

ON-LINE INSURANCE

SAMIM UNAN QUESTIONNAIRE

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1) Concerning the existence of a national legislation or regulation that is specifically dealing with internet insurance

Please state whether in your legislation you have rules that are specifically dealing with operations and contracts on the Internet, and whether they are applicable to all contracts (including insurance contracts) or to all financial services contracts, or solely to insurance contracts

1. Preliminary remark

Legislation and regulation from differential sources govern internet insurance operations.

The applicability criterion of the respective sources may relate to the capacity of the customer (private consumer or professional user), the capacity of the service provider (organized (“repeat player”) or incidental (“one shot”) provider, intermediary or principal), the type of the insurance (service), the modality of the service supply (distance, electronic), the phase of the insurance contract cycle (conclusion, performance, termination) etc.

A conflict between the respective legislative/regulatory sources raises the issue of the criterion to qualify the *lex specialis* that prevails over the *lex generalis*. In this respect the consumer protection legislation e.g. is horizontal and sector cross-cutting vis-à-vis the sectoral insurance legislation.

For the purpose of listing the legislation and regulation applicable to internet insurance, the following distinctions are relevant :

1.1.The respective phases in the (insurance) contract cycle :

- collective and individual publicity and promotion by the insurance service provider
- simulations and quotations
- individual negotiation of the contract
- conclusion of the contract (and evidence)
- performance of the contract :
 - payments (by internetbanking) : the premium, the loss
 - several notifications : e.g. advance notice of contract termination (non-renewal), notification of the loss claim, compliance with the duty of disclosure in the course of the contract, etc.
- complaint handling and dispute resolution

The title and questions of the questionnaire rightly do not limit the subject matter to the contracting (the contract conclusion) phase. Besides the conclusion of the contract, the distance

and digital/numerical characteristics can also relate to the performance of the obligations flowing from the contract.

The latter remark is all the more relevant since an insurance contract is a continuous (as opposed to instantaneous) performance contract, like the rent and labor contracts.

1.2.The capacity of the user of the insurance service

The customer can be either a private consumer or a professional user. The applicable legislative/regulatory regime may differ according to the status of the user : either it covers both B2C and B2B or only B2C. The Market Practices and Consumer Protection Act only applies to *the B2C relationship* (art. 2,3°, art. 2,21° and Chapter 3).

The Act on the Services of the Information Society applies both to B2C and B2B. But in the latter relationship the regime is not mandatory and can be deviated from by contract (art. 11).

1.3.The organized as opposed to the incidental distance sale system

The specific consumer protection legislation/regulation applies to distance marketing in an *organized* (as opposed to incidental) manner (art. 2,21° Market Practices and Consumer Protection Act). This application criterion relates to the distant nature of the transaction.

The Act on the Services of the Information Society applies to services that are *usually provided for reward, electronically, from a distance,...* (art. 2,1°). The qualification *usually* apparently only relates to the *for reward* application criterion¹, so that an incidental electronic distance transaction with respect to a service for reward is governed by the legislation on the services of the information society.

1.4.Internet and other modalities of distance contracting and contracting via ICT (Information and Communication Technology)

Internet offers only one particular medium/modality for :

- distance marketing/contracting :
Distance selling/contracting operations can be performed through other means than internet : such as telephone, telex, facsimile, SMS, radio, letter mail, a proxy (representative) etc..
- paperless (electronic, virtual, dematerialized, digital, numerical environment) contracting :
Paperless contracting operations can also be performed through other ICT media than internet.

Taking into account their differential applicable legal/regulatory regime, it is important to distinguish the internet from other communication channels.

Internet is defined as : “a worldwide system that interconnects computer networks using the same communication protocols”. A computer network is a telecommunication network that allows computers to exchange data.

¹ STEENNOT, R., *Financiële diensten op afstand*, Brussels, Larcier, 2006, p. 9, nr. 7.

Internet supports several applications such as :

- the world wide web : a system of interlinked hypertext (hyperlinked) documents, containing text, images, sound, videos and other multimedia and viewed via a web browser.
- e-mail : a method to exchange digital messages between an author and recipient(s) on a store and forward basis
- instant messaging : online real time text transmission (chatting)
- etc.

The distinction may be blurred in some cases, as illustrated by the few following examples :

- The status of SMS (Small Message Service) is controversial
- Facsimile messages may be sent by the internet
- Speech telephony and video may use the internet for the purpose of transmission,
- An intranet (as opposed to the internet) is a privately maintained computer network that can be accessed only by authorized persons. It functions either on proprietary protocols (privately owned and operated/managed), or can be accessed over the internet using internet technology. E.g. a Virtual Private Network (VPN) uses the internet for data exchange in a secure manner.

In order to qualify as a distance contract, the entire process of contract conclusion must take place without the parties' physical presence (art. 2,21° Market Practices and Consumer Protection Act). In the field of distance sale of financial services, the consumer protection legislation contains specific provisions only up to the conclusion phase of the contract (art. 2,21° Market Practices and Consumer Protection Act). The Market Practices and Consumer Protection Act is not concerned with the modality of the contract performance.

The Act on the Legal Aspects of the Information Society contains specific provisions on the (electronic distance) contract *conclusion* (art. 16), but it is not limited to that segment of the contract cycle.

The Act on the Legal Aspects of the Information Society applies only to the (part of the) operation (art. 2,1°, art. 5) :

- that is performed through electronic communication media, as opposed to a paper-based medium or to the physical aspects
- that is performed from a distance.

Services that are provided partly on-line and partly off-line, are governed by the Act on the Information Society for the online part only².

The Market Practices and Consumer Protection Act limits its scope of application to the distance sale effected via distance communication techniques : consequently the sale to the customer in the physical presence of the provider's representative is not considered to be a distance sale : see also the distinction between the service "supplier", who contractually commits to supply the services and the broader concept of the "undertaking", an operator that pursues an economic goal, also comprising the representative (art. 2,1° , art. 2,26° and art. 50 Market Practices and Consumer Protection Act).

² STEENNOT, *O.c.*, p. 9, nr. 7 c).

The part of the regulation on *distance* selling (i.a. imposing extensive information duties on the service provider) that is not specific for *internet* selling, requires no further elaboration in the present context.

1.5. Insurance as a financial service

Insurance is a service and more specifically a financial service (art. 2,24° Market Practices and Consumer Protection Act). See also the “Services Sectoral Classification List (W/120)” and the “United Nations Central Products Classification” (CPC).

Also according to art. 2,24° of the Market Practices and Consumer Protection Act an insurance service is a financial service.

The Twin Peaks II Act dated 30 July 2013 has reintroduced in the Act of 2 August 2002 a definition of “financial services” (art. 2 paragraph 1, 40°). It must be read together with the definition in 39° with respect to “financial products”. Those provisions had been abolished by the Royal Decree of 3 March 2011, but have been reinstated by the Act of 30 July 2013. The definition seems more restrictive than the one in the 2010 Act on Market Practices .

In the majority of the cases, insurance is an immaterial service, that does not require physical delivery. The performance (both premium and loss) is effected by the payment of a sum of money via internet banking. Therefore insurance is particularly suited for distance sale through the internet : not only the conclusion of the insurance contract is possible via the internet, but also its performance (execution).

In some cases however the insurer performs in kind (in natura).

2. The relevant legislation/regulation

Taking into account these specifications, the following sources of legislation may be cited.

2.1. Internet operations in general

There is legislation/regulation in force on internet operations in general in the field of secrecy/confidentiality of electronic communication, personal data and privacy protection, protection against fraud, etc.

Without prejudice to art. 9 and following of the Act of 8 December 1992 on the protection of privacy, the Act of 13 June 2005 on the Electronic Communication (art. 122 and following) limits (in principle forbids) the use by the operator of data gathered from electronic communications (cfr. infra).

The legislation in this field also imposes customer information duties on the service provider (cfr. Infra).

The publicity via electronic mail is regulated by art. 13-15 Act of 11 March 2003 on the information society and by the “Spam Royal Decree” (Royal Decree dated April 4th 2003 to regulate the sending of publicity by electronic mail).

2.2. Electronic contracting and evidence in general

There is a set of legislation in force on the electronic signature and document, thus offering a legal framework for paperless contracting, which in turn supports the conclusion of contracts (including insurance contracts) via the internet.

This regime allows to generate legal evidence of all paperless transactions, and consequently applies to all contracts, including insurance contracts.

This legislation is the following :

- Act of 20 October 2000 to introduce the use of means of telecommunication and of the electronic signature in the judicial and extra-judicial procedure (simple electronic signature and electronic notification)
- Act of 9 July 2001 to establish certain rules related to the legal framework for electronic signatures, the electronic registered mail and the certification services
- Royal Decree of 6 December 2002 to organise the supervision and accreditation of certification services that provide qualified certificates (advanced) electronic signature and certification services.
- Act of 11 March 2003 on certain legal aspects of the services of the information society (electronic trade).
- Royal Decree of 4 April 2003 to regulate the sending of publicity by electronic mail.
- Act of 13 June 2005 on electronic communications
- Act of 24 August 2005 to transpose several provisions of the Directive on distance financial services and of the Directive privacy in electronic communication. (is implemented in the Market Practices and Consumer Protection Act)
- Act of 15 May 2007 to establish the legal framework for some providers of confidential services.
- Act of 10 December 2009 on the payment services
- Act of 21 December 2009 on the status of payment institutions and institutions for electronic money, the access to the business of supplier of payment services and to the activity of issuance of electronic money and the access to the payment systems.

There is also legislation on evidence in force, that is applicable specifically to financial services contracts, but not exclusively to insurance contracts, viz. the :

- Art. 196 of the Act of 17 June 1991 to organise the public credit sector and the participation of the public sector in private financial corporations (on certified electronic copies). This provision may be overtaken by the more recent legislation on the evidence regime of electronic contracting.

2.3. Distance marketing of financial services

There is legislation in force that applies specifically to the distance marketing of financial services, viz. :

- Articles 49 till 55 of the Market Practices and Consumer Protection Act dated 6 April 2010³ deal specifically with distance contracting of financial services with consumers.

It is emphasized that those provisions apply to :

³ Wet 6 april 2010 Marktpraktijken en Consumentenbescherming

- Only consumer contracts (B2C), excluding B2B transactions
- Financial services contracts, including but not limited to insurance contracts
- Distance marketing, including but not limited to internet trade

There is also legislation that applies specifically/only to insurance contracts, namely :
 Art. 4§2bis of the Land Insurance Contract Act of 25 June 1992, that addresses some aspects of distance conclusion of insurance contracts.

It is stressed that this provision applies to :

- Land insurance, thereby excluding marine and aviation insurance.
- Both consumer and professional/commercial customers
- Distance contracting through all possible communication channels

Art. 4§2bis of the Land Insurance Contract Act of 25 June 1992 however specifically addresses the contracts governed by the Market Practices and Consumer Protection Act, the scope of which is limited to B2C transactions.

3. Supranational origin of the legislation/regulation

3.1. E.U.

This Belgian national legal regime is to a large extent inspired or dictated by European law, as it transposes i.a. the following EU directives.

- Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts
- Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal Market (“Directive on electronic commerce”).
- The Directive 2002/58 of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of the privacy in the electronic Communications sector (Directive on privacy and electronic communications).
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 relating to the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC.
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and

amending Council Directive 84/450/EC, 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no 2006/2004 of the European Parliament and of the Council (“Unfair Commercial Practices Directive”).

- Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 87/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC
- Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and user’s rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.
- Directive 2011/83 EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council.

3.2.Global

This European legislation is in turn inspired by international law, developed by UNCITRAL : see

- Recommendation on the Legal Value of Computer Records (1985)
- Model Law on Electronic Commerce (1996)
- Model Law on Electronic Signatures (2001)
- UN Convention on the Use of Electronic Communication in International Contracts (New York 2005)

4. Self regulation and soft law

Besides formal legislation, the insurance sector industry has also issued self-regulation on the subject in the form of codes of conduct through its professional organizations:

- On the national Belgian level : Assuralia (the Belgian professional organization of insurance companies) “Règles de conduite relative à la commercialisation à distance de services financiers” – “Code of Conduct for the distance selling of financial services”.
- On the regional European level : Insurance Europe (formerly the CEA, Comité Européen des Assurances) “Guide européen de bonne pratique des opérations d’assurance sur internet” – “European Good Practice Guide For Insurance Business on the Internet” 2001.

The Circular letter 2009-17 of the Belgian insurance supervision authority (formerly the CBFA, Commission for Bank, Finance and Assurance) and presently the NBB (National Bank of Belgium) formulates recommendations to the insurance industry on good practices in the

organization of the provision of financial services via the internet. It focuses primarily on protection against unauthorized access and recommends the issuance of simple and easily understandable manuals and documentations for the customer.

The Unfair Contract Terms Commission (part of the Consumption Council) has issued recommendations (legal basis : see art. 78 Market Practices and Consumer Protection Act) on matters of internet contracting : e.g. with respect to the prohibition of pre-thicked boxes (Opinion nr. 24 on general conditions of contracts in the teledistribution sector, June 15th 2008).

2) Concerning the conclusion of insurance contracts on Internet

Please describe briefly

- how the successive steps are characterized (offer, acceptance)

1. Preliminary remark

In e-commerce, three types of websites can be distinguished :

- Informative : for publicity purposes
- Interactive : for simulations and quotations
- Transactional : for concluding contracts

Many insurers only provide a quotation (tariff simulation) on-line, but consequently conclude the contract off-line⁴, in the traditional manner on paper medium. This is contrary to the essence of paperless trade. Even the E.U. Court of Justice is not yet fully e-trade minded, since for the sake of the protection of the consumer, it requires another channel than an e-mail address for the purpose of contacting the service provider “directly and efficiently” (art. 7§1,3° of the Act on the Services of the Information Society)⁵.

In the description of the procedure below we assume an organised on-line insurance transaction website set up by the insurance company (or intermediary).

Of course an incidental stand alone ad hoc transaction via the internet is also conceivable.

Website insurance distribution may be fully automated, machine generated on the side of the insurer, without any human intervention. Such automated interaction is more suitable for standardized (as opposed to tailor made, customised) insurance products, but also more prone to errors and mistakes on the side of the customer, than human (insurer staff) driven interaction.

2. The procedure

According to the insurance company and type of cover different procedures are applied.

⁴ JACQUEMIN, H., “Le formalisme du contrat d’assurance : analyse des règles en vigueur à l’aune des progrès techniques et de certaines pratiques contractuelles”, in *La loi sur le contrat d’assurance terrestre, Bilan et perspectives après 20 années d’application*, DUBUISSON, B. and CALLEWAERT, V., (eds), Brussels, Bruylant, 2012, p. 44, nr. 25.

⁵ E.U. C.J., 16 October 2008, case C-298/07, *R.D.T.I.*, 2009/34, p. 59.

Customized (tailor-made) insurance cover for more complex risks contain more variables to determine the terms and rates. They require the disclosure of characteristics/risk profile/loss history. It is not offered on an automated basis.

Very simple risks (whose profile and characteristics are irrelevant), such as travel insurance, are concluded on the basis of entering the policy holder's identity data, the choice of cover formula and the period of cover on the insurance company's interactive webpage.

The contract conclusion is effected without further formalities in automated manner. The payment of the premium renders the cover effective.

(see Europe Assistance).

Several insurance companies announce on-line insurance for other relatively standardized products such as Motor Third Party Liability Insurance, Fire Insurance, Legal Expenses (Assistance) Insurance.

But actually none of those insurance companies offers real on-line insurance. Only Actel Direct comes close. The electronic signature based on encryption is not used. Often the electronic medium is not used all the way and final confirmation from the policy holder is requested by the traditional postal mail and paper channel.

The on-line procedure is generally as follows :

2.1.The prospective policy holder fills out an application form/questionnaire on the interactive web page of the insurance company (or intermediary)

The input relates to the identity of the customer and the specification of the risk to be covered.

As the case may be, the customer chooses a particular cover formula in various dimensions of the delimitation of the cover : type, amount, deductible, duration, etc.

2.2.Pursuant to the prospective customer's data input, either the insurance company (or intermediary) formulates :

- immediately an offer to the prospective customer :
 - * usually automated, machine driven, either on the interactive webpage itself, or sent immediately by e-mail as an attachment to the prospective policy holder
 - * or human driven, generated via a personalised e-mail message from the insurer staff, possibly attaching other documents to complete.

2.3.The prospective policy holder :

- Validates the recapitulated contract elements
- Or returns as an attachment by e-mail the signed documents to the insurance company (or intermediary).

2.4. The insurance company sends confirmation of the contract and stores the contract

2.5. The policy holder makes the premium payment by internet banking

One procedure (Actel Direct) functions e.g. as follows :

- on the insurer's interactive webpage, called request for an insurance cover offer (in Dutch "offerteaanvraag") the prospective policy holder fills out an application form (in the terminology of the art. 1L of the Land Insurance Contract Act 1992, an insurance proposal, in Dutch : "verzekeringsvoorstel", in French : "proposition d'assurance") : input of his identity, address and contact data and the characteristics of the risk to be covered
- based on those parameters, the system checks whether the risk meets the acceptance criteria and if so automatically calculates the amount of the premium
- the system then generates an insurance cover offer, called an insurance request (in Dutch : "verzekeringsaanvraag", in French : "demande d'assurance" : see art. 1 K Land Insurance Contract Act 1992) and to be further completed by the prospective policyholder with additional data (e.g. license plate number, chassis number of the vehicle, mileage of the vehicle, desired date of entry into force of the cover, etc.)
- the general insurance conditions being accessible on-line on the insurer's website by downloading or by e-mailing
- the prospective policy holder can then return to the insurance company the completed, signed and scanned form by e-mail (but also by postal mail or by facsimile).

Another procedure (Ethias) :

Is similar with slight differences up to a certain stage. With respect to terminology, it refers to the request for an insurance cover offer, the offer, the contract request.

The filling out of the application form starts with the characteristics of the risk for the purpose of premium calculation and thereafter at the stage of the contract request the input of the prospective policy holder's identity data and other specifications of the risk is required.

After the contract request, the insurer's system sends an e-mail message to the prospective policy holder containing an insurance proposal, to be completed and returned (by postal mail or by facsimile, hence not by an electronic medium) to the insurer, who may then still decide to formulate an insurance offer, or refuse cover or request more information. From this stage on apparently the procedure uses again the traditional paper medium.

Another procedure (Corona Direct) requires the filling out of an application form on its interactive webpage.

The system automatically calculates the premium and then sends an e-mail message to the prospective policy holder to confirm the request.

The substantive reply to the request is not automated : within two working days a personalised reply is sent to the prospective customer by an insurance company staff member.

Another procedure (ING) through its broker for Belgium, requires the filling out of an application form on its interactive webpage. The system calculates the premium. The contract can then be requested. The system requires (immediate) payment by credit card. The contract is thereafter sent to the policy holder by postal mail.

Another procedure runs through an insurance intermediary (Callant) :

The prospective customer requests a premium calculation by input of the risk characteristics.

The "simulator" compares the rates of several insurance companies and shows the cheapest premium.

The broker sends an offer via e-mail, which the prospective policy holder is to print out, sign and return (apparently also by e-mail) to the broker.

- the moment when the consent is established

The insurance contract, being a consensual contract, comes into being by the mere consent of the parties.

In the general contract law, according to the “adapted reception-cognizance doctrine” (“gecorrigeerde ontvangst-vernemingsleer”) the contract between distant parties is deemed to come into being at the moment when, and the place where, the proposer learns the acceptance of his offer by his counterpart⁶ or has reasonably had the opportunity to learn it⁷.

The Act on the Services of the Information Society does not contain any rule in this respect. According to the Land Insurance Contract Act on the contrary, the moment of conclusion of the distance contract is set at the moment the insurer receives the acceptance from the policy holder.

In order for a proposal to be qualified as an offer for the conclusion of a contract, it must contain the essential elements of the contract and express the unequivocal intention to be bound by the mere acceptance of the counterpart⁸.

In the case of a pre-signed insurance policy or a provisional insurance (insurance request cf. supra) cover offer, the contract comes into being the moment the policyholder signs those documents, but the cover only takes effect the day after the insurer receives the signed document (art. 4§2 Land Insurance Contract Act). This system deviates to some extent from the general reception-cognizance doctrine;

In the specific case of a distance insurance contract in the sense of the Act on Market Practices and Consumer Protection (B2C), the conclusion occurs at the moment the insurer receives the acceptance by the prospective policy holder of the presigned policy (art. 4§2bis of the Land Insurance Contract Act dated 25 June 1992). This system is in accordance with the adapted reception-cognizance doctrine.

- the rules concerning the right to withdraw of the policyholder

Art. 53 of the Market Practices and Consumer Protection Act grants the consumer a right to withdraw from distance contracts for financial services.

The Land Insurance Contract Act installs a similar but not an identical system. As the more specific regime, the Land Insurance Contract system prevails over the more general system of the Market Practices and Consumer Protection system (*lex specialis generali derogat*).

⁶ See CLAESSENS, H., "Totstandkoming en bewijs van overeenkomsten : algemene beginselen en contractuele modalisering", in *Privaatrecht in de reële en virtuele wereld*, XXVIIe Postuniversitaire Cyclus Willy Delva 2000-2001, Kluwer, Antwerpen, 2002, p. 28-29; Cass., 16 Juni 1960, A.C., 1960, 932 en Cass., 25 Mei 1990, A.C., 1990-91, 1218.

⁷ Here lies the correction.

⁸ Cass., 23 September 1969, *R.C.J.B.*, 1971, p. 216.

According to art.4§2bis of the Land Insurance Contract Act dated 25 June 1992, both the policy holder and the insurer are granted a reflection period and have the right to withdraw without justification from the distance insurance contract within a period of 14 days.

For life insurance the duration of this period is 30 days.

The period starts from :

- the day of conclusion of the contract (except for life insurance where it starts on the day the insurer informs the policy holder of the conclusion of the contract) .
- the day of reception by the policy holder of the contract terms and conditions and all additional information

whichever is later.

This right of withdrawal does not apply to short term insurance contracts with a duration of less than 1 month, to travel and luggage insurance and to life insurance contracts linked to an investment fund.

The withdrawal by the policy holder is effective at the moment of his notification, the withdrawal by the insurer is effective 8 days after his notification.

3) Concerning special information or warnings to be given to the prospective policyholder when concluding on line operation

Think of communication failures: errors in declaration, transmission and software errors (press the wrong button, click on the wrong box; the electronic message is lost in the Internet or the software is not fit to send/receive the intended message, etc.)

1. Information to avoid mistakes

According to art. 8§1, 2° and 3° Act of 11 March 2003 on certain legal aspects of the services of the information society the service provider is under a duty to inform his customer on (i) the different technical steps in the conclusion of the contract and (ii) the technical means to identify and correct errors committed in the input of data before the order is passed. .

A virtual visit of the web-site may fulfil the information duty on the respective steps.

2. Techniques to avoid and correct errors and mistakes

Pursuant to art. 9 of the Act on Services of the Information Society, the service provider is under a duty to put technical means at the disposal of the user to detect errors/mistakes.

With respect to the means to identify and correct errors, the following technique may be used :

Instead of a one click system, in order to avoid mistakes and unwanted commitments, a gradual progressive build-up of the contract conclusion process is applied, by splitting it up in different steps, each to be confirmed by the user before allowing his access to the next step in de process, but also offering the option to the user to go back and correct, without being bound by the contract.

Pursuance of the process cycle is made subject to acceptance of the general conditions.

The software may detect erroneous or lacking data input and warn the user about this flaw by

blocking the access to the next step in the contract conclusion process.

A help function, explaining the process, may also prevent errors.

Double confirmation techniques prevent inadvertent, impulsive and/or erroneous contract conclusion.

On the basis of the data provided in the application form by the prospective policy holder, a preview version of the prospective contract is presented for a final check before signing to validate. After the input of the data by the customer, a first click generates a summary of the contract terms and price. A second click from the customer then validates the contract.

After validation, the contract (order) confirmation by the service provider to be sent to the customer (see art. 10 Act on the Services of the Information Society), recapitulating all relevant contract elements. Besides creating a proof of the contract conclusion, this confirmation offers yet another ultimate opportunity for the customer to correct any possible errors by using his withdrawal right (cfr. supra).

4) Concerning the special protection of the insured against fraud or concerning the payment of premium

Are there in your legal system specific rules as regards this protection?

As there is a thin line between outright fraud and unethical marketing methods trying to lure the customer, the protection devices against both abuses are listed here.

1. Anti-fraud devices

The NBB (National Bank of Belgium, the prudential insurance supervision authority) recommends to apply limited access systems, such as user names and personal access codes either or not in combination with personal TAN cards, figure strings, private software, encryption, etc. (see p. 6 circular letter insurance supervision authority).

Internet banking systems contain protection devices and safeguards against hacking, fraudulent money deviation and draining of bank accounts, by fire walls, individual oral confirmation via cell-phone contact for money transfers abroad, etc.

Warnings may be posted on the website of the service provider against phishing e-mails.

3. General information requirements

Before the consumer is bound by the distance contract, the consumer is to be provided with :

- (i) a number of information items (on the identity of the service provider, on the financial service, on the distance contract, on the recourse channels) by any suitable means adapted to the distance communication technique used (art. 50§1 Market Practices and Consumer Protection Act).
- (ii) the information items referred to in art. 50§1 and the contract conditions on paper medium or on another for the consumer available and accessible sustainable medium (art. 52§1).

In case the distance communication technique does not allow to meet this requirement before the conclusion of the contract, the service provider is to comply immediately after the conclusion (art. 52§1).

3.1. Identification of the service provider

With respect to the identification of the insurance service provider : his address cannot be merely virtual, but a physical (geographic) location of the service provider's seat must be disclosed (art. 50§1a) Market Practices and Consumer Protection Act).

3.2. General contract conditions

The information on the general conditions is very important in the field of (standard) insurance contracts, because the general conditions are not merely an accessory of the contractual relationship, but the general conditions form the core of the insurance contract, defining the substance of the insurance product and consequently the rights and duties of the contract partners that flow from it.

According to the general principles, in order for the general conditions to be binding, the contract partner must :

- effectively have consulted or reasonably having had the opportunity to consult them
- consented with them, either expressly or in an implied manner ⁹.

The judge will assess whether according to the circumstances, those requirements were met.

3.2.1. Communication

Art. 52§1 of the Market Practices and Consumer Protection Act requires the provider to communicate to the consumer in time and before he is bound by a distance contract, all the contract conditions and information mentioned in art. 50§1 on a paper or other sustainable medium available and accessible for the consumer.

3.2.2. Accessibility

Throughout the entire contractual relationship, the consumer has the right to receive on demand the contract conditions on paper medium and to change the distance communication technique unless incompatible with the contract concluded or the nature of the service provided (art. 52§3 Market Practices and Consumer Protection Act).

Art. 8§2 of the Act of 11 March 2003 on Certain Legal Aspects of the Services of the Information Society contains similar information requirements with respect to the (general) contract conditions.

Art. 10,1^o Act on the Services of the Information Society requires the provider to send without undue delay to the customer a confirmation of the order. Art. 12 quater a) of the Insurance Intermediation Act of 27 March 1995 requires that all information is communicated to the

⁹ STEENNOT, R., O.C., p. 69-70, nr. 106.

customer on paper or any other sustainable medium that is available and accessible to the customer.

The customer must also be informed by the service provider about the archiving (filing) of the contract and its accessibility (art. 8§1,4° Act on the Services of the Information Society).

3.2.3. Archiving (storage/conservation and reproduction)

According to art. 8§2 of the Act on the Services of the Information Society contract clauses and general conditions must be communicated to the customer in a manner that allows their conservation and reproduction (e.g. by printing them out or by saving them on the PC hard disk).

When invoked by the service provider, he will bear the onus of proof that the version of general conditions is the one that was in effect on the moment of the conclusion of the contract.

General conditions have a tendency to change as time goes by.

A system of electronic timestamping (in French : “horodatage”) of the file containing the general conditions may offer a solution for this problem.

3.2.4. Consent (acceptance)

Even if general conditions may be accepted tacitly and be inferred from other indicators, for the sake of evidence, the customer can better be invited to tick a box in order to acknowledge having read and accepted these conditions before the conclusion of the contract. A positive action from the customer to that effect will be less equivocal than an implied acceptance. A prethicked box is for that reason also to be avoided.

There are two mechanisms in this respect : the clickwrap and the browsewrap agreement.

The browsewrap variety allows the user to access the general conditions by surfing to the webpage containing them. For the sake of accessibility a hyperlink on each (as opposed to only on the home page) page is recommended¹⁰.

In order to be binding, it was held that the consultation of the webpage containing the general conditions ought to be prerequisite for passing the order¹¹.

A clickwrap agreement type forces the customer to surf to the page containing the general conditions before being able to pass his order.

A pop-up screen displaying the general conditions is not recommended because certain navigators will suppress those screens and the legibility of their text is not very good.

4. Evidence regime

In case of dispute the user must be able to prove the existence, contents, date etc. of his electronically concluded contract.

In case there is party autonomy with respect to the evidence regime of the insurance contract, like under the 1874 Insurance contract Act, an advance framework agreement could stipulate a contractual electronic evidence regime.

¹⁰ Commission on Unfair Contract Terms, opinion nr. 24.

¹¹ Tribunal Liège, October 1st 2008, *DAOR*, 2009, p. 326.

Since the regime in art. 10 of the 1992 Land Insurance Contract Act requiring evidence of the insurance contract between contract partners in the format of a written document, is mandatory as per its art. 3, the evidence regime of electronic contracting cannot be stipulated by contract but must be based on a legal provision.

The legislation/regulation introducing the electronic evidence is based on the principles of (i) technology neutrality¹², (ii) transversal, cross-cutting application in all fields of the body of law¹³ and (iii) functional equivalence with the characteristics of paper based evidence¹⁴.

The evidence regime for distance electronic contracting is as follows :

The law assimilates the electronic version with the paper carried signature if it meets 2 conditions : identification of its author and guarantee of the integrity of the deed (art. 16 Act on the Services of the Information Society, art. 4§4-5 of the Act on the Electronic Signature, art. 1322 second paragraph Civil Code). The judge can assess the evidentiary value of the electronic(ally signed) document, unless :

- (i) the signature was of the “advanced” type, i.e. :
 - unique for the signatory
 - whose author is identifiable
 - generated by means controlled exclusively by the signatory
 - linked to the data in such a manner that any alteration is traceable (guarantee of the integrity of the document)
- (ii) generated with a qualified certificate
- (iii) and generated by a safe device.

At present only the technique based on asymmetric encryption (using two complementary keys, a public one and a private one) meets these requirements : in practice via the chip in the ID-card, inserted in a card reader and validated by a pin code or pass-word. In practice this signing technique is generally not used yet for on-line insurance contracting.

Applications such as digipasses combined with a bank card, or scanned documents containing a signature and sent as an attachment by e-mail could qualify as valid “simple” signature.

In order to be assimilated with a written document, an electronic document must meet the requirements of (i) legibility, (ii) sustainability (art. 16 Act on the services of the information society) and (iii) integrity of the information.

The legal regime for the electronic registered mail is not yet operational¹⁵.

In several respects the Act on the Services of the Information Society stipulates a reversal of the onus of proof by shifting it to the service provider (e.g. see art. 12 and 14§4).

¹² Thus avoiding to adapt the legislation when technology develops.

¹³ Thus avoiding the need to adapt ad hoc every single legal provision that contains a rule on evidence.

¹⁴ Thereby acknowledging the specificity of the digital environment.

¹⁵ JACQUEMIN, H., *O.c.*, p. 63, nr. 43

5. Prohibition of default-option systems

Art. 44 of the Act on Market Practices and Consumer Protection forbids pre-ticked boxes for the purpose of avoiding the order of undesired services (e.g. a cancellation insurance when concluding a travel contract). Only an “opt-in” system (as opposed to an “opt-out” system) is allowed : the consumer must positively tick the box to confirm his order.

The same goes for the acknowledgement by the customer that he has read and accepted the general conditions (art. 75§1 and art. 2,28° Market Practices and Consumer Protection Act).

The Market Practices and Consumer Protection Act contains a provision (art. 44) that specifically forbids the service provider to use default-options, that must be expressly rejected by the consumer in order to avoid additional orders of products/services. It applies to all consumer contracts.

6. Misleading publicity

Electronic publicity must be made recognizable inherently or by the express mention “publicity” (art. 13, 1° Act of 11 March 2003 on the Services of the Information Society)

The sender of the publicity must be identifiable (art. 14§3 Act on the Services of the Information Society)

7. Misuse of personal data and privacy

Without prejudice to art. 9 and following of the Act of 8 December 1992 on the protection of privacy, the Act of 13 June 2005 on the Electronic Communication (art. 122 and following) in principle forbids the use by the operator of data gathered from electronic communications, save for invoicing or marketing motives. In the latter case it requires the provider’s information to the user that his personal data flowing from his visit to the provider’s web-site are recorded in a file, the customer can consult and can have corrected. It also requires the user’s (revocable) consent in advance.

8. Installation of permanent “cookies” on the consumer’s ITC hardware.

The service provider must inform his customer on the installation of permanent “cookies” on the hard disk of the customer’s PC on the occasion of their on-line interaction (see §4 CEA Good Practices Guide) and he must agree with it in advance (art. 129 of the Act of 13 June 2005 on Electronic Communications).

9. Unsolicited publicity (spam)

The sending of unsolicited communications for marketing purposes is limited.

The sending of publicity through electronic mail requires an express advance “opt-in” agreement from the addressee (art. 14§1 Act of 11 March 2003 on the information society). The addressee’s advance consent is not required in case (art. 1 Spam Royal Decree):

- he is a pre-existing customer of the sender
- he is a legal person having a non-personalised e-mail address.

After the consent from the addressee, the latter is to be informed that he can at any moment express the desire not to receive any longer the publicity by electronic mail (“opt-out”) (art. 2 Spam Royal Decree).

A similar regime is contained in the Market Practices and Consumer Protection Act (art. 100 and following) with respect to automated calling/contact systems for direct marketing purposes.

10. Payment services

According to art. 36 of the Act of 10 December 2009 on payment services, the payment service provider (the bank) bears the risk of non-authorized payment transactions and incurs a duty of reimbursement to the payment service user (the account holder), save a deductible of EURO 150.00 in case of contributory (gross) negligence of the payment service user by omission to apply the prescribed security measures (art. 37). The sanction in case of contributory negligence by the professional (non-consumer) payment service user is subject to contractual deviations and hence not mandatory (art. 55).

A bank payment transaction may be effected on the basis of an electronic signature supported by a qualified certificate. According to art. 19 Act on the electronic signature, the holder of the qualified certificate is liable for the fraudulent use of it by a third person to generate a forged advanced electronic signature, until he has revoked the certificate. But as a *lex specialis* the regime of the Act on payment services, will prevail over art. 19 Act on electronic signature as a *lex generalis*.

11. Insolvency of intermediaries

The payment of the premium to an agent who presents himself as the proxy of the insurer, extinguishes the debt vis-à-vis the insurer regardless whether the latter actually received the money or not (art. 13 Land Insurance Contract Act of 25 June 1992 and art. 12 Insurance Intermediation and Distribution Act of 27 March 1995).

12. User complaint bodies

Users can file a complaint with :

- E-cops : the Belgian public contact point for internet abuse complaints
- Spamquad : the Belgian portal site in the fight against spam
- Federal Computer Crime Unit (FCCU) of the Federal Police
- Privacy commission
- General Directorate Supervision and Mediation of the Department of Economy : for complaints on publicity by e-mail
- BELMED : online mediation institution

5) Concerning the special role of insurance intermediaries

Are there in your legal system specific rules for intermediaries when acting in Internet operation? Examples: registration requirement, information duties, responsibilities with regard to website, protection of personal data, etc.

There are no specific rules for intermediaries in internet operations. That means that they equally must comply with the requirements imposed on other service providers.

With respect to the compliance by the insurance intermediary with his information duties, art. 12 quater of the Insurance and Reinsurance Intermediation and Distribution Act of 27 March 1995 allows different modalities to meet his information duty vis-à-vis the customer : either by communicating it on paper or on another sustainable medium that is available and accessible for the customer. To the extent that it relates to the relationship with a consumer, this provision is redundant and repeats the same rule as in art. 52 of the Market Practices and Consumer Protection Act. Only the concept of sustainable medium is defined more concretely in art. 1,17° of the Insurance Intermediation Act by specifying that a sustainable medium comprises : computer diskettes, cd-roms, DVDs, computer hard disks, but not internet websites, unless they meet the criteria in the definition of a sustainable medium. The European Court of Justice¹⁶ ruled in this respect that the internet website is to meet the requirement of guaranteeing the integrity (unilateral unalterability) of the data in order to qualify as sustainable medium.

The concept of “service provider” (art. 2, 26° Market Practices and Consumer Protection Act) is distinguished from the concept of “undertaking” (art. 2, 1° Market Practices and Consumer Protection Act). The (insurance) service provider takes the commitment of the performance duty under the (insurance) contract.

The undertaking is a broader concept and refers to any person pursuing an economic goal. Both the insurer and the insurance intermediary are undertakings. Only the insurer is the service provider.

According to art. 55 of the Act on Market Practices and Consumer Protection, the service provider is responsible for the compliance with the information duties, even if he is represented by a proxy or agent.

But the information requirements (art. 50-52 Market Practices and Consumer Protection Act) imposed on the service provider equally apply to the intermediary.

The confrontation of the concept of distance selling with the intervention of insurance intermediaries raises the question whether a sales operation loses its distance nature when concluded through an intermediary. When the contract is concluded in the physical presence of the customer and the intermediary, representing the service provider, the contract is not a distance contract (see art. 2, 21° and 22° Market Practices and Consumer Protection Act)¹⁷.

Dd. 10 March 2014

¹⁶ C.J. E.U., 5 July 2012, case C-49/11, Content Services Ltd.

¹⁷ See also STEENNOT, R., *Financiële diensten op afstand*, Brussels, Larcier, 2006, p. 14, nr. 12.