one hand, confusion for consumers and, on the other, to cause an increase in the price of insurance coverage by increasing the insurers' cost of meeting the legal requirements.

Further, the Directives mentioned above often contain overlapping requirements due to their different scope. Considering the fact that in the event of distance or electronic sales the insurer's duty of disclosure in the precontractual stage is governed by more than one Directive, the insurer may encounter difficulties in knowing the rules to comply with.

Therefore, it is appropriate to simplify the existing legal framework concerning the insurer's precontractual information duty and consolidate all the requirements set by Directives 2002/83/EC, 92/49/EEC, 2000/31/EC and 2002/65/EC in a single text. In this regard, according to CEA, all the existing precontractual information requirements should be rationalized by eliminating differences in the terminology and by establishing an uniform regulation applicable to insurance, the core of which should be represented by the provisions contained in the sectoral directives (Directives 2002/83/

EC and 92/49/EEC). This regulation should also include, for distance or electronic insurance sales, just the specific precontractual information laid down by the Distance Marketing Directive and the E-Commerce Directive in this respect, to the exclusion of that repeating the sectoral provisions. The regulation should be based on strict harmonization and no derogation should be granted.

In the perspective of simplifying the existing EU rules on the insurer's precontractual duty of disclosure, consideration may be given to the provisions on this matter established by the Principles of European Insurance Contract Law (PEICL). That is convenient in order to clarify the information that should constitute the basis of the uniform regulation proposed above.

Unlike the insurance directives, the PEICL also establish the insurer's duty to advise the applicant as regards his individual needs of insurance. In light of the particular nature and complexity of an insurance contract and of the different regulatory approach to this issue adopted by the Member States, the analysis proposes to introduce rules at Community level on the insurer's duty to advise the insured. In this regard, the rules set out by the PEICL may represent a model. Where insurance products are not offered through intermediaries, indeed, the prospective policyholder may need specific advice to make an informed decision on the policy that he underwrites. In the context of the revision of the Insurance Mediation Directive, the approach of the Commission services that tends in the direction of establishing similar requirements for insurance undertakings and insurance intermediaries, taking into account the specificities of existing distribution channels, should be looked on with favour. In order to strengthen policyholder protection, direct sales by insurance undertakings should be included in the scope of the new Insurance Mediation Directive. In particular, Article 12(3) of Directive 2002/92/EC on insurance mediation, requiring insurance intermediaries to, at least, specify consumers' demands and needs and the underlying reasons for any advice on a given insurance product, may be extended to insurers.