

TRANSPARENCY OF INSURANCE CONTRACT TERMS AND CONDITIONS AND PRE-CONTRACTUAL INFORMATION

Prof. Dr. Britt Weyts, University Antwerp Belgium

Dr. Daily Wuyts, Guest Professor University Antwerp Belgium

The issue concerns policyholder protection against misleading terms of insurance policies and the disclosure requirements to be met by insurers and insurance intermediaries prior to the conclusion of any insurance contract.

Reports should outline any applicable laws and regulations, and any legal remedies available against non-compliance, such as civil actions, financial penalties or disciplinary measures.

Particular attention should be paid to transparency rules on life insurance contracts, including a comparison with similar rules applicable to financial intermediation.

The issue does not concern a policyholder/insured's duty of disclosure.

QUESTIONNAIRE

A. Transparency of insurance contracts

I. Transparency of insurance contract provisions under general contract law

As used herein, transparency means the clarity, comprehensibility and exhaustiveness of a contractual text. Please, indicate whether your country has any provisions of law or regulations and/or case-law decisions governing transparency in insurance contract terms and conditions, specifying whether:

- 1. there are separate rules governing specific types of contract or contracts with weaker parties, such as contracts concluded between a seller or supplier and a consumer; and**
- 2. any special duties are provided for in one-side, adhesion or standard contracts, and whether the *contra proferentem* doctrine is applied to any such contract.**

Both question 1 and 2 will be answered together:

In Belgian law, the rule of contractual freedom is the basis of contract law. Insurance contracts like other contracts, are made when the offer of one party is accepted by the other party. Insurance contracts are often adhesion contracts, which means that they are prepared by the insurer and presented to the other party. However, they are subject to the same rules of

interpretation as other contracts. The Belgian Civil Code prescribes several interpretation rules that are applicable to all contracts, including insurance contracts.¹

The starting point is very simple: when the terms of the contract are clear, interpretation is not necessary.² Moreover, the Belgian Supreme Court (Hof van Cassatie) refuses to interpret (insurance) contracts and will nullify decisions of lower courts if they refuse to apply clear contract terms.³

However, many insurance contracts lead to discussions on the meaning of certain provisions. The overriding aim has been said to find the intention of the parties (art. 1156 Civil Code). If after the application of this rule, the meaning remains unclear, courts are faced with ambiguity. According to art. 1162 Civil Code, the *contra preferentem* doctrine is applicable.⁴ The Belgian Supreme Court has stressed that this doctrine can only be applied when the meaning of (certain terms of) the insurance contract is uncertain.⁵ This doctrine of *contra preferentem* provides that an ambiguous provision will be construed against the party that imposed its inclusion in the contract – or, more accurately, against the interests of the party who imposed it. This means that in practice, provisions of an insurance contract will be interpreted against the insurer and in favor of policyholders.⁶ This rule has been criticized by different authors, as it is not necessarily the insurer who stipulates all contract provisions.⁷

However, this discussion does not seem important anymore for contracts with consumers, as consumers benefit from the rule of art. 40 § 2 of the WMPC⁸ (Act on market practices and consumer protection). This rule prescribes the general application of the *contra preferentem* doctrine on all contracts with consumers, including insurance contracts. In case of doubt about the meaning of a provision, preference must be given to the interpretation most favorable to the consumer.⁹

Nevertheless it has to be noted that the scope of application of this provision is limited to the contracts concluded with consumers. According to art. 2, 3° WMPC a consumer is a natural person who obtains or uses products (that are brought into circulation) exclusively for non-professional goals. This definition clearly limits the scope of application of art. 40 §2 WMPC. It implies that art. 40 §2 WMPC is not applicable in the contractual relations between an

¹ W. VAN GERVEN en S. COVEMAERKER, *Verbindenissenrecht*, Louvain, Acco, 2006, 95.

² L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 281.

³ Cass. 19 February 1987, *RGAR* 1989, nr. 11505.

⁴ P. CAMBIE, *Onrechtmatige bedingen*, Brussels, Larcier, 2009, 136-137.

⁵ Cass. 22 February 2002, www.cass.be.

⁶ Cass. 23 June 1983, *Pas.* 1983, I, 1996; P. COLLE, *Algemene beginselen van het Belgische verzekeringsrecht*, Antwerp, Intersentia, 2011, 50; M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 2011, 372; B. TOUSSAINT, “L’interprétation et rédaction des contrats d’assurance”, in J. ROGGE, M. REGOUT and F. LONGFILS (eds.), *Liber amicorum Jean-Luc Fagnart*, Louvain la Neuve, Anthemis, 2008, 294.

⁷ H. COUSY, “Onevenwichten in verzekeringsovereenkomsten: een verkennende benadering” in H. COUSY, H. CLAASSENS and C. VAN SCHOU BROECK (eds.), *Actualia Verzekeringen*, Antwerp, Maklu, 2000, 201; P. COLLE, *Algemene beginselen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2011, 50-52.

⁸ Wet 6 april 2010 betreffende marktpraktijken en consumentenbescherming, *BS* 12 april 2010.

⁹ I. DEMUYNCK, “Bedingen tot bepaling van de dekkingsomvang in verzekeringsovereenkomsten; toetsbaar (onrechtmatig) beding of ontoetsbaar kernbeding?”, *TBBR* 2002, 77-81.

insurer and a legal person or between an insurer and a natural person who, even only partially, obtains insurance in the course of his business or profession.

As said before, insurance contracts are often adhesion contracts with standard terms. This practice has the advantage of saving time and creating standard patterns of dealing so as parties to know what sort of risks they will have to bear and cover by insurance. On the other hand, adhesion contracts are also been used by commercial suppliers of goods and services to exploit superior bargaining power, especially in contracts with consumers.¹⁰ Therefore, in addition to the mentioned interpretation rule, the WMPC also prescribes a general rule that prohibits unfair contract terms. On the basis of art. 2.28 WMPC, a policy condition in a contract with a consumer is unfair when it creates in itself or in conjunction with other conditions, a manifest imbalance in the parties' rights and obligations, to the detriment of the consumer.

Article 73 WMPC completes the definition of unfair contract terms by stressing that the unfairness of a contractual term shall be assessed taking into account the nature of the products or services for which the contract was concluded and by referring, at the time of the conclusion of the contract and to all other terms of the contract or another contract on which its dependent. To assess the unfairness, account shall also be taken of the plain intelligible language requirement referred to in art. 40 § 1. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange on the other, in so far as these terms are in plain intelligible language. It may be clear that the qualification of a contract term is very important, as art. 73 WMPC states that the assessment of the unfairness of contractual terms is not possible for so called "core terms".¹¹

Article 74 WMPC prescribes a "black list" of 33 contractual terms that are unfair. Those terms are legally considered to be unfair because they lead to imbalance between the rights and obligations of the parties, to the detriment of the consumer.¹²

The more general rules of the artt. 2, 28° and 73 WPMC are subordinate to the rule of art. 74. Concretely, the court will first examine whether the contractual terms are in accordance with art. 74. If not, the court has to nullify the provisions in dispute. Secondly, when the terms are

¹⁰ H. COUSY, "Onevenwichten in verzekeringsovereenkomsten: een verkennende benadering" in H. COUSY, H. CLAASSENS and C. VAN SCHOU BROECK (eds.), *Actualia Verzekeringen*, Antwerp, Maklu, 2000, 198.

¹¹ I. DEMUYNCK, "Bedingen tot bepaling van de dekkingsomvang in verzekeringsovereenkomsten; toetsbaar (onrechtmatig) beding of ontoetsbaar kernbeding?", *TBBR* 2002, 414; H. KEULERS, *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 78; L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 195.

¹² R. STEENNOT, F. BOGAERT, D. BRULOOT and D. GOENS, *Wet Marktpraktijken*, Antwerp, Intersentia, 2010, 200.

not unfair in the sense of art. 74, the court can check whether the terms can be considered to be unfair on the base of artt. 2, 28° or 73.¹³

II. Transparency specific rules applicable to insurance contracts

Transparency rules include both the rules of contract law and any rules issued by authorities empowered to supervise insurance companies (supervisory rules).

1. Please, indicate which rules must be observed by insurance companies in setting out insurance contract provisions, distinguishing between insurance contract law rules and supervisory rules, and specifying:

(a) any rules common to all insurance contracts;

Simply to deprive standard terms of legal validity might not be an effective way of controlling their abuse, especially in contracts between commercial suppliers (such as insurers) and consumers. Belgian legislation therefore makes use of techniques of control.

Firstly, the content of a contract can be controlled by requiring certain terms to be included in it. In principle, insurance contracts are made when the offer of one party is accepted by the other party. Insurance applications may deal directly with insurers or may deal through insurance intermediaries. Whether through intermediaries or not, applicants usually obtain a quotation from an insurer. Applicants can accept the quotation by completing the insurer's proposal form. After receiving this document, the insurer must take a decision in a period of 30 days. He can either accept or refuse to contract with the applicant. Another possibility is that the conclusion of the contract is subject to further investigation.¹⁴ In case of contracting, art. 10 WLVO (Insurance Contract Act)¹⁵ demands a written contract. The legislator has chosen for contractual formalism, by making the evidence of the insurance contracts depend on certain mandatory elements in the contract.¹⁶ Those elements are: the date on which the contract was concluded, the date of effect of the contract, the duration of the contract, the identity of the parties involved and also the address of the insurer, the kind of risk covered and the premium to be paid by the policyholder. In case the contract was concluded through an insurance intermediary, his name and address must also be mentioned in the contract.

¹³ H. KEULERS, *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 81; M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 2011, 71.

¹⁴ Article 4 WLVO.

¹⁵ Wet 25 juni 1992 op de landverzekeringsovereenkomst, *BS* 20 august 1992.

¹⁶ H. JACQUEMIN, "Le formalisme du contrat d'assurance: analyse des règles en vigueur à l'aune des progrès techniques et de certaines pratiques contractuelles" in B. DUBUISSON and V. CALLEWAERT (eds.), *La loi sur le contrat d'assurance terrestre. Bilan et perspective après 20 années d'application*, Brussels, Bruylant, 2012, 21.

In practice, these legal requirements are mostly seen as minimal requirements, as most insurance contracts are much more extensive by imposing general and special policy conditions.¹⁷ However, the contractual freedom of the insurer is limited, mainly in view of the protection of the policyholders.¹⁸ While parties are normally free to determine the conditions of their contract, the WLVO dictates an extensive regulation, predominantly mandatory law.¹⁹ A good example is the system of the policyholder's duty to inform the insurer. The remedies in case of non-disclosure are regulated in such a detailed and strict way, that a different regulation in a policy is not possible.²⁰ Apart from the WLVO, Belgian law has also regulation for particular types of insurance contracts (see *infra*). The technique of minimum insurance coverages is also an important instrument for the protection of the consumers.

Secondly, the content of the insurance contracts can be controlled *ex post* through the application of the Belgian supervisory rules, that are included in the Controlewet (insurance control Act)²¹ and the Controlereglement (Royal Decree on the control of insurance companies)²². These regulation covers mainly the conditions of authorisation and permission for Belgian insurance companies. The control on the compliance on the conditions is performed by the FSMA (Financial Services and Markets Authority). Apart from the financial control, we must establish an important evolution with respect to the control on the premiums and policy provisions.

In the past, the control was exercised *a priori*, meaning that insurers were obliged to communicate their premiums and policy provisions before using them on the market. This practice has been ended in view of promoting competition on the insurance market. This means that control can only be exercised *a posteriori*.²³ However, the control remains important.²⁴ Furthermore, art. 19 of the Controlewet foresees that regulations may be issued by Statute for the establishment and implementation of premiums and provisions, and of all documents related to the formation and execution of insurance contracts. This rule was the basis for more detailed regulations (see *infra*).

Moreover, art. 14 Controlereglement provides that all the policy provisions must be drafted in clear and accurate terms and that the terms of the contract must not contain any clause that breaches the equivalence of the commitments of the insurer and policyholder. Contract terms may not cause a significant imbalance in the parties' rights and obligations arising under the

¹⁷ M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 2011, 363 ; J.L. FAGNART, "Le contrat d'assurance rédigé en termes clairs et précis: souhait raisonnable ou rêve impossible?" in C. VAN SCHOU BROECK, W. DEVROE, K. GEENS and J. STUYCK (eds.), *Liber amicorum H. Cousy*, Antwerp, Intersentia, 2011, 426.

¹⁸ J.L. FAGNART, *Traité pratique de droit commercial. Tome 3 Droit privé des assurances terrestres. Principes généraux*, Kluwer, 2011, 26-27.

¹⁹ According to art. 3 WLVO.

²⁰ H. COUSY, "Onevenwichten in verzekeringsovereenkomsten: een verkennende benadering" in H. COUSY, H. CLAASSENS and C. VAN SCHOU BROECK (eds.), *Actualia Verzekeringen*, Antwerp, Maklu, 2000, 203.

²¹ Wet 9 july 1975 betreffende de controle der verzekeringsondernemingen, *BS* 29 july 1975.

²² KB 22 february 1991 houdende algemeen reglement betreffende de controle op de verzekeringsondernemingen, *BS* 11 april 1991.

²³ H. COUSY, "Onevenwichten in verzekeringsovereenkomsten: een verkennende benadering" in H. COUSY, H. CLAASSENS and C. VAN SCHOU BROECK (eds.), *Actualia Verzekeringen*, Antwerp, Maklu, 2000, 206.

²⁴ M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 56-58.

contract, under the detriment of the policyholders. By the general terms of art. 14, courts are rather free in the assessment of the terms of an insurance contract. We must however establish the lack of jurisprudence on the basis of art. 14, probably because of the extensive regulation in the WLVO which has limited the contractual freedom of the insurer.

The Belgian Supreme Court has stressed that the clearness and accuracy of policy provisions must be judged from the perspective of a layman, who has not had legal education.²⁵ While a part of Belgian doctrine is in favour of this rule²⁶, others are more critical. J.L. Fagnart has mentioned that the demands of clearness and accuracy are a “myth” as the regulation on Insurance law is very technical and the legal language rather formal.²⁷

As mentioned above, insurers are also subject to the WMPC, which means that contract terms of insurance contracts must be in accordance with the requirement of fairness.

(b) whether different rules are applied to the following types of contract:

(i) life insurance contracts;

Life insurance contracts are subject to a specific regulation concerning the transparency of the contract. On the one hand, the life insurer has a much more wider duty to inform.²⁸ It concerns mainly financial technical information. (see *infra*). On the other hand, life insurances must contain a large number of mandatory policy provisions. Article 10 of the KB Leven (Royal Decree on life insurances)²⁹ prescribes three mandatory contract provisions. Firstly, after the life insurance contract is concluded, it is possible that the insurer discovers non-disclosure by the insured. If the non-disclosure is fraudulent, the contract will be nullified. However, when the non-disclosure is not fraudulent, the question arises whether or not the insurer can appeal on this lack of information of the insured. According to art. 10 § 1 of the KB Leven, a life insurance contract must indicate whether or not the insurance coverage is indisputable.³⁰ If so, the contract must state to what extent and until when the insurer can appeal on this non-disclosure. There is a maximum period of 1 year.

Secondly, the contract indicates if en for which period the technical bases of pricing are being guaranteed (art. 10 § 2 KB Leven).

Thirdly, according to art. 10 § 3 of the KB Leven the contract provides to what extent and on which conditions the policy leads to profit sharing.

²⁵ Cass. 9 April 1992, *Arr.Cass.* 1991-92, 769.

²⁶ C. PARIS, “L’interprétation des clauses d’une police d’assurance en cas de doute”, *JLMB* 2003, 1819; I. DEMUYNCK, “Interpretatie van verzekeringsovereenkomsten”, *DCCR* 2002, 69.

²⁷ J.L. FAGNART, “Le contrat d’assurance rédigé en termes clairs et précis: souhait raisonnable ou rêve impossible?” in C. VAN SCHOU BROECK, W. DEVROE, K. GEENS and J. STUYCK (eds), *Liber amicorum H. Cousy*, Antwerp, Intersentia, 2011, 425-437.

²⁸ J.M. BINON, “La métamorphose du devoir de transparence en assurance vie” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2010, 95- 127.

²⁹ KB 14 november 2003 betreffende de levensverzekeringsactiviteit, *BS* 14 november 2003, *err.*, *BS* 23 juli 2004.

³⁰ L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 594-595.

Further on, the policyholder is free to decide whether or not he will pay the premiums for the life insurance contracts, while the payment of the premium is compulsory in other insurance contracts. The life insurance contract must mention this freedom (art. 11 of the KB Leven).

The legislator wants to make sure that the policyholder has knowledge of the contractual provisions. Therefore, art. 5 of the KB Leven obliges the insurer to deliver a copy of the life insurance contract to the policyholder.

(ii) non-life insurance contracts;

There are some specific rules for non-life insurances, which will be discussed under (iii).

(iii) particular types of insurance contracts (e.g. accident or sickness policies); and

For certain types of insurance contracts, the legislator has chosen to formulate minimum coverage requirements.³¹ An example is the KB Privé-leven (Royal Decree on family insurance)³². Article 2 provides that all family insurance contracts must at least answer to all legal minimum insurance coverages. Given the rule of contractual freedom, parties can agree that the coverage will be more extensive.³³

Another technique involves the doctrine of “implied risks”. More specifically, the insurance coverage for a certain risk, automatically implies the coverage for another risk. These are usually risks which were difficult to insure in the past.³⁴ An example can be found in the Terrorismewet (Act on the insurance of damages caused by terrorism)³⁵. Article 10 of this Act provides that the damages caused by acts of terrorism in Belgium, must be covered in certain insurance contracts, such as occupational accident insurances, motor vehicle insurance, fire insurance ...

(iv) compulsory insurance contracts

³¹ J.L. FAGNART, *Traité pratique de droit commercial. Tome 3 Droit privé des assurances terrestres. Principes généraux*, Kluwer, 2011, 123; K. BERNAUW, “Minimumgarantievoorwaarden: qui peut le plus; peut le moins?” in *Liber amicorum Hubert Claassens*, Antwerp, Maklu, 1998, 55-64.

³² KB 12 January 1984 tot vaststelling van de minimum-garantievoorwaarden van de verzekeringsovereenkomsten tot dekking van de burgerrechtelijke aansprakelijkheid buiten overeenkomst met betrekking tot het privé-leven, *BS* 31 January 1984.

³³ P. COLLE, *Handboek bijzonder gereguleerde verzekeringscontracten*, Antwerp, Intersentia, 2011, 89-90.

³⁴ J.L. FAGNART, *Traité pratique de droit commercial. Tome 3 Droit privé des assurances terrestres. Principes généraux*, Kluwer, 2011, 168.

³⁵ Wet 1 April 2007 betreffende de verzekering tegen schade veroorzaakt door terrorisme, *BS* 15 May 2007.

In Belgium, all vehicles must have at least third party insurance to cover any physical harm or damage to a third party or their property. Proof of insurance must be carried at all times, and there are penalties for drivers of vehicles without valid insurance. Each driver has the possibility to take an extra insurance, more particular partial or complete coverage. Partial coverage is considered to be an extra insurance to the third party liability and will cover damages to your car and physical injuries that you yourself have sustained. With a complete coverage insurance you are not only covered for damage due to an accident but also for damage from a storm, glass fracture, theft and fire.

The contractual freedom for car insurance is very limited in Belgian law. The Belgian legislator has chosen to work out a model contract (Royal Decree on the mandatory model contract)³⁶ that is legally mandatory and which secures all rights and obligations of the parties. Deviations are only possible if they are in favor of the policyholders.³⁷

- (c) **whether there are special rules for insurance investment products, such as capital redemption policies, life insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies);**

The main problem in Belgian law concerns the qualification of investment products linked to an investment fund or stock index. While they are mostly been sold as insurance contracts, courts are more reluctant to this qualification. An insurance contract requires a “risk”, while often for these kinds of contracts the performance of the insurer does not depend on a risk. This does not mean that these contracts are null. They just have to be considered as contracts for which the regulation on insurance law is not applicable.³⁸

However, if such a contract is considered to be an insurance contract, the KB Leven prescribes some specific rules, which are mostly very technical. For instance, a contract can be linked to different funds, in which case it must indicate the extent to which the premium of performances are linked to these different funds.³⁹

2. **Please, indicate the consequences of infringing transparency duties under contract law and insurance contract law, specifying:**

- (a) **whether and under which circumstances infringement will affect a contract or individual contractual provisions (invalidity of contract or individual contractual provisions, termination of contract or other events);**

³⁶ KB 14 december 1992 betreffende de modelovereenkomst voor de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen, *BS* 3 february 1993, *err.*, *BS* 24 february 1993.

³⁷ P. COLLE, *Handboek bijzonder geregementeerde verzekeringscontracten*, Antwerp, Intersentia, 2011, 129.

³⁸ L. CORNELIS and J. DELVOIE, “Contractuele aspecten verbonden aan het bankverzekeren”, in K. BYTTEBIER, K. DE BATSELIER and E. JANSSENS (eds.), *Bankverzekeren*. Bancassurance, Antwerp, Kluwer; 2002, 299 e.v.

³⁹ Article 58 KB Leven.

As said before, an insurance contract demands a written contract that fulfils the demands of art. 10 WLVO. The insurance contract is incomplete until all the terms of the formal contract are stipulated in the written document. If the contract does not comprises all these elements as mentioned in art. 10, the agreement is not legally binding. The written document can only be used as “the beginning of written evidence”.⁴⁰ In that case, the existence of the insurance contract can be proved by witnesses or presumptions.⁴¹

The infringement of the WPMC can lead to different sanctions. The clauses mentioned in art. 74 of the WPMC must be nullified when they are provided in the (insurance) contract. This sanction is prescribed by art. 75 which means that the court can not decide otherwise. Clauses in the sense of art. 2, 28° WMPC can be nullified by the court. There does not exist a legal obligation in that case.

(b) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;

There are no specific rules regarding to compensation for infringement of the transparency rules by insurers. Consumers can fall back on the general rules of contractual and extra-contractual liability. When a consumer can proof that his damage was caused by the fault of the insurer, he can get compensation.

(c) whether any other consequences of infringement have been provided for;

In case of conflict with an insurer, a consumer has the possibility to appeal on the Ombudsman for Insurances, who will try to find a (extrajudicial) solution, often with success.⁴² The Ombudsman for Insurances publishes his annual report on his website. The latest report of 2011 mentions more than 4000 complaints.⁴³

(d) which consequences may follow infringement of supervisory rules, such as prohibition or restriction from continuing to conclude the contract involved and/or pecuniary penalties. Further specify whether any adopted measure involving penalties or restrictions on the activities of an insurance company is subject to the right to apply to the courts; and

According to art. 21 octies § 1 Controlewet the FSMA has the authority to demand on the

⁴⁰ G. JOCQUÉ, “Het bewijs van de contractvoorwaarden in verzekeringen”, *De Verz.* 2008, 9.

⁴¹ Article 10 WLVO.

⁴² M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 2011, 74.

⁴³ www.ombudsman.as.

hand the abolition of the premiums that what lead to losses and on the other hand the repeal or reform of policy provisions which are not in accordance with the law or other regulations.

Further on, art. 19 of the Controlewet stipulates that policy provisions which are not clear, inaccurate or in conflict with the law, are considered to be drawn in accordance with the law and the requirements on transparency. The doctrine has been very critical for this rule. How can an unclear or illegal policy provision become clear or legal, just because it is legally stipulated that is considered to answer to this conditions?⁴⁴

On the basis of art. 82 Controlewet, administrative sanctions can be imposed by the FSMA.

- (e) **whether a remedy taken by the supervisory authority is a *de jure* or *de facto* element binding upon the judge seised of the case in an action brought by the weaker party against the stronger party for the same facts as those prompting the remedy so taken.**

It may be clear that a policyholder cannot appeal on art. 21 octies of the Controlewet, because the FSMA can not interfere in existing contracts on the basis of this art.. However, the sanction of art. 21 octies can be important for future policyholders, as it leads to the removal or the change of policy provisions which were not compatible with the WLVO or other regulations.

On the other hand, the sanction of art. 19 of the Controlewet is relevant for individual policyholders, as it permits the so called “legal conversion” of the insurance contract. As said above, Belgian doctrine is very critical for these rule and states that this sanction can only be applied in a few cases. An example is the family insurance contract. If a contract does not answer to the minimum coverage requirements, the sanction of legal conversion can be applied. As so, the policyholder can appeal on the legal minimum standards.⁴⁵ In many other cases, the sanction of art. 19 seems not applicable, for example in case of infringement of art. 14 Controlewet. It is highly questioned whether art. 19 permits a court in an individual case to replace the provisions of the contract by other provisions who, according to the court, answer to the demands of art. 14.⁴⁶ Jurisdiction on this matter cannot be found.

B. Pre-contractual information and *bona fide* negotiations

⁴⁴ J.L. FAGNART, “Le contrat d’assurance rédigé en termes clairs et précis; souhait raisonnable ou rêve impossible?” in *Liber amicorum Herman Cousy*, Antwerp, Intersentia, 2011, 425- 438.

⁴⁵ P. COLLE, *Handboek bijzonder gereguleerde verzekeringcontracten*, Antwerp, Intersentia, 2011, 89.

⁴⁶ H. COUSY, “Onevenwichten in verzekeringsovereenkomsten: een verkennende benadering” in H. COUSY, H. CLAASSENS and C. VAN SCHCOUBROECK (eds.), *Actualia Verzekeringen*, Antwerp, Maklu, 2000, 207.

As used herein, “pre-contractual information” means the duty to inform and advise the policyholder prior to executing an insurance contract.

As used herein, “*bona fide* negotiations” means the duties to negotiate fairly, to refrain from malicious or even merely reticent behaviours, and to provide the other party with all information that is relevant to, known or even merely knowable within the scope of ordinary care with a view to, contract execution.

I. Pre-contractual information under general contract law

Please indicate whether:

1. there are separate rules governing specific types of contract or contracts with weaker parties, such as contracts concluded between a seller or supplier and a consumer; and
2. any special duties are placed upon the party setting forth contractual terms in one-side, adhesion or standard contracts.

Question I will be completely answered here.

Pre-contractual liability

The Belgian Civil Code lacks a general tenet concerning the pre-contractual legal relation between future contracting parties. This also means that under the general law of obligations there is no specific rule that obliges parties to inform each other during the pre-contractual phase.⁴⁷ However, this does not mean that this phase escapes the grasp of the law. Since several decades the legal doctrine as well as the courts have accepted that the pre-contractual relations between parties are governed by the concept of the *culpa in contrahendo* and give rise to certain obligations.⁴⁸

The grand majority of the doctrine as well as the Belgian Supreme Court have accepted that the legal basis for the *culpa in contrahendo* can be found in artt. 1382-1383 Belgian Civil Code. These rules govern the extra-contractual relations between parties and therefore are also deemed applicable in a pre-contractual situation, which is nothing more than a specific species of an extra-contractual relation.⁴⁹ This means that besides any specific provisions

⁴⁷ A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 432, nr. 999; J-M. BINON, “La métamorphose du devoir de transparence en assurance vie” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 117; L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 175, nr. 259.

⁴⁸ G. SCHRANS, “Praecontractuele verhoudingen naar Belgisch recht. Preadvies” in VERENIGING VOOR DE VERGELIJKENDE STUDIE VAN HET RECHT VAN BELGIË EN NEDERLAND (ed.), *Jaarboek 1967-68*, Zwolle, Tjeenk-Willink, 1968, 226-229; A. DE BOECK, “De precontractuele aansprakelijkheid anno 2010” in *Verbintenissenrecht*, Bruges, die Keure, 2010, 1-2.

⁴⁹ Cass. 10 december 1981, Arr. Cass. 1982, 502; A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia,

(*infra*), artt. 1382-1383 Civil Code apply to the phase prior to the conclusion of any category of insurance (liability insurance, life insurance...) and regardless of the fact whether it concerns business or consumer insurance.⁵⁰

The theory that the *culpa in contrahendo* can also be based on art. 1134, lid 3 Civil Code⁵¹ (that obliges parties to execute their contract in good faith), is, although sometimes applied in that way by the (lower) courts,⁵² not generally accepted. The main reason for this is that the concept of good faith is not generally recognized as a general principle of law. As a result art. 1134, lid 3 Civil Code can only be applied in the way the legislator intended it, namely to the execution of contracts and not to the conclusion of contracts.⁵³

Articles 1382-1383 Civil Code are fault-based and drafted from a curative point of view. They state that one is liable for the damages caused by his fault. From a preventive and normative point of view these rules set out an abstract standard of conduct that one has to uphold in his relationship to others if he wishes to avoid liability.⁵⁴ This standard of conduct is referred to as the *bonus pater familias*-criterium. The smallest deviance (*culpa levissima*) from this standard can lead to liability (on the condition that damage is caused).

This standard of conduct requires that one acts as would a normal, careful and reasonable person of the same category, placed in the same extrinsic circumstances. Since this is an abstract standard of conduct, in principle, personal characteristics (age, sex, inexperience) or abilities (specific skills) of a person are irrelevant to assess his conduct.⁵⁵ However when a person functions as a professional his conduct (while exercising his profession)⁵⁶ has to be compared to the conduct of a careful and reasonable person of the same professional category. This means that the conduct of a physician has to be compared to that of a normal careful physician and not to that of a layman. It is generally accepted that if a person wants to function as a professional he has to possess the necessary proficiencies to do so, what implies that his conduct must also be judged according to those proficiencies. This is considered an

2000, 193-194, nr. 442; L. CORNELIS, *Beginnselen van het Belgisch buitencontractuele aansprakelijkheidsrecht*, Antwerp, Maklu, 1989, 112-113, nr. 66; H. GEENS, "De grondslagen van de culpa in contrahendo", *Jura.Falc.* 2003-04, 433-460; W. VAN GERVEN and S. COVEMAEKER, *Verbintenissenrecht*, Louvain, Acco, 117; P. VAN OMMESLAGHE, *Droit des obligations*, Brussels, Bruylant, 2010, 519-520, nr. 336; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 85, nr. 112; P. WÉRY, *Droit des Obligations*, Brussels, Larcier, 2011, 322, nr. 356.

⁵⁰ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 26, nr. 2.2.1. *juncto* 46, nr. 6.3.

⁵¹ See i.a.: H. COUSY, "De rol van de goede trouw in het verzekeringscontract" in *Liber amicorum Jan Ronse*, Brussel, Story-Scientia, 1986, 15, nr. 2, footnote 25; W. WILMS, "Het recht op informatie in het verbintenissenrecht", *RW* 1980-81, 499-501; D.M., PHILIPPE, "Rapport belge" in *La bonne foi. Journées Louisianaises*, Parijs, Litec, 1992, 71-74.

⁵² For some examples, see: A. DE BOECK, "De precontractuele aansprakelijkheid anno 2010" in *Verbintenissenrecht*, Bruges, die Keure, 2010, 2-3, nr. 4.

⁵³ R. KRUIHOF, H. BOCKEN, F. DE LY and B. DE TEMMERMAN, "Overzicht van rechtspraak (1981-1991): verbintenissen", *TPR* 1994, 279, nr. 75; A. VAN OEVELEN and E. DIRIX, "Kroniek van het verbintenissenrecht (1981-1984)", *RW* 1985-86, 11, nr. 8.

⁵⁴ W. DE BONDT, *De leer der gekwalificeerde benadeling*, Antwerp, Kluwer, 1985, 209-211.

⁵⁵ T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 127, nr. 176.

⁵⁶ In his personal life he is subject to the same standard of conduct as a non-professional.

objective materialization of the abstract standard of conduct.⁵⁷ For an insurer, who per definition is a professional, this means that his conduct in the phase prior to the conclusion of a contract has to be compared to that of a normal, careful and reasonable insurer.

Since it has been established that the phase prior to the conclusion of the insurance contract is governed by artt. 1382-1383 Civil Code,⁵⁸ the essential question becomes whether or not (and to what extent) a reasonable and prudent insurer would inform the future policy holder.

On the principle that the insurer has a pre-contractual duty to inform under the general law of obligations, both the doctrine and the courts are unanimous. Since the insurer (as a professional) has a great advantage as to the knowledge of the products he offers and since he knows that the customer legitimately places his trust in him,⁵⁹ it is reasonable to accept that under those circumstance he has a duty to inform and to alleviate this inequality.⁶⁰ Although there sometimes remains some indistinctness about the legal grounds on which this duty is based,⁶¹ most scholars agree that the insurer has a duty to inform under artt. 1382-1383 Civil Code.⁶² The same goes for the courts. Although there is relatively little case law where the insurer is actually held liable for an infringement on his pre-contractual duty to inform, the courts have no problem to acknowledge the existence of such a duty⁶³ on the basis of artt. 1382-1383 Civil Code.⁶⁴

Though the principle by itself is pretty clear, the precise extent of the duty is not. As we have stated, the range of the insurer's duty to inform is determined by the abstract norm of conduct of artt. 1382-1383 Civil Code and thus by the conduct of a reasonable and careful insurer placed in the same extrinsic circumstance. This means that this abstract norm has to be

⁵⁷ T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 130-131, nr. 181.

⁵⁸ Kh. Turnhout 14 november 2011, *TBH* 2012, 311; P. COLLE, *Algemene beginselen van het Belgische verzekeringsrecht*, Antwerp, Intersentia, 2011, 32, nr. 29.

⁵⁹ H. COUSY, "De rol van de goede trouw in het verzekeringscontract" in *Liber amicorum Jan Ronse*, Brussel, Story-Scientia, 1986, 11-13, nr. 1.

⁶⁰ A. DE BOECK, "De precontractuele aansprakelijkheid anno 2010" in *Verbintennisrecht*, Bruges, die Keure, 2010, 19, nr. 29 en M. GRÉGOIRE en V. DE FRANQUEN, "Bancassurfinance. Devoir d'information" in K. BYTTEBIER, K. DE BATSELIER and E. JANSSENS (eds.), *Bankverzekeren. Bancassurance*, Antwerp, Kluwer, 2002, 341, nr. 4.

⁶¹ J-L. FAGNART, *Droit privé des assurances terrestres. Principes généraux* in *Traité pratique de droit commercial*, Kluwer, 2011, 87, nr. 145; M. FONTAINE, *Verzekeringsrecht*, Brussel, Larcier, 2011, 272, nr. 338.

⁶² K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar", in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2010, 46, nr. 6.3; J-M. BINON, "La métamorphose du devoir de transparence en assurance vie", in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2010, 119; P. COLLE, *Algemene beginselen van het Belgische verzekeringsrecht*, Antwerp, Intersentia, 2011, 32, nr. 29; P. DE JONGHE, "Informatieplicht van de verzekeraar", *Jura Falconis*, 510-511 en 525-526; C. VERDURE, "L'obligation d'information de l'assureur direct" (noot onder Brussel 1 december 2006), *DCCR* 2007, 43, nr. 4.

⁶³ Cases where the legal grounds are not specified: Brussels 1 december 2006, *DCCR* 2007, 38, noot C. VERDURE; Liège 22 november 2007, *DBF* 2009, 290; Rb. Antwerp 27 may 2009, *RDC* 2011, 322.

⁶⁴ Kh. Brussels 3 december 1996, *TBH* 1997, 741; Mons 26 mei 1997, *TBH* 1998, 655; Antwerp 23 march 1998, *RW* 2000-01, 1600, noot A. DE BOECK; Gent 22 december 1999, *TBH* 2001, 183; Rb. Bruges 15 january 2004, *RW* 2007-08, 1255; Mons 29 november 2006, *T.Verz.* 2007, 220, noot C. DEVOET; Brussels 31 march 2011, *T.Verz.* 2011, 318.

materialized each time depending on the circumstance beforehand.⁶⁵ In other words, in every situation it is up to the courts to determine whether or not the insurer acted as would a normal prudent insurer. This ‘flexibility’ makes it very difficult to determine *in abstracto* the exact reach of the duty to inform, since it will heavily depend on the specific circumstances of the case.⁶⁶ Although it should be possible to derive from the published case law certain general criteria that can serve as a standard to judge the fulfillment of the insurer’s duty to inform,⁶⁷ there are two problems that hinder this research. Firstly there is relatively little published case law on the pre-contractual liability of the insurer. On top of that, in the few cases that are available his pre-contractual liability is never extensively explored and the courts often limit themselves to the finding that a duty to inform exists. Secondly, despite the fact that there is an abundant amount of case law on the pre-contractual liability of intermediaries, these cases cannot blindly serve as an inspiration for the shaping of the insurer’s duty to inform. Whereas the duty to inform and to give advice forms the core of the intermediary’s business,⁶⁸ the insurer primarily remains a seller of insurance products. This makes it clear *prima facie* that their respective duties to inform have a different range.⁶⁹ Nevertheless, based on the available doctrine and limited case law we will try to formulate some general boundaries that in practice will determine the general reach of the insurer’s duty to inform.

First of all the insurer has to provide objective, adequate and neutral⁷⁰ information about the content and the main characteristics of the products he is offering. As to the mode of the provided information, no specific form is required under the general law of obligations. For evidence purposes it is evidently wise to provide the information in writing.

As to the content, the information has to be drafted in a way that makes it possible for a normal and reasonable policy holder to grasp the essence and the conditions of the product he is buying.⁷¹ If essential contract terms are drafted in a legal jargon that is difficult to understand for a normal reasonable person, the insurer has the duty to explain these terms in plain and understandable wordings.⁷² The information also has to provide the necessary clarification for the policy holder so that he can choose the product that is most suited for his needs.⁷³ This implies that the provided information has to allow the policy holder to make a comparison between different insurance products available on the market. The insurer does

⁶⁵ L. CORNELIS, “La responsabilité précontractuelle, conséquence éventuelle du processus précontractuel”, *TBBR* 1990, 413, nr. 21.

⁶⁶ L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 174, nr. 258.

⁶⁷ A. DE BOECK, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 200-201, nr. 458.

⁶⁸ M. GREGOIRE en V. DE FRANQUEN, “Bancassurfinance. Devoir d’information” in K. BYTTEBIER, K. DE BATSELIER and E. JANSSENS (eds.), *Bankverzekeren. Bancassurance*, Antwerp, Kluwer, 2002, 353, nr. 32.

⁶⁹ J.L.-FAGNART, “L’obligation de renseignement du vendeur-fabricant”, *RCJB* 1983, 239; K. BERNAUW, “De gemeenrechtelijke informatieplicht van de verzekeraar”, in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2010, 41, nr. 5.2.3.1.

⁷⁰ This means for example that an insurance company cannot give different information about the same situation depending on the client who asks for information: Liège 13 may 2008, *T.Verz.* 2010, 383.

⁷¹ Rb. Antwerp 27 may 2009, *RDC* 2011, 322, noot B. FRIN.

⁷² Brussels 1 december 2006, *DCCR* 2007, 38, noot C. VERDURE.

⁷³ Gent 22 december 1999, *TBH* 2001, 183; Liège 22 november 2007, *DBF* 2009, 290.

not have to provide a market analyses (which is the duty of a possible intermediary), but does has the obligation to provide the basic information to do so. Thus the insurer minimally has to inform the policy holder about his identity (including the coordinates on which he can be reached in case of a dispute), the premium, and the contract terms⁷⁴ (e.g. the coverage, possible exclusions, commencement).⁷⁵

The fact that the information provided by the insurer has to clarify the essential characteristics and conditions of the presented insurance products, implies that the extent of the duty to inform will vary according to the type and the complexity of the insurance product. Thus the type of insurance contract will determine which elements of the contract especially need clarification. For example, although both an accident insurance and a life insurance policy linked to an investment fund have certain fiscal implications, it is reasonable to expect that the amount of fiscal information and the detail should be much larger when contracting a life insurance policy.⁷⁶ After all, life insurance policies are often used as a tool of estate planning, which requires detailed information about the fiscal consequences of the product. On top of that, the complexity of the insurance product (which also is often connected to the type of insurance) will determine the amount of clarification that is required from the insurer. When concluding a rather complex unit- or stock linked policy the insurer will have to explain that the investment is not without risk and draw up an understandable profile of the available funds including the degree of risk connected to each of these funds.⁷⁷

Although the insurer has an obligation to inform the policy holder about the contractual terms of the policy, he does not have to sum up nor does he have to explain all legal provisions that are applicable to the insurance contract. For instance, the insurer does not have to inform his customer about the provisions of a Royal Decree that automatically applies to every car insurance policy.⁷⁸

It speaks for itself that the insurer is in breach of artt. 1382-1383 Civil Code if he provides false, inaccurate or misleading information. It is not required that the insurer deliberately provides false information, it suffices that he is aware or as a reasonable insurer should be aware of the fact that the information is/could be inaccurate or misleading. If the insurer doubts the accuracy of the information at his disposal, it is his duty as a professional to inform himself before informing his customers.⁷⁹

⁷⁴ Kh. Brussels 3 december 1996, *TBH* 1997, 741; Mons 26 may 1997, *TBH* 1998, 655, noot G. SCHOORENS; Brussels 1 december 2006, *DCCR* 2007, 38, noot C. VERDURE.

⁷⁵ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2010, 19-20.

⁷⁶ M. MOHR, "De informatieverplichtingen van de verzekeraar betreffende de fiscaliteit van de verzekeringscontracten" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 217-239.

⁷⁷ Kh. Turnhout 14 november 2011, *TBH* 2012, 311; Rb. Antwerp 27 may 2009, *RDC* 2011, 322, noot B. FRIN.

⁷⁸ Rb. Brussels 4 september 2007, *VAV* 2007, 430.

⁷⁹ Rb. Bruges 15 january 2004, *RW* 2007-08, 1255; A. DE BOECK, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 203-204, nr. 460-461.

The courts, as well as the FSMA,⁸⁰ also hold that the insurer has a limited duty to give advice.⁸¹ As indicated, this duty is limited to the portfolio of the insurer. The insurer does not have the duty to inform the customer about other comparable products of other insurers.⁸² However, if the legislator has erected a “bureau of tarification” (tariferingsbureau) and the customer qualifies to appeal to this bureau, the insurer has to inform him about this. For certain types of insurance (car insurance, insurance against natural disasters) the legislator has erected these bureaus to assure that people who are repeatedly declined by the insurers or who can only conclude a policy at extremely high premium rates or with high deductibles can still conclude insurance at a relatively fair rate. Of course this goal can only be achieved if these persons are made aware of this possibility. Thus the insurers have a duty to give information about these bureaus.⁸³ This duty exists under the general law of obligations and is confirmed by the provisions that govern these bureaus.⁸⁴

The duty to give advice is clearly a broader concept than merely providing objective information about his products. Giving advice means that the insurer has to assess the specific situation of his customer and has to provide the necessary notifications to allow his customer to choose the most adequate solutions for his needs.⁸⁵ This also implies a duty to inquire about the needs of the policy holder. Since the customer will not always be aware of what information is relevant, the insurer may not assume a passive attitude but has the duty to actively request information from his customer.⁸⁶ After he has received the necessary information from his customer the insurer still has to ask clarification about inexactitudes that should be clearly visible to a careful insurer.⁸⁷ Thus the court of appeal of Antwerp held that when confronted with a contradiction in the information provided by his customer, a normal and prudent insurer will seek clarification from his customer before concluding a contract.⁸⁸

After having provided sufficient advice, the insurer’s pre-contractual duty to inform comes to an end. Whether or not the customer eventually concludes the contract is, provided that adequate information and advice have been given, entirely his own responsibility. Even though the insurer has a duty to warn his customer about the contractual terms and the

⁸⁰ See for example the guidelines concerning the pre-contractual duty to inform in fire insurance: www.fsma.be/~media/Files/fsmafiles/circ/nl/fsma_2012_14.ashx. These guidelines are not binding for the courts, but they offer the insurers with important guidance on the materialization of the abstract norm of art. 1382-1383 Civil Code.

⁸¹ Liège 22 november 2007, *DBF* 2009, 290; Mons 29 november 2006, *T.Verz.* 2007, 220, noot C. DEVOET; J-M. BINON, “La métamorphose du devoir de transparence en assurance vie”, in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 117.

⁸² K. BERNAUW, “De gemeenrechtelijke informatieplicht van de verzekeraar” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 20.

⁸³ C. PARIS, “Le devoir d’information de l’assureur dans les assurances de dommages” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 77-78.

⁸⁴ Art. 68-9, §2 WLVO (natural disasters) and art. 9ter, §5 W.A.M.-wet (Act on mandatory car insurance).

⁸⁵ Gent 22 december 1999, *TBH* 2001, 183; J-M. BINON, “La métamorphose du devoir de transparence en assurance vie” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 117-118.

⁸⁶ A. DE BOECK, *Informatierechten en –plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 205, nr. 471: “l’obligation de s’informer pour informer”. Also see: J-M. BINON, “La métamorphose du devoir de transparence en assurance vie” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 118.

⁸⁷ Rb. Bruges 15 januari 2004, *RW* 2007-08, 1255.

⁸⁸ Antwerp 23 march 1998, *RW* 2000-01, 1600, noot A. DE BOECK.

possible consequence of specific contractual clauses (e.g. exclusions), the insurer cannot substitute his own judgment for that of the customer.⁸⁹ Therefore the court of appeal of Liège judged that the insurer's duty to inform does not include that he has to refuse to conclude a life insurance policy linked to an investment fund because the policy holder lacked the profile for such investments.⁹⁰

It has to be noted that under the general law of obligations the pre-contractual duty of a professional to inform only exists to the extent that the other contracting party is legitimately ignorant. In application of artt. 1382-1383 Civil Code the future policy holder also has to act as a normal, careful and reasonable person in the phase prior to the conclusion of an insurance contract.⁹¹ In practice this means that the customer cannot blame the insurer for a lack of information if this information was easily accessible for a reasonable person of that specific category (e.g. the fact that car insurance is mandatory).⁹² The courts often take into account the fact whether or not the customer is a professional. If he is a professional the courts easily derive from this that he is or ought to be aware of more insurance related information.⁹³ Although this reasoning indeed applies to insurance professionals who conclude insurance in the practice of their profession (e.g. in the case of reinsurance), it is doubtful that the mere fact that someone is a professional (e.g. industrial farmer) implies that he is or ought to be aware of more insurance related information than any other consumer.⁹⁴ The duty to act as a reasonable customer does imply that the professional customer who requires specific coverage for the performance of his profession will have to inform the insurer about these specific wishes or preferences if the insurer could not reasonably be aware of them.⁹⁵ Nevertheless it has to be stressed that in practice the duty of the customer to inform himself will be relatively limited. First of all insurance contracts often have a high degree of technicality and specificity (both material and intellectual) what makes it extremely difficult and almost objectively impossible for the customer to gather information on his own initiative. On top of that, the customer who asks information from an insurer does so because he is aware of his own ignorance and because he wishes to be informed by a professional

⁸⁹ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 122-123.

⁹⁰ Liège 22 november 2007, *DBF* 2009, 290

⁹¹ A. DE BOECK, "De precontractuele aansprakelijkheid anno 2010" in *Verbintenissenrecht*, Bruges, die Keure, 2010, 20, nr. 30.

⁹² K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 26-27, nr. 2.2.1. For an other example, see: Rb. Brussels 4 september 2007, *VAV* 2007, 430.

⁹³ G. SCHOORENS, "De aansprakelijkheid van de verzekeringsmakelaar wegens de niet-naleving door de verzekeringnemer van duidelijke dekkingsvoorwaarden" (noot onder Mons 26 may 1997), *TBH* 1998, 660.

⁹⁴ A. DE BOECK, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 211, nr. 484; T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 131-132, nr. 182.

⁹⁵ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 124-125; M. GREGOIRE en V. DE FRANQUEN, "Bancassurance. Devoir d'information", in K. BYTTEBIER, K. DE BATSELIER and E. JANSSENS (eds.), *Bankverzekeren. Bancassurance*, Antwerp, Kluwer, 2002, 341, nr. 4.

about the possible solutions for his needs. In doing so he acts as a reasonable and prudent customer would and is therefore entitled to expect sufficient information from the insurer.⁹⁶

From the point of view of the insurer it is not only relevant to take into account the information the customer should have obtained by himself under artt. 1382-1383 Civil Code, but also what information the customer actually gathered above this legal duty. If the consumer already gathered certain information himself or if he has appealed to the services of another professional, the duty to inform of the insurer will be limited in accordance to the acquired information and/or counseling.⁹⁷ For the insurer these facts constitute extrinsic circumstances that will affect the extent of his own obligation to inform under artt. 1382-1383 Civil Code. Thus the courts of appeal of Brussels and Mons held that when the policy holder was assisted by an intermediary or a family member that is an insurance professional, the insurer can take this into account and limit his information accordingly.⁹⁸ Nevertheless, the risk of limiting the reach of the provided information rests entirely on the insurer. If the intermediary does not provide sufficient advice nothing prohibits the customer from addressing the insurer who has limited the reach of his advice.⁹⁹ To avoid such discussions the insurer could in each case inform the customer to the full extent, regardless of the fact whether or not an intermediary participates in the pre-contractual phase.¹⁰⁰

The pre-contractual duty to inform under WMPC

Contrary to the Belgian Civil Code the WMPC contains a specific provision pertaining to the pre-contractual obligation to inform. Article 4 WMPC (former art. 30 WHPC) states that, not later than at the moment of the conclusion of the contract, a business¹⁰¹ has the obligation to divulge proper and useful information to the consumer¹⁰².¹⁰³ According to art. 4 WMPC this information has to pertain to the most important characteristics of the product and to the

⁹⁶ A. VAN OEVELEN, “Juridische verhoudingen en aansprakelijkheid bij onderhandelingen over (commerciële contracten”, *DAOR* 1990, 53-54, nr. 12.

⁹⁷ A. DE BOECK, “De precontractuele aansprakelijkheid anno 2010” in *Verbintenissenrecht*, Bruges, die Keure, 2010, 20, nr. 30; J-M. BINON, “La métamorphose du devoir de transparence en assurance vie” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 121; M. FONTAINE, *Verzekeringsrecht*, Brussels, Larcier, 2011, 273, nr. 338.

⁹⁸ Mons 26 may 1997, *TBH* 1998, 655, noot G. SCHOORENS; Brussels 31 march 2011, *T.Verz.* 2011, 318, noot P. MOREAU.

⁹⁹ K. BERNAUW, “De gemeenrechtelijke informatieplicht van de verzekeraar” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 36, nr. 3.2.5.

¹⁰⁰ G. SCHOORENS, “De aansprakelijkheid van de verzekeringsmakelaar wegens de niet-naleving door de verzekeringnemer van duidelijke dekkingsvoorwaarden” (noot onder Mons 26 may 1997), *TBH* 1998, 661.

¹⁰¹ The business-concept used by art. 4 WMPC is a broad one and refers to the performance of economic activities on a lasting base, irrespective of the legal form in which these activities are performed (art. 2, 1° WMPC).¹⁰¹ It is clear that an insurer resides under this category. See: G. STRAETMANS and J. STUYCK, “Wet Marktpraktijken en consumentenbescherming (WMPC)” in *CBR-jaarboek 2009-2010*, Antwerp, Intersentia, 2010, 536.

¹⁰² For the definition of “consumer” under the WMPC, see *supra*.

¹⁰³ This implies that art. 4 WMPC is not applicable in the pre-contractual relations between an insurer and a legal person or between an insurer and a natural person who, even only partially, obtains insurance in the course of his business or profession. In these situations artt. 1382-1383 Civil Code will govern the pre-contractual duty of the insurer to inform.

conditions of sale. In giving this information the business has to take into account the need of information expressed by the consumer en the expressed or reasonable foreseeable use of the product.

The information does not have to be provided in a specific manner. To avoid discussions it is however recommendable that the information is divulged in written form.¹⁰⁴

As to the content of art. 4 WMPC, we have to ascertain that this provision contains nothing more than the legal explicitation of the pre-contractual duty of a professional (insurer) to inform a layman under artt. 1382-1383 Civil Code.¹⁰⁵ As we already extensively explained, the duty of the insurer to actively give proper and useful information about the most important characteristics and contract conditions of a policy also exists under the general law of obligations (*supra*). The same goes for the duty to take into account the information provided by the customer and the reasonably expected use of the policy. Legal analysis confirms that in practice the application of art. 4 WMPC leads to similar results as the application of artt. 1382-1383 Civil Code.¹⁰⁶ This explains why the courts when assessing the pre-contractual duty of the insurer to inform, do not analyze art. 4 WMPC separately but always in conjunction with artt. 1382-1383 Civil Code.¹⁰⁷ Because art. 4 WMPC as a *lex specialis* does not derogate from artt. 1382-1383 Civil Code (*lex generalis*) in any way, there is no objection in applying both provisions in a cumulative manner.¹⁰⁸

On top of art. 4 the WMPC also contains a specific duty to inform when a distance contract concerning financial services (this includes insurances)¹⁰⁹ is concluded between a business and a consumer.¹¹⁰ A distance contract exists when the business uses an organized system for the sale of goods/services (e.g. mailings, website) and the contract is concluded without any face-to-face contact in the pre-contractual phase.¹¹¹ In that case the business has to provide a significant amount of pre-contractual information on a durable medium (e.g. hard disk). If the customer has the possibility to download the information from the website and is explicitly asked to do so and to confirm this, this can be considered a durable medium.¹¹² The information has to be clear and understandable and has to be provided in a manner that is adapted to the used means of communication at a distance (art. 50, §1 WMPC).

¹⁰⁴ R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 184, nr. 302.

¹⁰⁵ Brussels 31 march 2011, *T.Verz.* 2011, 318, noot P. MOREAU; R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 184, nr. 301.

¹⁰⁶ R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 186, nr. 305. For example: a consumer has to be informed about the reach of certain contractual provisions (Gent 4 december 2006, *Jaarboek Handelspraktijken* 2006, 253).

¹⁰⁷ Kh. Brussel 3 december 1996, *TBH* 1997, 741; Rb. Brussels 4 september 2007, *VAV* 2007, 430; Brussels 31 march 2011, *T.Verz.* 2011, 318, noot P. MOREAU.

¹⁰⁸ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 38, nr. 5.1 en L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 190, nr. 275.

¹⁰⁹ Article 2, 24° WMPC.

¹¹⁰ R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 163-167.

¹¹¹ Article 2, 21° WMPC.

¹¹² Kh. Antwerp 29 may 2008, *T.Verz.* 2008, 254, noot.

The information that has to be provided can be divided into four categories.¹¹³ Firstly, the consumer has to be informed about the provider (insurer) of the financial service (identity, geographical coordinates, activities, identity of representatives, identity of intermediaries, coordinates of the supervising authority). Secondly, the business has to give information about the provided services (main characteristics, all information necessary to make an evaluation of the services offered, the total cost including all taxes, mode of payment and execution). If the provided service implies certain financial risks (e.g. unit- or index linked policies) the insurer has to inform his customer about this and has to stress that previous revenues do not offer guaranties about future profitability. Thirdly, the consumer has to be informed about the distance contract and its characteristics (possible right to revoke, mode of revocation, right to rescind including possible penalties, applicable law, competent courts, the language used in further communication). Lastly, the business has to provide the consumer with information about his legal remedies (existence or non existence of extra-judicial procedures, ombudsman, guarantee fund).

For the sake of completeness it has to be noted that when a distance contract is concluded electronically, the insurer will also have to divulge the information defined by artt. 7-8 Act of 11 March 2003¹¹⁴.¹¹⁵ This mainly concerns information to identify the provider of the service and some basic information on how a contract is concluded electronically.

II. Pre-contractual information in concluding insurance contracts. Specific rules on insurance contracts.

1. Please, indicate whether there are separate rules governing the following types of contract:

The Controlreglement contains a list of specific details that an insurance company has to divulge prior to the conclusion of the contract (art. 15). This information varies according to the risks covered and the type of insurance.

The KB Leven also contains a list of (rather technical) information that has to be divulged prior to the conclusion of a life insurance contract.

(a) life insurance contracts;

When contracting life insurance the insurance company has to communicate a whole list of information to the future policy holder (art. 15, §1, b) Controlreglement). This information is

¹¹³ For an extensive overview, see: M. THIRION, "Informatieverplichtingen bij verkoop op afstand van verzekeringsovereenkomsten" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 62-71; H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 109-115. If the sale is concluded by phone, the business can, with consent of the client, limit its duty to inform (art. 51 WMPC).

¹¹⁴ Wet 11 maart 2003 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, BS 17 march 2003.

¹¹⁵ C-A. VAN OLDENEEL, "Contrats électroniques d'assurances" in *E-business en assurance*, Antwerp, Kluwer, 2003, 96-97.

neutral and mainly concerns a description of the available coverage, the rights of the policy holder, the duration and end of the policy, information about the premium, technical information typical of life insurance (e.g. surrender/redemption value, calculation and allocation of dividends, units of account used in unit- or index-linked policies, the nature of the assets that support the unit-linked policies) and a general indication of the fiscal rules that apply to the contract. The insurer also has to communicate the name of the insurance company and its legal form, the country where the company or its branch office with which the policy will be concluded is registered as well as its address.

Ultimately at the moment of conclusion of the contract the insurer has to provide the policy holder with the general and specific terms of contract.

When concluding a life insurance policy the insurer also has to take into account his pre-contractual duty to inform under art. 8 KB Leven. This provision also obliges the insurer to divulge a large amount of technical information linked to the characteristics of life insurance policies and in doing so partially overlaps with the duty to inform under art. 15, §1, b) Controlereglement. However, the information required by art. 8 KB Leven is often more detailed than under art. 15, §1, b) Controlereglement.¹¹⁶

(b) non-life insurance contracts;

In non-life insurance the insurance company has to communicate: the name of the country where the company or its branch office with which the policy will be concluded is registered, the law applicable to the contract even if no choice of law is possible and the fact that any complaints about the contract can be reported to the insurance ombudsman (with reference to his coordinates) without this affecting his rights to take legal proceedings. The first of these duties does not apply to the insurance of large risks, the second and third duty only apply if the future policy holder is a natural person (art. 15, §1, a) Controlereglement).

(b) particular types of insurance contracts (e.g. accident or sickness policies);

There are no other rules besides those mentioned under (a) and (b).

(d) compulsory insurance contracts; and

Article 15, §4 Controlereglement states that in compulsory car insurance the contract has to mention separately certain aspects concerning the calculation of the premium. However this provision does not contain a specific pre-contractual duty to inform.

(e) insurance investment products, such as capital redemption policies, life

¹¹⁶ J-M. BINON, “La métamorphose du devoir de transparence en assurance vie”, in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 106-107.

insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies).

See point (a).

2. Please, indicate the obligations applicable to all insurance contract and those applicable to special types of insurance contracts, specifying whether:

- (a) **there is a duty for the insurer to inform the policyholder about the rights and obligations arising from the contract, even if only covered by the general conditions of a contract of adhesion that are known or knowledgeable to the adhering party;**

See point II.1.

- (b) **there are specific information duties in relation to the object and characteristics of insurance coverage;**

See point II.1.

- (c) **there are information duties also in relation to the policyholder's statutory obligations (e.g. in compulsory insurance); and**

See point II.1.

- (d) **there is a duty to assess whether the relevant insurance product is adequate to meet the insured's cover needs and to direct his or her choice to a more suitable product; and**

Despite the fact that the IMD (insurance mediation and distribution Act)¹¹⁷ is mainly applicable to insurance intermediaries, it also contains some provisions on the insurer's pre-contractual duty to inform (art. 12*quinquies juncto* art. 12*bis* and art. 12*quater*).

According to art. 12*bis*, §3 the insurer has to identify the needs and wishes of his customer, especially taking into account the information provided to him by the customer. He also has to explain to the customer on what elements his advice regarding certain insurance products is based. The required precision of this information varies according to the complexity of the insurance products in question. Referring to the analysis of the insurer's duty to inform under the general law of obligations, it is clear that these provisions do not add anything to that duty.¹¹⁸ Therefore the duty of the insurer to give advice is limited to his own portfolio. The insurer does not have the duty to inform the customer about other comparable products of other insurers.¹¹⁹

¹¹⁷ Wet 27 march 1995 betreffende de verzekerings- en herverzekeringsbemiddeling en de distributie van verzekeringen, *BS* 14 june 1995.

¹¹⁸ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 21, nr. 2.1.3.

¹¹⁹ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 20.

Contrary to the general law of obligations and art. 4 WMPC, the IMD contains a specific provision on the manner in which this information has to be divulged. According to art. 12*quater* the information has to be clear, accurate and understandable¹²⁰ and it has to be given in writing or has to be provided on another durable medium that is available to and understandable by the customer. The information has to be provided in one of the official languages of Belgium (Dutch, French or German) or in any other language that was agreed upon by the contracting parties. If the customer requests so and if coverage commences immediately, the information can be divulged orally provided that at the moment of the conclusion of the contract the information is still provided in writing or on another durable medium.

As we stated, the provisions of the IMD do not add anything to the insurer's duty under the general law of obligations. On the contrary, the question is if their scope of application does not detract from the duty to inform that exists under the general law of obligations.

If we look at the scope of application it is, in principle, relatively wide. The provisions in question are applicable to all types of insurance and are not limited to insurance contracts concluded with consumers. They are applicable in the insurer's direct contacts with his contracting party. Since the IMD does not refer to the concept of direct distribution, the provisions also remain applicable if an insurance intermediary is involved in the conclusion of the contract. If there is any direct contact between the insurer and his contracting party, these provisions apply. This means that this duty to inform will often exist parallel with the obligation of information of the intermediary.

The (theoretical) problem is that the scope of application is limited to the insurance of large risks (art. 12*bis*, §4). Without examining in detail the criteria used to define large risks (art. 1, 7 Controlereglement) it is clear that these criteria are mainly linked to business insurance (e.g. transport risks, fire and liability insurance if the company concluding the insurance surpasses certain criteria concerning balance total, annual revenue and staffing). This means that the duty to inform under art. 12*quinqüies* IMD will not apply to certain business insurance. Since art. 12*quinqüies* has to be considered a *lex specialis* compared to the general law of obligations, the question then rises if this does not equally limit the duty of the insurer under the general law of obligations. In practice this question seems of no importance. There simply is no case law that applies art. 12*quinqüies* IMD when assessing the insurer's pre-contractual duty to inform. As we have ascertained, the courts continue to apply artt. 1382-1383 Civil Code and simply take into account the complexity of the insurance contract and the extrinsic circumstances, including (if relevant) the professional capacity of the customer.¹²¹ This position corresponds with the consideration in the doctrine that the legislator, who strives towards a better and larger legal protection of the weaker contracting party, probably did not

¹²⁰ Under the general law of obligations the same criteria are implied under artt. 1382-1383 Civil Code. A normal and prudent insurer only provides his clients with understandable information that is accessible.

¹²¹ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 121.

have the intention to limit the insurer's existing pre-contractual duty under the general law of obligations to inform but only used a disadvantageous formulation.¹²²

- (e) **there are any information duties as to potential conflicts of interest between the insurer and the insured.**

Article 12bis, §1, 5° IMD obliges the insurer to inform his contracting party about the authority that is competent to handle complaints.

III. Infringing *bona fide* negotiation and pre-contractual information obligations.

1. Under law of contract.

Please, indicate:

- (a) **whether and under which circumstances infringement will affect a contract or individual contractual provisions (invalidity of contract or individual provisions, termination of contract or other events);**

Although the Belgium Civil Code does not contain specific provisions on the pre-contractual obligations of information, it does contain some provisions on the validity of contracts, which are also applicable to insurance contracts. Article 1108 Civil Code states that a valid contract always requires a valid consent between parties. To be valid this consent has to be free of vices. According to art. 1109 *juncto* art. 1117 Civil Code the consent is invalid and the contract is voidable when it has been obtained by means of fraud or when it is caused by error.¹²³

Thus an insurance contract is voidable when the consent of the policy holder was obtained by fraud from the part of the insurer (1116 Civil Code).¹²⁴ However, a mere infringement on his duty to inform does not constitute fraud.¹²⁵ The existence of fraud requires the usage of an artificial ruse combined with the intention to mislead the other party and to induce him to

¹²² K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 42-43, nr. 5.2.3.2; G. VAN VAERENBERGH, "Informatieplicht van de verzekeringstussenpersoon: oude en nieuwe verplichtingen" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 245.

¹²³ The list of vices also includes duress. Since this is not very likely to exist in the relation between an insurer and his client, we will not discuss this any further.

¹²⁴ Art. 1116 Civil Code requires that the fraud has been committed by one of the parties. Thus fraud by a third party does not give rise to the avoidability of the contract.

¹²⁵ P. WÉRY, *Droit des Obligations*, Brussels, Larcier, 2010, 226-228, nr. 244; W. WILMS, "Het recht op informatie in het verbintenissenrecht", *RW* 1980-81, 490.

conclude the contract.¹²⁶ It is up to the claimant to prove that both these conditions are fulfilled (art. 1315 Civil Code *juncto* art. 870 Judicial Code). On top of that, the Belgian Supreme Court holds that a contract is only voidable under art. 1116 Civil Code if the claimant proves that he would not have concluded the contract without the fraud. The proof that he only would have concluded the contract under different conditions does not suffice. In case of an insurance contract this will not be very self-evident. If the claimant fails to prove this, the contract will not be voidable, but he will only have a claim for damages under artt. 1382-1383 Civil Code (*infra*), since every form of pre-contractual fraud is considered an infringement on these rules.¹²⁷

Although the proof of a ruse itself is not too difficult,¹²⁸ the proof of the intentional element is.¹²⁹ This probably explains why there is so little recent case law where an insurance contract is declared void because of fraud by the insurer.¹³⁰ On top of that, it has to be noted that the avoidance of the policy will not always be preferred by the policy holder. If the policy remains in existence the policy holder can still profit from the coverage the contract does provide and he can still claim compensation for damages suffered, under artt. 1382-1383 Civil Code. On the other hand, if the contract is declared void the policy holder will get his premiums reimbursed, but he will often still be confronted with far greater damages (greater than the reimbursement) that are not covered by an insurance contract.¹³¹ Therefore the policy holder will also have to turn to artt. 1382-1383 Civil Code to claim for damages.¹³² Even in the presence of fraud the best solution sometimes will be not to demand that the policy is declared void, but to simply claim for damages under artt. 1382-1383 Civil Code.¹³³

Even in the absence of fraud the divulging of deficient information (this includes the absence of information) can have an important effect on the validity of the consent. According to art. 1110 Civil Code a contract is voidable if the consent was caused by error. Error implies a misconception of an element of the contract at the moment of conclusion. It is possible that the information (or the lack of information) provided by one of the contracting parties causes such a misconception and thus an error.¹³⁴ Still, not every error makes the contract voidable. It is required that the error pertains to an element of the contract that was decisive for the party to conclude the contract. This implies that without that specific element the contract would

¹²⁶ Cass. 21 may 1953, *Pas.*, I, 731; Cass. 24 may 1974, *Arr. Cass.*1974, 1063; W. VAN GERVEN en S. COVEMAERKER, *Verbintenissenrecht*, Louvain, Acco, 2006, 121.

¹²⁷ Cass. 2 october 2009, *RW* 2011-2012, 1713.

¹²⁸ Even the fact that a party did not divulge information when they had the obligation to do so can be considered an artificial ruse: Cass. 8 june 1978, *RW* 1977-78, 1777; *R.C.J.B.* 1979, 525, noot J.P. MASSON.

¹²⁹ P. VAN OMMESLAGHE, *Droit des obligations*, Brussels, Bruylant, 2010, 250-253, nr. 153. For an example of a lack of proof of the intentional element, see: Brussels 31 march 2011, *T.Verz.* 2011, 318, noot P. MOREAU.

¹³⁰ Voorz. Kh. Liège 8 december 1977, *JT* 1978, 247; Brussels 22 january 1985, *JT* 1985, 718.

¹³¹ K. BERNAUW, "De gemeenrechtelijke informatieplicht van de verzekeraar", in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 48, nr. 7.2.1.

¹³² The fact that the policy is void, does not prevent the application of artt. 1382-1383 Civil Code: W. VAN GERVEN en S. COVEMAERKER, *Verbintenissenrecht*, Louvain, Acco, 2006, 116.

¹³³ A. DE BOECK, *Informatierechten en -plichten bij de totstandkoming en uitvoering van overeenkomsten: grondslagen, draagwijdte en sancties*, Antwerp, Intersentia, 2000, 279-280, nr. 647.

¹³⁴ This certainly is not a required element for the existence of an error. Nevertheless, this is the relevant situation within the scope of this rapport.

not have been concluded.¹³⁵ Two examples of such essential elements are an error concerning the type of the insurance contract and a misconception about the nature, risk and flexibility of the investment fund that is linked to a life insurance policy.¹³⁶

Even if the error pertains to an essential element of the contract, a second condition has to be fulfilled so that the contract can be declared void under art. 1110 Civil Code. The voidance of the contract requires that the error is excusable. An error is excusable if a reasonable and careful person placed in the same extrinsic circumstances would have made the same error.¹³⁷

In practice this means that a contracting party has the autonomous obligation to gather information, make inquiries and make reasonable verifications. If he fails to do so his error will not be deemed excusable.¹³⁸ Since it concerns a reasonable person placed in the same extrinsic circumstances, the fact that in concluding an insurance contract the customer is confronted with a professional who has a duty to inform and in whom the customer can reasonably place his trust, has to be taken into account when assessing the conduct of the customer and the question whether or not an excusable error exists.¹³⁹ Therefore if an insurer presents a policy to a customer that clearly states that it concerns a life insurance policy, there is no excusable error as to the type of insurance even if the accompanying brochure does not literally specify that it pertains to an insurance policy. The same reasoning applies to the degree of risk of the chosen investment fund linked to the insurance policy. If the provided information clearly gives the customer the choice between three types of funds and explains in plain and understandable wordings that the composition (stocks-bonds) and the investment risk significantly differs between the investment funds (including clear graphs), no error exists as to the existence and the degree of the investment risk.¹⁴⁰

Although error can be ground for the voidance of an insurance contract, in practice we have to ascertain that little case law exists on this specific situation.¹⁴¹

(b) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;

As to the consequences of an infringement on the insurer's pre-contractual duty to inform, artt. 1382-1383 Civil Code are very clear. They state that one is liable for the damages resulting from his fault. In other words, artt. 1382-1383 Civil Code only give rise to a claim

¹³⁵ Cass. 27 october 1995, *RW* 1996-97, 298.

¹³⁶ Rb. Antwerp 27 may 2009, *RDC* 2011, 322, noot B. FRIN.

¹³⁷ Cass. 28 june 1996, *Arr.Cass.* 1996, 664; A. VAN OEVELEN, "Kroniek van het verbintenissenrecht (1993-2004)", *RW* 2004-05, 1648.

¹³⁸ W. VAN GERVEN en S. COVEMAEKER, *Verbindenissenrecht*, Louvain, Acco, 2006, 120.

¹³⁹ A. DE BOECK, "Dwaling in de ban van de precontractuele informatie- en onderzoeksplichten", *RW* 2000-01, 354.

¹⁴⁰ Rb. Antwerp 27 may 2009, *RDC* 2011, 322, noot B. FRIN; Brussels 31 marcht 2011, *T.Verz.* 2011, 318, noot P. MOREAU.

¹⁴¹ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 116-117.

for reparations. In principle the liable person is obligated to fully restore the injured party in the state that would have existed absent of fault. In most cases this will result in the awarding of damages.¹⁴² Thus an infringement on these provisions does not affect the validity of the contract, nor does it give rise to a right of termination.¹⁴³

(c) any criteria applicable to the identification (also in relation to the burden of proof) and the quantification of the losses or injuries to be compensated for; and

According to art. 1315 Civil Code *juncto* art. 870 Judicial Code it is up to the policy holder who claims for damages to prove the existence of these damages and the amount of damages suffered.

The only conditions for the rewarding of damages are that the damage is certain and personal.¹⁴⁴ Thus it is not required that a contract actually has been concluded before compensation can be claimed. For example, if a customer can prove that his decision not to conclude a contract was based on confusing information provided by the insurer and that shortly after this decision and before he was able to conclude another policy he was confronted with an accident that would have been covered by the policy he did not conclude, it is possible to claim for the compensation of the damages resulting from the accident.

In the existing case law the claims for damages under artt. 1382-1383 Civil Code are always directed against an insurer with whom a contract has been concluded. Most of the time the policy holder will try to prove that because of the deficiency or absence of information he concluded a contract that he would otherwise have concluded under different conditions or not at all. Therefore the suffered damages often consist of the costs of covering the risks of which the policy holder legitimately thought that they were included in the coverage (e.g. cost of repairing a damaged vehicle, health care costs,...).¹⁴⁵ In a case of underinsurance the damages consisted of the sum that, in application of the rule of proportionate reduction, was deducted from the real value of the insured car.¹⁴⁶

(d) whether any other consequences are provided for.

Under the WMPC an infringement only gives rise to a claim to cease the infringing activities and in some situations criminal penalties are provided.¹⁴⁷ The WMPC does not provide the necessary legal grounds to award damages for an infringement on the duty to inform under

¹⁴² T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 123, nr. 172.

¹⁴³ W. VAN GERVEN en S. COVEMAEKER, *Verbintenissenrecht*, Louvain, Acco, 2006, 117-118.

¹⁴⁴ T. VANSWEEVELT and B. WEYTS, *Handboek buitencontractueel aansprakelijkheidsrecht*, Antwerp, Intersentia, 2009, 638-653.

¹⁴⁵ Kh. Brussels 3 december 1996, *TBH* 1997, 741; Antwerp 23 march 1998, *RW* 2000-01, 1600, noot A. DE BOECK; Gent 22 december 1999, *TBH* 2001, 183.

¹⁴⁶ Brussels 1 december 2006, *DCCR* 2007, 38, noot C. VERDURE.

¹⁴⁷ R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 211 et. seq.

art. 4 WMPC. Therefore the courts always have to revert to to artt. 1382-1383 Civil Code to award damages. This does not create any difficulties since an infringement on a legal norm implies a fault under artt. 1382-1383 Civil Code.

In certain situations art. 55, §2 WMPC provides a specific civil remedy that is available to the consumer. If the insurer fails to give full and correct information about the provided financial services or the distance contract (*supra*) and its characteristics or if the insurer provides the information too late or not on a durable medium, the consumer has the right to rescind the contract without any costs or fines. The consumer has a choice whether or not to rescind the contract. He is not obligated to do so. Although, if he wishes to exercise this right, he has to do so within a reasonable period after the discovery of one of the infringements.

Since an infringement on the obligations of art. 50 WMPCPC automatically constitutes a fault under artt. 1382-1383 Civil Code, the consumer can also claim for compensatory damages under these provisions. It is irrelevant whether or not the consumer chooses to rescind the contract. If he suffered damages, he can always claim for compensatory damages under artt. 1382-1383 Civil Code. Of course he will have to prove the existence of the damage. Thus if after a possible rescission of the contract no more damage exists, no compensation is possible. On top of that it has to be noted that even a perfect fulfillment of the information duties under art. 50 WMPC does not imply that there is no more room for the application of the theory of the *culpa in contrahendo*. The WMPC only provides the minimum amount of information that has to be divulged and does not detract from the duty to inform under the general law of obligations (or any other specific provision).¹⁴⁸ For example, when a distance contract is concluded and the insurer has fulfilled all his duties under art. 50 WMPC, he can still be held liable for damages arising from a lack of advice under artt. 1382-1383 Civil Code (*supra*).

2. Under law of insurance contract.

Please, indicate:

- (a) whether and under which circumstances infringement will affect a contract or individual contractual provisions (invalidity of contract or individual provisions, termination of contract or other events);**
- (b) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;**

¹⁴⁸ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 112; M. THIRION, "Informatieverplichtingen bij verkoop op afstand van verzekeringsovereenkomsten" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 62 en H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 115.

- (c) **any criteria applicable to the identification (also in relation to the burden of proof) and the quantification of the losses or injuries to be compensated for; and**
- (d) **which consequences may follow infringement of supervisory rules, such as prohibition or restriction from continuing to conclude the contract involved and/or pecuniary penalties;**
- (e) **whether any adopted measure involving penalties or restrictions on the activities of an insurance company is subject to the right to apply to the courts; and**
- (f) **whether the remedy taken by the supervisory authority is a *de jure* or *de facto* element binding upon a civil court seised of the case in an action brought by the weaker party against the stronger party for the same facts as those prompting the remedy so taken.**

Question III.2 will be completely answered here.

The IMD by itself does not provide for any specific consequences if the insurer infringes on his duty to inform under art. 12*quinquies* *juncto* art. 12*bis* and art. 12*quater* IMD. Since an infringement on these legal provision constitutes a fault, it is however possible to claim for damages under artt. 1382-1383 Civil Code. As we already stated, there is no published case law that applies art. 12*quinquies* IMD when assessing the insurer's pre-contractual duty to inform. The courts apply artt. 1382-1383 Civil Code and simply take into account the complexity of the insurance contract and the extrinsic circumstances, including (if relevant) the professional capacity of the customer.¹⁴⁹

An infringement on art. 15 Controlereglement or on art. 8 KB Leven also gives rise to a claim for damages under artt. 1382-1383 Civil Code.¹⁵⁰

In this context art. 28*bis* Controlewet states that the directors, the business managers and the commissioners are personally liable for damages caused by any infringement of the obligations provided by the Controlewet or its implementing provisions.

An infringement on the provisions of the Controlewet or its implementing provisions can also give rise to an administrative sanction. If an insurance company does not act in accordance with the obligations of the Controlewet, the FSMA can remind the company of its obligations and, in case of a failure to comply (art. 81 Controlewet), have this reminder published in the

¹⁴⁹ J-M. BINON, "La métamorphose du devoir de transparence en assurance vie" in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 121.

¹⁵⁰ C. VERDURE, "L'obligation d'information de l'assureur direct" (noot onder Brussels 1 december 2006), *DCCR*. 2007, 43, nr. 4.

“Staatsblad” (where all legislation is published). Further failure to comply can then result in an administrative fine (art. 82 Controlewet).

However, practice has shown that insurers do not encounter difficulties in observing these (rather technical) duties. Given the neutral character of this information and the high degree of technicality, insurers use standard forms (drafted by the associations of insurers and intermediaries)¹⁵¹ to observe these duties and to avoid penalties by the FSMA.¹⁵²

For the sake of completeness it has to be noted that the mere fulfilment of the obligations to inform under these decrees does not imply that the insurer acted as a normal and reasonable insurer and cannot be held liable under artt. 1382-1383 Civil Code. The norm of conduct imposed by artt. 1382-1383 Civil Code is broader than the fulfilment of these specific provision (e.g. the insurer will also have a duty to give advice: *supra*).

IV. Insurance intermediaries

As used herein, “insurance intermediary” means a person who submits or proposes insurance contracts on behalf of an insurer.

1. Indicate whether an insurance intermediary’s activity:

(a) is unregulated;

The activity of insurance intermediaries is regulated in Belgian law. It is striking that in recent years, their activities have become much more professional, linked to more duties. The conduct of the intermediaries is regulated both by statute and by rules of guidance.

(b) is subjected to supervision rules;

In Belgian law, the supervision is exercised by the FSMA. The regulation on insurance intermediaries is based on the IMD. The EC Insurance Mediation Directive 2002/92/EC was implemented in 2006 by the Act of 22 February 2006. Article 5 of the IMD requires all insurance intermediaries operating in Belgium to be registered by the FSMA. This registration is subject to the fulfilment of certain professional requirements.¹⁵³ The insurance intermediary must for example have the necessary professional knowledge. He must be suitable for the activities of insurance intermediaries and must be reliable. He must engage himself to participate in a system of non-judicial handling of conflicts and also is obliged to insure his liability.

¹⁵¹ <http://info.verzekeringen.as/gedragscode.pdf>.

¹⁵² G. VAN VAERENBERGH, “Informatieplicht van de verzekeringstussenpersoon: oude en nieuwe verplichtingen” in *De informatieplicht in verzekeringen*, Antwerp, Kluwer, 2011, 245.

¹⁵³ For a more extensive analysis: T.L. EEMAN, J.P. FOLLET en A. RONDAO ALFACE, ‘ La responsabilité des courtiers d’assurances et l’assurance de cette responsabilité’, *De Verz.*, 2012 58-83.

The insurance intermediary must make a choice to be registered as “insurance broker”, “insurance agent” or “insurance sub-agent”. An insurance broker is free to deal with any insurer, while an insurance agent only acts as the agent of a specific insurer.

- (c) is subjected to supervision rules only for specific classes of professional intermediaries, such as insurance agents or brokers; and**

There do not exist specific rules for specific classes of intermediaries, except their obligation to inform the consumer on their capacity as insurance agent or insurance broker.

- (d) the authority supervising insurance intermediaries is the same as the authority called upon to supervise insurance companies.**

The supervising authority (FSMA) is the same for insurance intermediaries as for insurance companies.

- 2. Indicate the following, specifying the source of the relevant obligation (statutes and/or supervisory rules):**

- (a) intermediaries’ duties of pre-contractual information, specifying whether there are separate rules applying to the following types of contract:**

- (i) life insurance contracts;**
- (ii) non-life insurance contracts;**
- (iii) particular types of insurance contracts (e.g. accident or sickness policies);**
- (iv) compulsory insurance contracts; and**
- (v) insurance investment products, such as capital redemption policies, life insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies); and**

- (b) whether there are different and/or additional duties placed upon particular classes of intermediaries.**

Question 2 will be completely answered here.

In Belgian law, lots of insurance business is in practice transacted through insurance intermediaries and for good reasons. Insurance contracts are mostly very technical which makes them not always easy to understand for laymen. Furthermore, insurance brokers undergo more professional training than in the past. Because of the heavy reliance customers place on the advice of a broker, the law now views insurance intermediaries as professionals in placing insurance. As such, a higher duty of care is being imposed on brokers by the courts. As an expert, the insurance broker has a duty to determine the customer's needs and help the consumer to choose appropriate insurance coverage.¹⁵⁴ When insurance brokers engage in a commercial relationship with customers, the law imposes certain duties on brokers that require them to adequately perform the services they offer.

The legal basis for which insurance intermediaries may be held liable has widened over the years.

Firstly, the IMD pays attention to the duty to provide information in art. 12 bis-quater. The EU Directive 2002/92 on insurance intermediation recognized the “good advice” principle.¹⁵⁵

The obligation to inform can be divided in different categories.

The intermediary must provide certain information prior to the conclusion of the contract and if necessary, upon amendment or renewal thereof. The intermediary must more exactly provide the consumer with at least the following information:

- (a) his identity and address;
- (b) the register in which he has been included and the means for verifying that he has been registered;
- (c) whether he has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in a given insurance undertaking;
- (d) whether a given insurance undertaking or parent undertaking of a given insurance undertaking has a holding, direct or indirect, representing more than 10 % of the voting rights or of the capital in the insurance intermediary;
- (e) the procedures referred to in Art. 10 allowing customers and other interested parties to register complaints about insurance and reinsurance intermediaries and, if appropriate, about the out-of-court complaint and redress procedures referred to in Art. 11.

In addition, an insurance intermediary shall inform the customer, concerning the contract that is provided, whether:

¹⁵⁴ T.L. EEMAN, J.P. FOLLET en A. RONDAO ALFACE, *l.c.*, 67.

¹⁵⁵ M. EYSKENS, *Makelaar en agent in de bank-, beleggings- en verzekeringssector*, Antwerp, Intersentia, 2010, 422.

- (i) he gives advice based on the obligation in paragraph 2 to provide a fair analysis, or
- (ii) he is under a contractual obligation to conduct insurance mediation business exclusively with one or more insurance undertakings. In that case, he shall, at the customer's request provide the names of those 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 the obligation in paragraph 2 to provide a fair analysis. In that case, he shall, at the customer's request provide the names of the insurance undertakings with which he may and does conduct business.

In those cases where information is to be provided solely at the customer's request, the customer shall be informed that he has the right to request such information.

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

Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product. These details shall be modulated according to the complexity of the insurance contract being proposed.¹⁵⁶

There do not exist other rules for different types of insurance contracts. All insurance intermediaries are obliged to inform the consumer in the same way. However, Assuralia has worked out documents that can be used by insurance intermediaries to help them with this obligation. These are a document for life insurance, for saving or investment with life insurance and non life insurance. They can be found on the websites of the different professional associations: FVF (www.fvf.be), Feprabel (www.feprabel.be), BVVM (www.upca.be) and Assuralia (www.assuralia.be). The use of these documents is facultative. They are intended to facilitate the job of the intermediary.

Secondly, the WMPC is also applicable on insurance contracts with consumers. In a more general way, art. 4 prescribes that consumers must at least at the moment of the conclusion of the contract have knowledge of all the important features of the product and the sale conditions.

¹⁵⁶ See also *infra* the analysis of the pre-contractual duty of the insurer to inform. This duty partially overlaps with that of the intermediaries.

3. Indicate which consequences may follow infringement by the intermediaries of information duties, specifying:

(a) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;

In practice, when the intermediary has not fulfilled the duty to inform as prescribed by art. 12 IMD, the consumer can sue him for damages. However, the consumer must prove his loss and the causal connection with the wrongful behaviour of the intermediary.¹⁵⁷

The intermediary has an insurance duty and must be financial reliable.¹⁵⁸

(b) whether and under which circumstances the insurer-and-principal is liable to the policyholders and the insured for losses caused by the intermediaries;

Article 3 § 3 Controlewet states that an insurance contract will be nullified when it covers a risk in Belgium but is concluded with a foreign insurer who has no licence for Belgium. In case of good faith of the insured, the insurer must fulfil his obligations and is liable for the mistake of the intermediary made by the negotiation of the contract.

(c) whether the authority supervising insurance intermediaries' activity may inflict penalties; and

The WLVO prescribes penalties in case of infringement of some provisions (art. 43, 51 and 96), which are also applicable on intermediaries conform to art. 139 WLVO.

The Controlewet also foresees penalties in case of infringement of the WLVO.

(d) whether and under which circumstances penalties may also be inflicted on the insurers-and-principals.

The penalties of the WLVO are also applicable on insurers (art. 139 WLVO).

C. Publicity of insurance products: Transparency and fairness

¹⁵⁷ See infra point III.2.

¹⁵⁸ L. SCHUERMANS, *Grondslagen van het Belgisch verzekeringsrecht*, Antwerp, Intersentia, 2008, 178.

Under Belgian law the publicity of insurance products is governed by three sets of rules. Firstly, the publicity of insurance products is governed by the general rules on publicity that are contained in the WMPC. Secondly, there are several provisions spread over different legal instruments that specifically concern the publicity of insurance products by insurers and insurance intermediaries. Thirdly, the association of Belgian insurers (Assuralia) has drafted up a code of conduct (soft law) for the publicity of insurance products.

Please, indicate:

- 1. whether there are any special transparency and fairness duties to be observed in advertising insurance products;**

WMPC

Article 2, 19° of the WMPC defines publicity (“reclame”) as every communication of a business that directly or indirectly has the aim to stimulate the sale of products, irrespective of the place or the used means of communication. It is clear that this definition is very broad with the intent to cover all possible forms of publicity. Because not every form of publicity has the same characteristics, the WMPC sets out three different sets of rules that apply according to the type of publicity used.

Firstly it has to be ascertained whether or not the publicity is comparative. If so the publicity is governed by art. 19, §1 WMPC.¹⁵⁹ Publicity is deemed comparative if it refers implicitly or explicitly to a competitor or to the products or services offered by a competitor (art. 2, 20° WMPC). A business can be considered a competitor when it offers products that, from the point of view of a normal reasonable consumer, are adequately substitutable, provide for the same needs or are aimed at the same goal. In the light of this broad definition not only insurers can be considered each other’s competitors but intermediaries and insurers can as well.¹⁶⁰ It is not required that the publicity actually makes a comparison, it suffices that it refers to a competitor or his products.

If the publicity is comparative it has to fulfil the criteria set out by art. 19, §1 WMPC. Thus comparative publicity is only allowed if it compares goods or services that provide for the same needs or are aimed at the same goal and if it compares in an objective manner one or more essential, relevant, verifiable and representative characteristics (possibly including the price) of these products. On top of these two positive conditions, art. 19, §1 WMPC also formulates that comparative publicity may not lead to a dishonest advantage, may not pertain to imitation goods and may not be misleading (artt. 88-91 and 96, °1 WMPC), confusing or denigrating.

In practice insurers seem to restrain from comparative publicity concerning insurance products. They probably realize that the exact conditions and provisions of an insurance

¹⁵⁹ For an extensive overview, see: R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 25-41.

¹⁶⁰ See the discussed case law in: R. STEENOT, “Kroniek handelspraktijken (1999-2004)”, *RW* 2005-06, 526.

product depend highly on the individual situation (risk profile), what makes it almost impossible to give an objective comparison of insurance products.¹⁶¹ The few published cases concerning comparative publicity date from a period prior to the instalment of the present rules on comparative publicity when comparative publicity was forbidden and thus are of little relevance.

If the publicity is not comparative then other provisions of the WMPC apply, depending on the fact whether or not the publicity is aimed at consumers. If the publicity is aimed at consumers the rules of artt. 84-94 WMPC apply. These provisions have a broad scope of application and govern dishonest trade practices as a whole, thus including publicity.

First of all, artt. 91 and 94 WMPC contain two lists of misleading and aggressive trade practices that are forbidden *per se*.¹⁶² For example, a business cannot falsely claim to have subscribed to a code of conduct or falsely state that it is recognized or approved by certain institutions. In practice insurers seem to have no problem restraining themselves from such practices.

Even if a practice does not correspond with the practices described in artt. 91-94 WMPC, it will still be forbidden if it violates the open norms of artt. 84-86, 88-90 and 92 WMPC). These provisions install a general ban on misleading (artt. 88-90 WMPC), aggressive (art. 92 WMPC) and every other form of dishonest (84-86 WMPC) trade practices. Thus a letter from an insurance intermediary to his clients stating that a certain insurance company is unreliable, can be considered denigrating and constitutes an infringement on these rules.¹⁶³

Since the scope of this rapport is not to give a full overview of the rules on publicity, we will limit ourselves to the elements that are most relevant for insurance products.

Publicity can be considered misleading if it has the potential to mislead (no dishonesty of the business is required) an average consumer about one of the elements specified in art. 88 WMPC (e.g.: nature of the product, essential characteristics, the obligations of the business, the duties and rights of the consumer, the identity of the business,¹⁶⁴ etc.) and if it can turn the consumer into taking a decision he would otherwise not have taken. Publicity can also be misleading by omission if it omits essential information an average consumer requires to be able to give his informed consent and thus can turn the consumer into taking a decision he would otherwise not have taken (art. 90 WMPC).

In a case before the court of commerce of Antwerp the plaintiff claimed that by using the phrase “*in 75% of cases ... is cheaper than other car insurance*” the insurer was misleading

¹⁶¹ H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 35-37.

¹⁶² R. STEENOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 42-55.

¹⁶³ Thus the letter of an intermediary stating that a certain insurance company is unreliable, can be considered denigrating: Vz. Kh. Brussels 1 february 2007, *Jaarboek handelspraktijken en mededinging* 2007, 191.

¹⁶⁴ Kh. Brussels 23 april 2008, *T.Verz.* 2008, 246, noot R. STEENNOT and L. VAN DEN STEEN and the appeal against this judgement: Brussels 27 april 2009, *Jaarboek Handelspraktijken & Mededinging* 2009, 286. In this case the plaintiff claimed that the business did not clearly indicate that it was an insurance agent and was thus misleading the consumers. Both times the courts held that the identity of the business is indeed essential information, but that it was not proven that the business did not identify itself clearly in a manner understandable for a normal consumer.

the consumers by omitting essential information, because he did not mention the evolution of the premium after a possible accident. The court disagreed with the plaintiff and held that this information could not be considered essential. On top of that the court judged that the plaintiff did not prove that the consumer was being turned into taking a decision he would otherwise not have taken. The aim of the publicity was only to inform the client about the website of the insurer where he could find sufficient information about the premiums and a possible increase after an accident.¹⁶⁵

If the publicity is not only aimed at consumers but also at non-consumers the rules of artt. 96-97 WMPC will also apply. Again the publicity may not be misleading or denigrating. This time the misleading character of the publicity has to be assessed from the point of view of a normal and reasonable non-consumer. If the publicity is aimed at a specific target audience, the misleading character has to be judged from the point of view of a reasonable person of the targeted audience.¹⁶⁶

For the sake of completeness it has to be noted that electronic publicity is also governed by artt. 13-15 Act of 11 march 2003. These provisions are however relatively limited. The most important duties resulting from these provisions are that the advertiser has to be identified, it has to be clear to the public that it concerns publicity and the publicity as well as the conditions (e.g. for reductions) mentioned in the publicity have to be clear and understandable. If it concerns publicity by electronic mail the publicity has to mention that anyone has the right to protest such publicity and the advertiser has to provide the necessary and functional tools to do so.

Insurance regulation

On top of the general rules on publicity (WMPC), there also exist some specific rules on the publicity of (certain types of) insurance products. Again these rules are not contained within a coherent set of provisions, but they are scattered over different legal instruments each with their own scope of application. Some of these rules simply apply to insurers (art. 20 Controlewet *juncto* art. 15, §6 Controlebesluit), others apply to advertisements by insurance intermediaries (art. 12^{ter} IMD) or only to specific types of insurance contracts (artt. 8, §5-§6 and 72, §1 KB Leven).

By themselves these provisions are very clear. They only impose a duty to mention certain information in the publicity.

Thus in each publicity document an insurer has to mention the (corporate) name and the name of the country where the company's main office is registered (art. 20 Controlewet *juncto* art. 15, §6 Controlebesluit).

¹⁶⁵ Kh. Antwerp 29 may 2008, *T.Verz.* 2008, 254, noot R. STEENNOT and L. VAN DEN STEEN.

¹⁶⁶ R. STEENNOT, e.a., *Wet Marktpraktijken*, Antwerp, Intersentia, 2011, 80.

In his publicity an intermediary always has to mention his registration number and an insurance agent also has to identify his principals for whom he concludes contracts (art. 12^{ter} IMD). This information has to be visible and legible.¹⁶⁷ In assessing this duty, the courts can take into account the nature of the publicity and its limitations (e.g. limited space on a gadget). However, the intermediary will still have to prove that he has taken other measures to insure that the public is made aware of this information.¹⁶⁸ Thus the court of commerce of Brussels held that a gadget (ice scraper) that accompanied an advertisement in a magazine did not have to mention the registration number because the advertisement mentioned this number and the gadget also referred to the website that contained this information.¹⁶⁹ The court of appeal did however not agree with this judgment. It confirmed the principle, but held that the nature of the publicity did not limit the intermediary's possibility to mention the registration number on the gadget itself.¹⁷⁰

When it concerns the publicity of life insurance policies, the publicity has to mention certain technical information (tariffs, returns, costs, name of the investment fund, goals of investment, degree of risk, whether or not a capital is guaranteed), a warning that past returns offer no certainty for future returns (art. 8, §5-§6 KB Leven), the fact that a document with the management regulations concerning the investment funds is available to the public and the location where this document is available (art. 72, §1 KB Leven).

Soft Law

On top of the legal rules we discussed, the association of Belgian insurers (Assuralia) together with the different associations of intermediaries (Fepabel, FVF, BVVM) have worked out a code of conduct.¹⁷¹ This code applies to all insurers and intermediaries active on the Belgian market, but only to (most) individual life insurance policies. The code governs the publicity of these policies as well as the duty of the insurer and the intermediary to inform. The aim is to provide the customer with sufficient information, both in the publicity as well as in the pre-contractual phase, to be able to conclude an individual life insurance policy on an informed basis. As we already mentioned (*supra*) this has led to the drafting up of a standard information card that insurers and intermediaries can use to fulfil their pre-contractual duty to inform when concluding a life insurance policy.

The code also obliges the insurers and intermediaries to mention certain information in their publicity on individual life insurance. The information varies according to the type of product (e.g. unit-linked, guaranteed capital) and from "below-the-line publicity" to "above-the-line publicity". In "below-the-line publicity" the consumer can immediately subscribe to the product (e.g. brochure, e-mail) and thus has to be informed more extensively. In case of

¹⁶⁷ Vz. Kh. Brussels 7 april 1998, *Jaarboek handelspraktijken en mededinging* 1998, 331; Kh. Brussels 23 april 2008, *T.Verz.* 2008, 246, noot R. STEENNOT and L. VAN DEN STEEN.

¹⁶⁸ R. STEENNOT, *Handboek consumentenbescherming en handelspraktijken*, Antwerp, Intersentia, 2007, 82.

¹⁶⁹ Kh. Brussels 23 april 2008, *T.Verz.* 2008, 246, noot R. STEENNOT and L. VAN DEN STEEN.

¹⁷⁰ Brussel 27 april 2009, *Jaarboek handelspraktijken en mededinging* 2009, 286.

¹⁷¹ <http://info.verzekeringen.as/gedragscode.pdf>.

“above-the-line publicity” (e.g. poster, advertisement) the duty to inform is limited to the main characteristics of the product, since the consumer cannot immediately subscribe to the product.

2. whether any controls on advertising are in place, specifying:

(a) the types of advertising placed under control; and

Only the code of conduct drafted up by Assuralia and the different associations of intermediaries contains a specific control procedure. To make sure that this code of conduct is upheld a system of self control is implemented. Every insurer has to appoint someone within the company to monitor the publicity. Each consumer, insurer or intermediary that suspects that the code is not being upheld, can formulate a complaint with the insurance ombudsman. Although the Controlewet does not contain a specific procedure for the control of publicity, the FSMA can exercise a general control and ascertain whether or not the publicity made by an insurance company complies with the provisions of the Controlewet and its implementing provisions.

(b) whether prior approval procedures are in place;

No form of prior approval exists.

3. which consequences may ensue from non-performance of transparency and fairness duties.

The WMPC contains a specific consequence in case of an infringement on artt. 84-86, 91 and 94 WMPC. In those situations the consumer can claim that the price is repaid (e.g. premium) without him having to repay the product or the services rendered (e.g. provided coverage). Depending on the rules infringed upon the courts have to award this claim (art. 91, 12°, 16°, 17° and art. 94, 1°, 2°, 8° WMPC) or merely have the possibility to do so and can reduce the claim (artt. 84-86, art. 91, 1°-11°, 13°-15°, 18°-23° and art. 94, 3°-7° WMPC). On top of that a misleading or aggressive publicity campaign will give rise to a claim to cease the infringing activities (art. 110 et seq. WMPC). In awarding this claim the court can also order that the judgment has to be published in the media (art. 116 WMPC). It also has to be noted that the publicity can have an effect on the way in which the contract concluded with the consumer has to be interpreted. Article 40 WMPC allows the contract to be interpreted according to the trade practices (including publicity) that are connected to the contract.¹⁷² Lastly the WMPC also contains penal consequences for certain infringements (artt. 124-132 WMPC).

¹⁷² H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 38.

These provisions do not detract from the consequences under the general law of obligations (art. 41 WMPC). Thus the consumer can also revert to the general law of obligations and prove that the publicity caused a vice in his consent and/or caused damages (*supra*).

As to an infringement on the rules on publicity contained in insurance regulation, only art. 15 IMD contains specific penal consequences for insurance intermediaries in case of an infringement on art. 12^{ter} IMD. Infringements on the provisions of the Controlewet give rise to the general administrative consequences for such an infringement (art. 81-82 Controlewet). However in practice, the courts accept that an infringement on these duties constitutes a form of misleading publicity under art. 88 WMPC. As we already noted the omission of essential information (for example information that is mandatory) can be considered misleading publicity.¹⁷³ Thus the president of the court of commerce can order that these misleading practices are to be ceased (art. 2 WMPC^{bis}).¹⁷⁴ On top of that, art. 4, 7^o WMPC^{bis} allows the president of the court of commerce to identify any infringement on the legal rules that govern publicity and to order that the infringing activities are to be ceased.

Chapter six of the code of conduct states that the observing of the code is considered an honest trade practice. This means that an infringement on the rules of the code can be sanctioned according to the provisions of the WMPC.¹⁷⁵ However, until now there has not been any published case law about an infringement of this code of conduct.

V. Open Answer:

If necessary, indicate other points that could be felt to be relevant to the topic.

Dd. 3 June 2013

¹⁷³ Vz. Kh. Brussels 7 april 1998, *Jaarboek handelspraktijken en mededinging* 1998, 331; Vz. Kh. Brussels 19 april 2000, *Jaarboek handelspraktijken en mededinging* 2000, 120; Kh. Brussels 23 april 2008, *T.Verz.* 2008, 246, noot R. STEENNOT and L. VAN DEN STEEN; Brussels 27 april 2009, *Jaarboek Handelspraktijken & Mededinging* 2009, 286.

¹⁷⁴ H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 2011, 45-46.

¹⁷⁵ H. KEULERS, e.a., *Verzekeringen en marktpraktijken*, Mechelen, Kluwer, 54.