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TRANSPARENCY IN INSURANCE CONTRACT LAW

P. Marano / K. Noussia (Editors)

TRANSPARENCY IN THE INSURANCE CONTRACT LAW OF PORTUGAL

Margarida Lima Rego (Author)

ABSTRACT

In Portugal, mostly by virtue of its EU membership, there has been a dramatic increase in transparency requirements in the course of the last 20 years. In view of this, I argue that another question is begging to be asked: does it make sense to put all one's eggs in the basket of information? In particular, should transparency as an ideal be allowed completely to replace trust in contractual relations? Information plays a central role in traditional contract formation models: contracting parties are meant to acquaint themselves with all the terms of the contracts they contemplate entering into so as to make an informed decision whether or not to make a commitment thereto. I argue that the protection of insurance customers can best be achieved if one *complements* the informational approach with a different approach consisting of treating financial products much like any other products, placing upon the insurer the burden to check that the products it offers to its customers are consistent with their demands and needs.

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OUTLINE

1. Brief Overview of Insurance Contract Law in Portugal

In Portugal, the most relevant source of insurance contract law is Decree-Law 72/2008 of 16 April 2008, which came into force on 1 January 2009. This statute, whose main purpose was to approve the new insurance contract legal framework appended thereto, has since been amended once, by Law 147/2015 of 9 September 2015. I shall refer to it hereinafter simply as 'PICA' (Portuguese Insurance Contract Act).

PICA was long overdue. It was the first successful attempt, in close to two centuries, to update, complete and consolidate the rules applicable to insurance contracts in general and the main rules applicable to some of the most relevant classes of insurance contracts in Portugal[1]. Previously, insurance contracts had been governed by a fragmentary legal framework scattered over an assortment of some long-standing and some comparatively more recent statutes[2]. There were inconsistencies within the framework and some relevant issues were either entirely overlooked or only partially addressed. In addition, there was a widely shared perception that the existing regulation should be amended so as more faithfully to reflect current values, consumer protection not having been high up in the scale of legislative concerns at the time some of our most comprehensive statutes had been enacted: the Commercial Code of 1888 and a Decree of 21 October 1907[3].

PICA comprises a total of 217 provisions, distributed by three main titles: Title I (Articles 1 to 122) includes the most general framework, purporting to regulate the main issues affecting all insurance contracts alike. Title II of PICA (Articles 123 to 174) regulates indemnity insurance. After a relatively small number of provisions devoted to all classes of indemnity insurance, a few chapters specifically regulate liability insurance (Articles 137 to 148), fire insurance (Articles 149 to 151), crop and livestock insurance (Articles 152 to 154), goods in transit insurance (Articles 155 to 160), credit and suretyship insurance (Articles 161 to 166), legal expenses insurance (Articles 167 to 172) and assistance insurance (Articles 173 and 174). Title III (Articles 175 to 217) is concerned with personal insurance. It includes chapters on life assurance (Articles 183 to 209) as well as on accident and health insurance (Articles 210 to 217).

PICA applies to all classes of insurance, including those for which more tailored regulation was already in place at the time it came into force, or has since been enacted.

[1] A remarkably thorough regulation of the insurance contract had been included in the Commercial Code of 1833, subsequently replaced, not as successfully when it came to the insurance contract, by the Commercial Code of 1888.

[2] For an overview of the history of insurance law in Portugal, see Cordeiro 2013, pp. 75-100. For a more thorough account of the insurance business over the last 45 years, see Carvalho 2016 (passim).

[3] Various announcements had been made the past that more systematic and in-depth legislation was in the making. The first of them was a brief reference at the beginning of the preamble of a statute approved as early as 1929. See Vasques 2005, pp. 21-22; and Martinez 2006, pp. 34-39 (the latter chaired the committee in charge of drafting what would eventually become PICA). Almeida 1971, pp. 431-459, had included a draft of his own as an appendix to his monograph on the insurance contract, deeming the preparation of a new insurance contract law a "necessity" (p. 423). Other authors would follow suit. In addition to the above, see Cordeiro 2003 (passim).

However, those types of insurance which were or have since been the object of special regulation will continue to be primarily regulated thereby. PICA applies to those classes of insurance only insofar as its rules are compatible with the relevant special regulation. So, for instance, maritime insurance is still primarily regulated by Articles 595 to 615 of the Commercial Code of 1888[4].

There are well over 100 instances of compulsory insurance in Portugal[5]. Statutes regulate them with varying degrees of comprehensiveness. All such regulation prevails over the comparatively more general rules contained in PICA.

Portuguese insurance contract law is also partly made up of rules which originate in a multitude of statutes containing non-insurance specific regulation, such as those which set forth the legal frameworks on standard terms, on distance selling, on electronic commerce, on consumer protection[6].

To some extent, the rules governing the taking-up and pursuit of insurance and reinsurance activities in Portugal – the Portuguese Insurance Supervision Act approved by Law 147/2015 of 9 September 2015, as amended by Law 7/2019 of 16 January 2019, implementing Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance, known as the Solvency II Directive – also have a palpable impact on insurance contract law. I shall refer to this act, hereinafter, simply as 'PISA'. The same is true of those regulating insurance distribution – the Portuguese Insurance Distribution Act approved by Law 7/2019 of 16 January 2019, which has implemented Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, known as the Insurance Distribution Directive. I shall refer to this act, hereinafter, simply as 'PIDA'.

For instance, the single most relevant criterion used in PICA to distinguish between rules that are absolutely or relatively mandatory to contracting parties from those that only apply by default depends on whether the contract should be qualified as mass insurance or as large-risks insurance, a distinction which stems from a set of directives on the taking-up and pursuit of insurance and reinsurance activities in the European Union. PICA mostly applies by default to large-risks insurance, the parties being free to diverge from its rules save in a very small number of cases[7]. As regards mass insurance, however, there is a long list of provisions which may not be contractually derogated from or which may only be derogated from to the benefit of the policyholder,

[4] See Articles 2 and 155(2) of PICA. See Martinez et al 2011, pp. 41-42 (annotation by Martinez PR).
[5] There is a list of all compulsory insurance requirements on the regulator's website: www.asf.com.pt. The regulator is the Portuguese Insurance and Pension Funds Supervisory Authority ("ASF").
[6] See Cordeiro 2013, pp. 553-555.
[7] Hence, in most instances the transparency requirements that will be discussed in the sections ahead should also be interpreted in this light, when it comes to large risks insurance. No further mention to this distinction will be made in this chapter. See Martinez et al 2011, pp. 68-71 (annotations by Martinez PR and Oliveira AC).

the insured and/or the beneficiary of the insurance. The distinction is currently set forth in Article 5(2) to (4) of PISA.

As a member-state of the European Union, much of Portugal's insurance contract law directly or indirectly originates in EU Law, although this phenomenon is more pervasive in the regulation of the taking-up and pursuit of insurance and insurance-related activities than in the rules governing the insurance contract, which, although also partially predisposed by EU Law, especially in what concerns the protection of the mass insurance consumer, were in fact more heavily influenced by recent national statutes of a few EU member-states, perhaps most prominently the Belgian Insurance Contract Act of 25 June 1992.

2. Definition of Transparency in Portuguese Insurance Contract Law

'Transparency' as a term meant to denote a special concern with the protection of the mass insurance consumer was firstly used in a Portuguese statute in 1994[8]. That statute was Decree-Law 102/94 of 20 April 1994, which implemented third generation Council Directives 92/49/EEC of 18 June 1992 (non-life insurance) and 92/96/EEC of 10 November 1992 (life assurance).

Although for the most part Decree-Law 102/94 established a new set of rules regulating the taking-up and pursuit of the business of direct insurance and its supervision by the local regulator, Title IV contained a number of provisions directly regulating the insurance contract, amongst which were Articles 168 to 173, which listed the information that insurers must communicate to policyholders before non-life insurance contracts and life assurance contracts were concluded and, as regards the latter, also throughout the duration of contracts. Such provisions implemented Articles 31 and 43 of the 3rd Non-Life Directive and Article 31 and Annex II of the 3rd Life Assurance Directive.

Given that there were more provisions in need of implementation on life assurance than on non-life insurance, the chapter where such implementation was accomplished was subdivided into sections, the first of which was entitled 'Transparency'. There were no other references to transparency in this chapter, and no references thereto in the chapter devoted to non-life insurance. The one reference to transparency in insurance contained in this statute was thus in the title of a section within the chapter devoted to life assurance.

More than a year would pass before the approval of Decree-Law 176/95 of 26 July 1995, which came into force on 25 October 1995. I shall refer to it hereinafter simply as "TIA" (Transparency in Insurance Act).

[8] See Oliveira 1995, p. 76.

TIA's preamble contextualizes the establishment of a new legal framework on transparency in insurance as a much-needed reaction to the inception of the single European market in the insurance sector, which in this country had been accomplished by Decree-Law 102/94. Its entry into force had opened up a new area for competition, potentially giving rise to a greater and much more complex supply of insurance products, so the preamble said. Although there was no specific mention thereto, the abandonment of the prior system of supervisory preapproval of standard terms by the regulator was also an important factor behind the increased variety and complexity of insurance products available on the market[9].

This increased variety of products came at the expense of a decline in product transparency and resulting added difficulties in product comparability. To make up for these perceived negative side effects of the single European market in the insurance sector, the 3rd generation Directives "increased and broadened the minimal requirements for transparency of individual contractual contents"[10]. This approach was "in line with the EU's general approach of consumer protection by implementing a model of information"[11].

Hence the diversity of coverage, exclusions and other contract terms made available on the market, with variable degrees of explicitness, would call for the introduction of minimum transparency requirements in pre and post-contractual relations.

Such transparency was an ideal to be sought after. So as to achieve that ideal, new information duties were created, setting out the data that insurers and insurance intermediaries should disclose to policyholders prior to, at the time of, and after concluding an insurance contract, and the manner in which such data should be conveyed to policyholders. Such was the purpose of Articles 168 to 173 of Decree-Law 102/94 and, shortly afterwards, the main purpose of the Transparency in Insurance Act[12].

'Transparency', as used in the TIA, is, first and foremost, a reference to the plainness and intelligibility of contract terms, as well as to their exhaustiveness. Strictly speaking it transcends contract terms, also applying to any accounts of a predominantly descriptive or explanatory nature provided orally and/or in writing at or around the time of contracting, and even to the contents of advertisements of insurance products. However, such other accounts might ultimately also be deemed to integrate the contract terms, if they are found to be sufficiently concrete and objective so as to allow the interpreter to construe them as such[13].

[9] See Wandt 2012, p. 14.
[10] Wandt 2012, p. 14.
[11] Wandt 2012, p. 14.
[12] See Cordeiro 2013, p. 552.
[13] This rule would eventually be set forth in Article 33 of PICA.

This meaning of the term is consistent with the understanding of the Court of Justice of the European Union that the requirement of transparency of contractual terms, as set forth in Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, must be interpreted broadly, to mean that terms which form part of the main subject-matter of the contractual framework must be drafted 'in plain, intelligible language'[14].

Whilst being presented as an end in itself, transparency is ultimately also a means to an implicit end: making accessible to insurance customers all the data that they need to take in and process in order to make an informed decision when choosing to enter into an insurance contract.

3. The Issue of Transparency in Portuguese Insurance Contract Law

3.1. The Principle of Good Faith in Portuguese Insurance Contract Law

Although the term itself plays no part in traditional contract law, transparency is generally regarded as a key value in pre-contractual negotiations, both parties having a duty to negotiate in good faith (Article 227 of the Portuguese Civil Code). Once the contract has been concluded, the parties continue to be subject to the principle of good faith throughout the contract's duration, as they must act in accordance with this principle both in fulfilling their obligations and in enforcing their contract rights (Article 762(2) of the Portuguese Civil Code)[15].

Good faith subjects contracting parties to ancillary duties aimed at protecting their respective counterparties and demanding loyal treatment of one another. Such protection and loyalty duties include duties of disclosure[16]. Hence, even before transparency in insurance contracts had been the object of special regulation, to some extent insurers were already bound by such non-insurance-specific information duties as could be drawn from the above mentioned provisions on the principle of good faith in general contract law.

Also a by-product of the principle of good faith is the regulation contained in Decree-Law 446/85 of 25 October 1985, as amended by Decree-Law 220/95 of 31 January 1995. I shall refer to it hereinafter simply as 'STA' (Standard Terms Act). This Act, which in 1995 incorporated the implementation of Council Directive 93/13/EEC of 5

[14] On the topic of insurance contracts, see *Jean Claude Van Hove v CNP Assurances SA*.

[15] The main reference on the principle of good faith in Portuguese contract law is Cordeiro 1997. On *culpa in contrahendo* and the duty to negotiate in good faith, see pp. 527-585. Good faith throughout the duration of a contract is dealt with on pp. 586-660.

[16] See Cordeiro 1997, pp. 586-625. Although the author treats duties of disclosure as a third type of ancillary duties, in addition to the protection and loyalty duties, I believe that in all instances they should also be qualified as protection duties and/or as loyalty duties, which appears to deny their autonomy. Information is never an end in itself, but rather a means of protecting or being loyal to one's contracting parties.

April 1993 on unfair terms in consumer contracts, applies to all contracts which consist of, or purport to include standard terms drafted by one of the parties without any prior individual negotiation.

In addition to prohibiting the use of any contract terms which offend the principle of good faith, rendering them null and void (Articles 12 and 15), the STA sets forth specific disclosure requirements that contracting parties must meet if they wish to include their standard terms in the contracts they enter into (Articles 4 to 9). All such standard terms must be fully and adequately communicated to the other party reasonably in advance of the contract's conclusion. They must be thoroughly explained to the other party whenever such explanation is needed. Non-compliance with any one of these duties – of communication and explanation – results in the exclusion of such terms from the contract. Any ambiguities are resolved through the application of the *contra proferentem* doctrine, which determines that any doubt as to the meaning of a term will result in the term bearing the meaning most favourable to the adhering party (Article 11).

Finally, mention should be made to Law 24/96 of 31 July 1996, as amended from time to time, which approved the Consumer Protection Act (hereinafter, the 'CPA'). This Act reflects the need to protect the weaker contracting party and is applicable to contracts concluded between a professional and a consumer. The professional, in its capacity as supplier of goods or services, has a duty to inform the consumer about the goods or services provided in an objective, adequate and clear way. Consumers must be thoroughly informed about their product's characteristics, the applicable price, the consequences of default, the contract's duration, after-sales assistance and/or time of delivery, when relevant. If this duty to inform is not complied with, consumers have a right to terminate the contract (Articles 8 and 9).

Such is the wider legal context of any insurance-specific transparency regulation.

3.2. Transparency Regulation: the Previous Regime (TIA)

On 25 October 1995, when the Transparency in Insurance Act (Decree-Law 176/95 of 26 July 1995) came into force, most of that wider legal context was already in place. TIA had its predecessors, some of which were mentioned above. At that time, the legal framework governing insurance contracts in general was mostly still contained in Articles 425 to 462 of the Commercial Code of 1888. These would only be revoked on 1 January 2009, by Decree-Law 72/2008 of 16 April 2008, which replaced them by PICA[17]. Understandably, before this came about the most relevant sources of duties of disclosure lay elsewhere. Decree-Law 102/94 of 20 April 1994 was eventually replaced

[17] See below 3.3.

by Decree-Law 94-B/98 of 17 April 1998, and the latter by Law 147/2015 of 9 September 2015 (PISA), implementing the Solvency II Directive.

As mentioned above, TIA's preamble identifies the inception of the single European market in the insurance sector as the main driving force behind the growing need for the setting up of minimum transparency requirements in pre and post contractual relations. TIA was meant to set out the information that insurers must provide to their client policyholders so as to clarify their respective rights and obligations and thereby reduce the potential for conflict between contracting parties in insurance contracts. It only applied to individual insurance contracts entered into with natural persons, so its rules coexisted with, rather than replaced its predecessors in its entirety[18].

The drafting of a statute thoroughly regulating all insurance contracts had been publicly referred to a number of times in the past. It had been an apparently on-and-off pet project of different governments which would not bear any fruits until 2008. In TIA's preamble the intention to make it happen was specifically referred to. Notwithstanding that more ambitious project, the need for dispensing adequate levels of consumer protection would recommend that the insurance contract law rules more closely related to the provision of information would come into force sooner rather than later. Such was the reason provided for their (provisional) inclusion in TIA.

TIA's Chapter I contained a number of so-called 'general provisions'. Following a list of defined terms, Articles 2 to 7 of TIA were devoted to the establishment of pre-contractual information duties. Such duties were built upon those previously set forth in Articles 168 to 173 of Decree-Law 102/94 of 20 April 1994. In the first place there were those duties generally applicable to life assurance contracts (Article 2) and non-life insurance contracts (Article 3). Then there were duties specifically concerned with group insurance contracts (Article 4) and with insurance contracts which required the insured's prior taking of a medical exam (Article 5)[19]. In 2004 Article 5-A was added, on structured savings collection instruments (unit-linked life assurance). Finally there were some rules on public disclosure of pricing conditions (Article 6) and on the advertising of insurance products (Article 7).

TIA's Chapter II began with a Section suggestively entitled 'Transparency'. It contained two very short provisions. Article 8 set forth the rule that an insurance contract's general and special terms must be "drafted in a clear and perfectly intelligible manner"[20]. Article 9 determined that an insurance contract's special and particular terms could not modify the nature of the risks covered in accordance with the applicable general and special terms, respectively, taking into consideration the legally prescribed risk classification (at the time, Articles 114 and 115 of Decree-Law 102/94). Given that insurance products were not – and are still not – subject to a principle of *numerus*

[18] See Vasques 1999, pp. 191-192 and 201.
[19] See Vasques 1999, pp. 214-215.
[20] See Vasques 1999, p. 350. The author believes that the actual wording came from Article 3(b) of the Spanish Ley 50/1980 of 8 October.

clausus, the only concern behind this legal restriction seemed to be that of preventing the misselling of insurance products by prohibiting insurers from distributing any insurance products which may appear to belong to an class of insurance whilst they actually belong to a different class of insurance[21].

Then there came a Section on life assurance (Articles 10 to 12) and another Section on non-life insurance (Articles 13 to 16). Both set forth the minimum contents of the contracts' general and special terms. Chapter II included a fourth and final Section which contained a number of rules on the formation and duration of insurance contracts (Articles 17 to 25).

A comparison of TIA and PICA allows us to confirm that, whilst the wording of the relevant provisions has suffered significant amendments, the bulk of TIA's provisions has found its way into PICA. Although Articles 5-A to 7 are still in force today, we may safely conclude that TIA was almost entirely replaced by PICA. We may also confirm the reasonableness of the decision not to wait until the enactment of PICA which paved the way to the setting forth of the main rules on transparency in TIA, given that over a decade would pass before PICA's entry into force, on 1 January 2009.

3.3. Transparency Regulation: the Current Regime (PICA)

3.3.1. Transparency in the Formation of an Insurance Contract

PICA is currently the most relevant source of transparency requirements in the formation of an insurance contract. One may safely conclude that information plays a very important role in PICA, there being numerous provisions specifically setting forth or referring to information duties of various kinds and scope[22].

PICA's Title I regulates the formation, vicissitudes and cessation of all insurance contracts in general. As to formation, first and foremost one should mention the prohibition of discriminatory practices, which deepens the concept of what is considered a discriminatory practice[23] and sets forth a procedure to settle disputes arising from an insurer's refusal to enter into an insurance contract with a prospective policyholder or of the former's acceptance to enter into such a contract only on more onerous terms than might otherwise have been granted to that prospective policyholder, such as a higher premium and/or the stipulation of extra exclusion clauses. This procedure includes a specific duty to provide the prospective policyholder with information on the objective data upon which the insurer grounds its decision to refuse

[21] See Rego 2010, p. 283.

[22] See Articles 15, 18-26, 29, 78-79, 87-88, 91-94, 100, 133, 135, 140, 170, 178, 180, 185-187, 205-206, 208 and 201 of PICA. See Teles 2012 (passim); and Cordeiro 2013, pp. 564-586. In English, see Rego 2017, pp. 565-567.

[23] On discrimination in insurance, see Rego 2015 ("Statistics"); and Rego 2015 ("Segmentation"). On Article 15 of PICA, see Rego 2014 ("Inconstitucionalidade"); and Rego 2016 ("Futuro").

the client or to condition its acceptance of the client to those unfavourable terms (Article 15 of PICA)[24].

This appears to be the new law's first transparency requirement, although the term has not been employed in this context. When refusing a contract or when accepting to conclude it only under what appear to be discriminatory terms, the insurer must be able to justify the different treatment but it must also be transparent as to the reasons behind that stance. Silence is no longer an option. By making insurers accountable to whomever reaches out to them in search of an insurance contract, this requirement reinforces the prohibition of discriminatory practices: not only are insurers banned from treating their clients differently unless their reasons to do so are legally acceptable, but this information right puts any one of them in a position to check them.

The insurer's duties to inform the policyholder and keep it up to speed on the contents of the insurance product it supplies both before and after the contract is concluded are also very thoroughly laid down, with an emphasis on the insurer's pre-contractual information duties (Articles 18-23 of PICA). The policyholder's and the insured's information duties on the insured risk are also comprehensively regulated, with an emphasis on the initial declaration of the risk, the policyholder's or the insured's wilful or negligent misrepresentations respectively giving rise to the insurer's right to avoid the contract and to its right to terminate or amend the contract (Articles 24-26 of PICA). Given that, as seen above, transparency as a concept used in this jurisdiction is meant to refer to information requirements placed upon the insurer, rather than to those placed upon the policyholder or the insured, the former will be analysed herein in greater detail than the latter[25].

Article 18 of the PICA lays down the data that every insurer must disclose to a prospective policyholder as part of its pre-contractual duties[26]. Although the provision includes a long list of topics that must be covered when rendering such information to the client, that list is non-exhaustive in nature. In sum, the insurer must convey to its client no less than the full contents of the envisaged insurance contract[27]. This information must be conveyed to the client clearly and in writing. It must be written in Portuguese. The document must be delivered to the client prior to the contracting stage, so that the client may process the information contained in that document before entering into the insurance contract (Article 21 of PICA)[28].

[24] Both in its original version and as amended by Law 147/2015.
[25] On the Portuguese rules on the initial declaration of the risk and on the consequences attached to the policyholder's or the insured's wilful or negligent misrepresentations, see the monograph by Poças 2013 (passim). See also Gomes 2011 (passim); Martinez et al 2011, pp. 131-178 (annotations by Oliveira AC and Martinez PR); Teles 2012, pp. 249-273; and Cordeiro 2013, pp. 573-586.
[26] See Martinez et al 2011, pp. 101-105 (annotation by Ribeiro E); Teles 2012, pp. 216-230; and Cordeiro 2013, pp. 564-567.
[27] Rego 2012 ("Contrato"), pp. 22-23.
[28] In some respects this requirement is closely reminiscent of § 7 of the German Insurance Contract Act.

Except for the language requirement, even without such provisions we could reach a similar conclusion just by taking into consideration Article 232 of the Portuguese Civil Code and Articles 4 and 5 of the Standard Terms Act. Nonetheless, prior to the entry into force of PICA, it was fairly common practice for insurers to provide their clients at the contracting stage with a short summary of the contract terms, only conveying to them the full contents of the contract after its conclusion. Therefore, although legally unnecessary, the introduction of this requirement played in fact an important role in the dissemination, throughout the industry, of the notion that this practice is legally untenable[29].

The following is the list of topics that are non-exhaustively set forth in these provisions – topics that an insurer must cover in its written communication with clients so as to fulfil its pre-contractual information duties towards them: (a) the insurer's name and legal form; (b) scope of the insurance coverage; (c) cover exclusions and limitations; (d) the premium amount or its calculation method, as well as the payment method and the consequences of default; (e) applicable bonus-malus rules and their calculation method; (f) minimum insured capital in compulsory insurance; (g) claim limits per insurance period; (h) the contract's duration and the rules governing its renovation and cessation; (i) the rules on assignment; (j) how to lodge complaints, the applicable protection mechanisms and the supervision authority; (k) the applicable law, if different from that of Portugal (Article 18 of PICA); and (l) the Member State in which the head office is situated as well as the branch concluding the contract, where appropriate, and their respective addresses (Article 20 of PICA).

Article 185 of PICA adds to the above-mentioned topics a few additional topics that insurers should also include in their pre-contractual communications with life assurance clients: (a) the attribution and calculation method of any profit participation rights; (b) the scope of each cover option; (c) an indication of surrender and paid-up values, as well as the nature of the coverage and penalties in case of surrender, reduction or assignment of the contract; (d) the premiums corresponding to each benefit and option; (e) minimum guaranteed benefits, including information on the applicable interest rate and on the duration of the guarantee; (f) the reference values used in contracts with a variable insured capital, as well as the number of existing units; (h) the nature of the assets underlying the contracts with variable insured capital; (i) general information on the applicable tax arrangements; (j) in contracts that contain a capitalization component, indication of the quantification of the charges and respective incidence and moment of liquidation; (k) indication of the right of access by the insured person to medical data resulting from any medical examinations performed on the insured person[30].

Article 206 of PICA, on unit-linked products, adds the following to the above mentioned topics: (a) the reference value; (b) the policyholder's rights in the event of a

[29] Something similar to what had happened in Germany. See Gaul 2007 (passim); Stockmeier 2008 (passim); and Römer 2008, pp. 1520-1523.
[30] See Martinez et al 2011, pp. 539-540 (annotation by Torres LC).

liquidation of the investment fund or the elimination of an account unit before the end of the contract; (c) the methods and regularity of the provision of information on the evolution of the reference value; (d) the terms applicable to the liquidation of the surrender value and of the insured sums; (e) the regularity of the provision of information on the evolution of the investment portfolio[31].

A special duty to explain the functioning of the insurance contract has also been set forth. The intensity of this duty mostly depends on the complexity of the contract and on the amounts involved, as well as on the medium used for the conclusion of the contract. This duty's main focus is on the scope of the insurance coverage. This duty includes a requirement that the insurer identifies which insurance product, out of the various ones in its own portfolio, is most suitable to each client's needs (Article 22)[32].

Pinpointing the true nature of these information duties is somewhat challenging. We should begin by distinguishing between the act of rendering information on the contents of a future contract or which is somehow relevant to that contract, and the act of producing the statements which will form that same contract. When we utter an informative statement, that statement may be classified as being either true or false. When we conclude a contract, our statements are performative in nature: they are speech acts which create something new: the contract[33].

This pre-contractual communication between contracting parties fulfils these two different functions at once: by informing their clients of the contents of the future contract, insurers are also taking steps that will later allow them to claim that a contract has in fact been entered into with those contents, to the extent that the information provided is contractual. Whilst most of the above-mentioned topics will correspond to actual contract terms, others are purely informational: for instance, the identification of the insurer's registered address and office location is purely informational, and so is the information on the applicable tax arrangements. They are not part of the *lex contractus*[34]. Strictly speaking such information is not binding upon the insurer, although the insurer might be held liable if it renders information that is either false, incomplete or misleading is any way.

Indeed, non-compliance with the insurer's pre-contractual information duties generally renders the insurer liable for any harm caused to the policyholder or the insured. In cases where the insurer is sued, the client claiming damages on the ground of the former's liability for non-compliance with its pre-contractual information duties, the criteria applicable for the identification and quantification of the losses or injuries to be compensated for are the general criteria applicable to pre-contractual civil liability

[31] See Martinez et al 2011, pp. 588-597 (annotation by Ribeiro E).
[32] See Martinez et al 2011, pp. 119-126 (annotation by Oliveira AC and Ribeiro E); Teles 2012, pp. 237-240; and Cordeiro 2013, pp. 569-570.
[33] Speech acts in the meaning attributed to the expression by Austin 1962 and further developed by Searle 1969.
[34] See Rego 2012 ("Contrato"), p. 22.

(Article 227 of the Portuguese Civil Code). In the case of pre-contractual information duties, it could be argued that, if a policyholder does not obtain the most suitable coverage due to defective information, and as a result suffers loss that ends up being uninsured, such policyholder/insured could claim compensation in the amount corresponding to the difference between their actual situation and that which they would have been in had adequate insurance been in place. Generally it should be said that an injured party must be compensated for loss that is a direct consequence of the insurer's omission[35].

Breach of such duties also enables the policyholder to terminate the contract within thirty days of their receipt of the insurance policy, but only when the terms stipulated therein and the ones submitted as pre-contractual information differ and those differences represent crucial elements of the contract that influenced the policyholder's decision to enter into the insurance contract (Article 23 of PICA)[36].

When the data that the insurer has failed to convey to its client, or which it has conveyed in a deficient fashion, would correspond to a contract term, in addition to that line of defence the client is also entitled to argue that the term in question should be deemed to have been excluded from the contract due to its non-existent or inadequate communication, pursuant to Article 232 of the Portuguese Civil Code and Article 8 of the STA.

Non-compliance with information duties is also sanctioned with regulatory measures, it being classified as a serious misdemeanour by Article 370(z) of PISA. Such non-compliance is punishable with a fine of up to € 1,500,000. PISA contains several other provisions regulating market conduct requirements, many of which concern transparency in insurance. Such requirements will be analysed elsewhere[37].

It is also important to note that, pursuant to Article 33 of PICA, specific and objective messages contained in insurance advertisements are deemed to be part of the insurance contract, those terms that contradict them being deemed as excluded from the contract, except to the extent that they are more favourable to the policyholder, the insured or the beneficiary[38].

PICA has also provided some much needed clarification that an insurance contract's validity does not depend on the existence of a written contract, but where a contract has not been made in writing the insurer is under a duty to put it into writing by producing a policy that it must deliver to the policyholder (Articles 32 to 37 of PICA)[39]. The policy may be supplied in any durable medium. The burden of proof of such delivery falls

[35] Pinto 2008, pp. 1143-1144, 1379-1389 and 1412-1447.
[36] See Martinez et al 2011, pp. 126-130 (annotation by Oliveira AC and Ribeiro E); Teles 2012, pp. 241-248; and Cordeiro 2013, pp. 570-572.
[37] See Marano and Noussia (eds), Vol. II (forthcoming).
[38] See Martinez et al 2011, pp. 219-220 (annotation by Vasques J).
[39] See Rego 2012 ("Contrato"), pp. 25-27.

upon the insurer. Once delivered, the insurer may not invoke any clauses not included in the policy. However, the policyholder is given a thirty-day period within which to check conformity of the policy terms with its prior agreement. Once such period has lapsed, only a claim of non-conformity that is sustained by written evidence will be accepted (Article 35 of PICA)[40].

In many cases, compliance with the above-mentioned transparency requirements entails the delivery, to each policyholder, of two sets of almost identical documents: a first set of documents containing the full contents of the future insurance contract at the pre-contractual stage, and a second set of documents consisting of the insurance policy which is delivered to the same policyholder after the contract has been concluded.

Nonetheless, the requirements that apply to both sets of documents are only partially the same. Whilst the pre-contractual document must be written clearly and in Portuguese (Article 21 of PICA)[41], its post-contractual replica must be drafted in a concise, rigorous and understandable fashion, in legible font, using common words and expressions whenever the use of legal or technical terminology is not indispensable, also in Portuguese (unless the policyholder specifically requests information in a different language) (Article 36 of PICA)[42].

A list of topics that should be included in an insurance policy is set forth, this time in Article 37 of PICA[43]. Once again, the list only partially coincides with that relating to the pre-contractual document, contained in Articles 18 and 20 of PICA. Understandably, the first difference is in the name of this second document, which must bear the name "policy" (*apólice*).

Interestingly, this requirement is followed by the determination that all policy documents should be properly identified as such. This requirement appears to have been aimed at doing away with one of the most frustrating difficulties previously faced by an insurance lawyer in Portugal: that of gathering a complete set of all the documents that might contain the contract terms applicable to any given case, in the midst of what sometimes amounted to a real chaos of existing general, special and particular conditions, the former usually in various editions, of the many forms and questionnaires filled in by the policyholder and the insured, and sometimes of a long succession of policy endorsements[44].

Another very pragmatic requirement addresses an equally relevant concern: that of correctly identifying the policyholder, the insured and the beneficiary, with names, addresses and tax numbers, as well as the insurer's claims representative.

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[40] See Rego 2012 ("Contrato"), pp. 36-37.
[41] See Martinez et al 2011, pp. 115-119 (annotation by Ribeiro E); Teles 2012, pp. 230-236; and Cordeiro 2013, pp. 567-569.
[42] See Martinez et al 2011, pp. 225-226 (annotation by Vasques J).
[43] See Martinez et al 2011, pp. 226-233 (annotations by Vasques J and Oliveira AC).
[44] See Rego 2012 ("Contrato"), p. 29.

All other requirements relate to normative aspects of an insurance contract and should more properly be construed as being the mandatory minimum contents of an insurance agreement: they are the topics that the parties must agree upon when negotiating an insurance contract: (a) the nature of the insurance; (b) the insured risks; (c) the insurance period and the insured territory; (d) the rights and obligations of the parties, the insured and the beneficiary; (e) the insured capital or its calculation method; (f) the premium amount or its calculation method; (g) the date and time of the insurance's inception and its duration; (h) what the insurer shall provide in the insured event occurs or its determination method; (i) the governing law of the contract and any arbitration clause.

Article 37 of PICA also establishes that certain contract terms must be written in a font style and size which is larger and bolder than that which is used in the remaining contract terms. This applies to terms relating to the contract's ineffectiveness, prorogation, suspension or cessation by either party, terms which outline the coverage outlines, exclusions and limitations and terms which establish deadlines for the policyholder or the beneficiary to take any action.

Without prejudice to any liability derived therefrom, once again a breach of the duty to deliver the insurance policy also gives rise to the policyholder's right to terminate the insurance contract within thirty days of their receipt of the insurance policy or, alternatively, to demand a correction of the policy terms, when the terms contained therein differ from the ones agreed to by the parties and those differences represent crucial elements of the contract that influenced the policyholder's decision to enter into the insurance contract (Article 37, which refers back to Article 23 of PICA).

PICA also clarifies who owes what to whom in group insurance, in situations where there had previously been many doubts as to who should be the bearer and the recipient of the relevant information (Articles 78 and 79). In such insurance arrangements, the policyholder plays the role of a go-between, disseminating in the insured group the relevant information provided by the insurer. In arrangements where the insured bears the cost of the premium, or a part thereof, they are entitled to receive the same information that is owed to a policyholder in an individual insurance arrangement (Article 87).

These are the information duties set forth in PICA (with the exclusion of a few additional ones which only apply to particular classes of insurance). However, these information duties are then supplemented by additional information duties set forth in legislation aimed at regulating specific distribution channels or specific types of contractual arrangements.

As to the former, the regulation on the distance marketing of financial services contains some provisions which set forth further information duties[45], and so does the regulation on insurance contracts concluded via an insurance intermediary[46].

As to the latter, unit-linked policies and other complex financial products are also subject to the requirements applicable to similar non-insurance related financial products, and have recently been the object of Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products ("PRIIPs")[47] which also applies thereto since 31 December 2016[48]. The new PRIIPs Regulation imposes new pre-contractual information duties for the benefit of retail investors in insurance-based products. The distribution of PRIIPs entails the drawing up of a so-called "key information document" (known as "KID")[49].

A similar approach has been adopted involving both the life and non-life insurance sectors upon the implementation of the Insurance Distribution Directive ('IDD'). In Portugal, this came about with the entry into force of PIDA[50]. The IDD placed additional requirements on the sale of complex insurance-based investment products ("IBIPs"), requiring insurers to provide information on the costs of the distribution service in addition to the information which they are already bound to provide on the product itself under the PRIIPs Regulation[51].

For the first time, non-life insurers will also be required to produce an "insurance product information document" (known as "IPID") and provide it to their customers prior to their entering into their insurance contracts[52]. According to EIOPA, the IPID is "a pre-contractual document and does not replace policy terms and conditions, which will be provided to customers in addition to the IPID"[53].

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[45] See Articles 11 and following of Decree-Law 95/2006 of 29 May 2006 (as amended), which implemented Directive 2002/65/EC the European Parliament and of the Council of 23 September 2002.
[46] See Article 29 of PICA and Articles 31 and 32 of PIDA.
[47] Prior to its entry into force, see also Decree-Law 211-A/2008 of 3 November 2008 (as amended) and Regulation 2/2012 of the Portuguese Market and Security Commission ("CMVM").
[48] Article 34 of Regulation (EU) No. 1286/2014.
[49] See EBA's EIOPA's and ESMA's Final Draft Regulatory Technical Standards with regard to Presentation, Content, Review and Provision of the Key Information Document, including the Methodologies Underpinning the Risk, Reward and Costs Information in accordance with Regulation (EU) No 1286/2014 of the European Parliament and of the Council, of 31 March 2016.
[50] See EIOPA's Final Report on Public Consultation on Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, of 6 April 2016, and its Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, of 1 February 2017, pp. 29-60.
[51] See Article 40(1)(b) of PIDA and Article 30 of the IDD.
[52] See Article 33 of PIDA, Article 20 of the IDD and EIOPA's Final Report on Consultation Paper no. 16/007 on Draft Implementing Technical Standards Concerning a Standardised Presentation Format for the Insurance Product Information Document of the Insurance Distribution Directive, of 7 February 2017.
[53] EIOPA's Final Report on Consultation Paper no. 16/007 on Draft Implementing Technical Standards Concerning a Standardised Presentation Format for the Insurance Product Information Document of the Insurance Distribution Directive, of 7 February 2017, p. 4.

3.3.2. Transparency Throughout the Duration of an Insurance Contract

As mentioned above, both the insurer's duty to inform the policyholder and keep it up to speed on the contents of the insurance product it supplies and the policyholder's and/or the insured's duty (or burden) to disclose information on the insured risk are very thoroughly regulated in PICA.

Information duties arise for both contracting parties both before and after the contract is concluded. However, the main principle behind the establishment of post-contractual information duties is that the data that should have been conveyed to the other party, had it existed or been known at the time of contracting, is exactly the same as that which must be conveyed to the other party in case it comes into existence or awareness during the life of the insurance contract.

These post-contractual information duties are set forth in Articles 91 to 94 of PICA. Articles 92 to 94 of PICA regulate the consequences of changes in the data relating to the policyholder's or the insured's initial declaration of risk[54]. Only Article 91 of PICA contains general rules applicable to both contracting parties. Specifically in what concerns the insurer's information duties: as a result of the above-mentioned principle, the insurer must inform the policyholder of any changes in the information initially provided to the policyholder in compliance with the pre-contractual and contractual information duties (Article 91(1) of PICA).

Of course, insofar as the data in question concern the normative contents of the insurance contract, the insurer is generally not entitled unilaterally to change it, according to the general principle of *pacta sunt servanda* (Article 406 of the Portuguese Civil Code). But some of the data in question is of a purely informational nature. For instance, a change in the insurer's name or legal form would trigger the insurer's duty to inform the policyholder, because that information was included in the pre-contractual information to be provided to the policyholder pursuant to Article 18 of PICA.

The insurer must also inform all irrevocable beneficiaries, as well as any other third parties whose rights have been specifically acknowledged in the insurance contract, of any contract amendments which might injure their interests, unless such disclosure would be contrary to the nature of the insurance or of the amendment (Article 91(2) of PICA.

The most common irrevocable beneficiaries are financial lenders, the benefit of life assurance being typically irrevocably offered as collateral by their client borrowers. In property insurance, when the insured property has been pledged or otherwise offered as collateral, the beneficiaries of such guarantee fall in the category of third parties whose rights have been specifically acknowledged in the insurance contract. But this category

[54] As to which, see Rego 2012 ("Risco") (passim).

is wide enough to include any third parties whose rights may somehow be directly or indirectly affected by an insurance contract, provided that such rights have been specifically acknowledged by the parties to the insurance contract.

The parties may eliminate this information duty towards some or any third parties by stipulating the amendment's confidentiality (Article 91(3) of PICA). However, this stipulation will not always prevail against legal protection afforded to some third party rights. For instance, Article 146(1) of PICA sets forth an injured third party's direct claim as against the liability insurer in all compulsory liability insurance. Even in voluntary liability insurance, the injured third party has a privilege over the insured's indemnity claim as against the insurer (Article 741 of the Portuguese Civil Code). In cases such as these, the third party's right to know must prevail over any confidentiality clause (Article 573 of the Portuguese Civil Code).

4. Discussion

4.1. The Role of Informed Consent in Traditional Contract Formation and in Today's World

A contract is formed when all parties so declare, which happens *v.g.* when a party makes an offer which is then accepted by the other party or parties or when two or more parties simultaneously express their acceptance of the same previously negotiated terms. In either case, the parties are meant to agree on all essential terms, that is to say, on all terms over which their agreement has been deemed a necessity by either one of them. Whenever the parties fail to agree on any essential terms, no contract is formed. Should they fail to agree on any non-essential terms, the contract is concluded without the inclusion of such non-essential terms[55].

Information plays a central role in traditional contract formation models: contracting parties are meant to acquaint themselves with all the terms of the contracts they contemplate entering into so as to make an informed decision whether or not to make a commitment thereto. Thus, according to Article 232 of the Portuguese Civil Code:

> *The contract is not concluded until the parties have agreed on all clauses over which an agreement has been deemed necessary by either of them*[56].

If we forgot all our contract law bearings and interpreted this wording literally, we might be inclined to believe that it would be acceptable for a potential policyholder to ask its broker or financial advisor for an executive summary of the contract terms and

[55] See Vasconcelos 2008, pp. 486-490.

[56] See § 154(2) of the BGB. § 155 of the BGB is even clearer (on the effects of partial hidden dissent: the contract is deemed concluded without the part over which the parties have disagreed, if it is to be assumed that the contract would have been entered into without it).

simply let the professionals take care of the details. But that is not how this provision is traditionally construed. The question is: why not?

I do not question that consent still has a role to play in contract formation. Neither do I wish to go over the primeval debate on contract formation as to the relative importance of the will of the parties, of their subjective intentions, as opposed to their more objectively observable outward utterances. I merely question the importance of a thoroughly *informed* consent: the requirement that contracting parties must acquaint themselves with the entire content of the contract that they are about to enter into before doing so.

In fairness I should say that contracting parties are not actually barred from entering into a contract when insufficiently informed. The problem is that such conduct is negatively valued[57]. Take the preposterous Article 21(5) of PICA, which sets forth the rule that an insurance offer must include a statement, signed by the potential policyholder, confirming that the insurer has provided all legally required information[58]. It does not ask potential policyholders to confirm that they have read and understood such information. However, if they fail to read it, they are to bear the consequences: they will be deemed to have accepted the contract terms they have failed to read or assimilate. A similar result is reached after the conclusion of the contract, when policyholders are given a 30 day period within which to read the policy so as to check that it is faithful to the parties' agreement, as set forth in Article 35 of PICA.

That not paying attention is bad for you and should be frowned upon has been confirmed on numerous occasions by the Portuguese Supreme Court of Justice:

> *[G]iven that the contractual freedom of one of the contracting parties is limited in practice to the freedom of accepting or rejecting the imposed contract terms and the conclusion of the contract, that contracting party must at least have the actual and effective knowledge of such terms, so that it may decide whether or not to accept them, the duty to communicate such terms appropriately and with the necessary advance being aimed at combatting the risk of his/her unawareness of significant aspects of the contract. It is intended to facilitate the adhering party's complete and effective knowledge of the contract terms, also requiring the latter's adoption of diligent behaviour, oriented towards an actual and effective knowledge of the contract terms*[59].

In today's world, especially but not only in the financial world, contracts are becoming more and more complex; so much so that some of them are virtually incomprehensible

[57] See Cordeiro 2013, pp. 561-563 and 567, in defence of a policyholder's right to be kept in ignorance of the intricacies of insurance contracts, that is to say, of their right to trust the insurer and the laws of the State.
[58] Fortunately in contracts entered into with consumers this absurdity is cancelled out by Article 21(e) of the STA, which prevails, pursuant to Article 3 of the PICA.
[59] Ac. STJ of 24.03.2011.

to most of us. So why even bother? Why make the sometimes extraordinary effort that would be required so as to read them from cover to cover and really understand them?

In today's world, time is precious; so precious that it should not be deemed unreasonable for someone to decide, after weighing all the pros and cons, to enter into a contract, be it simple or complex, without first having carefully studied all its terms for as long as needed in order for such terms to be thoroughly understood and agreed to.

Bearing in mind the dramatic increase in transparency requirements during the course of the last 20 years, and without questioning transparency's role in making accessible to insurance customers all the data that they need to take in and process in case they wish to make an informed decision when choosing to enter into an insurance contract, I believe that another question is begging to be asked: does it make sense to put all one's eggs in the basket of information? In particular, should transparency as an ideal be allowed completely to replace trust in contractual relations?

> *If I know everything in advance, there is no need for trust. Transparency is a state in which all not-knowing is eliminated. When transparency prevails, no room for trust exists. Instead of affirming that 'transparency creates trust', one should instead say, 'transparency dismantles trust'*[60].

4.2. The Insurer's and the Intermediary's Ever-increasing Pre-contractual Information Duties

As we have seen, over the last 20 years a number of statutes have been enacted, in Portugal as in other EU Member-States, mostly as a result of implementation requirements of EU directives, which have dramatically increased the insurer's and insurance intermediaries' pre-contractual and contractual information duties towards policyholders and relevant third parties in insurance contracts. Such duties, which epitomize the legislator's efforts to keep up with the growing complexity of financial products, are in line with one of the main goals of EU legislation in this field: that of enhancing transparency in insurance transactions so as to protect insurance customers.

This proliferation of information duties has increased the amount of paperwork being produced by insurers and provided to insurance customers, but this has not made a significant impact in the clarity of insurance contracts, which admittedly remain as opaque as ever. Furthermore, this system has a down side: whilst it penalizes insurers who fail to comply with their information duties, whenever they do comply and information is properly made available, customers may be deemed negligent for choosing not to take it in.

[60] Han 2015, pp. 47-48.

I take issue with this outcome. When so many of us make this choice on a daily basis, myself included, are we not being too demanding on customers by concluding that they should have read all the paperwork and made sure to understand and agree with it before choosing to enter into the contract?

As an insurance customer I have often entered into insurance contracts – and in fact many other contracts – without bothering to read the fine print. It happens on a daily basis that I find myself having to choose between taking the time to read all the paperwork that comes before me and being able to devote my time to so many other more interesting things that are going on in my life. And I am in a somewhat privileged position when it comes to insurance: at least if I were to choose to read all the paperwork I could hope to grasp the essence of it fairly quickly, which may not be said of the greater part of our population. So why place what seems like such an unfair burden on insurance customers?

> *For ordinary people today, at least in developed countries, many more of the needs and wants of daily life are acquired through contracts than ever before. As the reliance on contracts has been increasing, the delivery of textual content purporting to be contractual has resulted in an immense proliferation of such texts.*[61]

It is widely known and accepted, at least in the field of medical law, that too much information which the patient is unable to understand and assimilate properly may hinder, rather than facilitate the patient's informed consent[62]. This rings true in many other fields, especially those where the most relevant players have a marked predisposition to resort to extremely technical, virtually opaque language and impervious drafting techniques, such as is the case of the insurance industry. Why pretend that the entire population is ready and able to understand the basics of an insurance contract just by reading it, even if aided by the insurer's attempts at clarifying any aspects in need of clarification?

Article 10(2) of the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, known as the European Convention on Human Rights and Biomedicine, reads as follows:

[61] Radin 2017, p. 505. The author argues that very common procedures such as that of asking customers to click 'I agree' next to a line that states they have read any given set of terms and agreed thereto "has made liars of us all" (p. 519). "How could we? There is so much of it. And why should we? We cannot change it, and we are not likely to understand it" (p. 520). For empirical evidence on the (extremely reduced and thus virtually negligible) number of people who actually read such terms from top to bottom, see Bakos et al 2014 (passim).

[62] See Barendrecht et al 2007, pp. 837-838; Han 2015, p. 8: "More information, or more communication, does not eliminate the fundamental absence of clarity of the whole. If anything, it heightens it.".

> *Everyone is entitled to know any information collected about his or her health. However, the wishes of individuals not to be so informed shall be observed.*[63]

In fairness, there is not that much room for analogy between the right not to know one's genetic code and the right not to bother reading the fine print in an insurance contract. However, such as in the field of medical law, it is submitted that in the field of contract law in general we should recognize a person's right not to know, which is to say, a right to place one's trust on the good judgment of a third party intermediary, or even of the insurer, our expert counterparty[64]. A right which does not entail a waiver of the right to sue if, later on, it turns out that one's demands and needs, as made clear to the insurer, directly or through the intermediary, were not duly attended to.

4.3. The Insurance Distribution Directive: a New and Complementary Approach: the Demands-and-needs Test, Product Oversight and Governance Arrangements

Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution, known as the Insurance Distribution Directive ('IDD'), has paved the way for a much needed change of perspective.

The IDD is the successor of the Insurance Mediation Directive[65]. However, unlike its predecessor, it applies to all distribution channels, including insurance undertakings selling their own products directly, in order to guarantee that the same level of protection applies throughout the marketplace and that insurance customers can benefit from comparable standards.

Equality of treatment in the disclosure of information remains a concern of particular importance in this directive[66]. The purpose of providing customers with the data that will allow them to make an informed decision whether or not to enter into the contract is still present. I do not take issue with its lingering pervasiveness. No one in their rights mind would argue that insurance customers should be kept in the dark.

Such is the traditional flow of information: insurer to insurance customer (I → C). However, before that flow even begins distributors are now meant to apply a demands-and-needs test to their (potential and actual) customers, which means we also find evidence of a new and reverse flow of information: insurance customer to insurer (C →

[63] Article 10(2) of the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, known as the European Convention on Human Rights and Biomedicine (Oviedo, 1997).
[64] See Cordeiro 2013, pp. 561-563 and 567.
[65] Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation ("IMD").
[66] Recital 6 of the IDD. See also articles 1 and 2 (1) to (3) of the IDD.

I). The IDD appears to strike a balance between both flows of information (especially but not exclusively in Articles 20 and 25 of the IDD).

The new requirements are meant to tackle the very relevant problem of insurance misselling (Article 20 of the IDD). In order for the new requirements to be complied with insurers must maintain, operate and review product oversight and governance arrangements aimed at identifying each product's target market and ensuring that the product is and remains consistent with the needs of that target market throughout its lifetime, and that it is distributed to that target market (Article 25 of the IDD)[67]. Hence, even before a product is commercialized, target groups must be identified and their typical demands and needs assessed, so that the product's design matches such typical demands and needs[68].

Then there is a second round of attention that insurers must pay, this time to the individual demands and needs of their actual customers. Rather than flood their customers with information, insurers must begin by paying attention to their demands and needs, it being their job to find the product that best suits them. This includes the prior collection of information about their customers' circumstances and concerns (Article 20 of the IDD)[69].

Implementation of this requirement should have entailed further development of the rule already set forth in Article 22 of PICA, according to which it is for the insurer to select, out of the various insurance products already present in its own portfolio, the one which most suits each customer's particular needs[70]. All of this, of course, in order "to prevent or mitigate customer detriment"[71]. However, the Portuguese legislator chose to include the relevant transposing rules in a provision directly addressed only at intermediaries, elsewhere determining, by mere cross-reference, that the same rules

[67] This requirement is not entirely new, but is a reinforcement of the principles which had previously been more succinctly set forth in Articles 153 and 154 of PISA. Article 153 of PISA was amended by Law 7/2019 of 16 January 2019 so as more thoroughly to reflect Article 25 of the IDD. See also Article 5 of ASF Regulation 10/2009-R of 25 June 2009, as amended, on the general principles to be followed by insurance undertakings in their dealings with policyholders, the insured, beneficiaries and injured third-parties.

[68] See also Recital 55 of the IDD, and also EIOPA's Final Report on Public Consultation on Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, of 6 April 2016, and its Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, of 1 February 2017, pp. 29-60.

[69] See also Article 31 od PIDA and Recitals 44 and 45 of the IDD. There was but a hint of this requirement of an insurance intermediary to collect information from its clients and advise them accordingly in Article 12(3) of the IMD.

[70] According to Cordeiro 2013, p. 570, this duty is most important in its negative form, that is to say, as an insurer's duty to warn a potential policyholders against purchasing insurance products which are ill-suited to their particular circumstances and/or which fail to meet their needs.

[71] EIOPA's Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, of 1 February 2017, p. 34.

would also apply to insurers "as duly adjusted" (with no further clarification of what such adjustments might be)[72].

The traditional flow of information is still present in the requirement that insurers "provide the customer with objective information about the insurance product in a comprehensible form to allow that customer to make an informed decision" (also in Article 20 of the IDD).

Of course the provision of information is still very relevant in today's world, because insurance customers must be allowed to confirm their insurer's advice by reading through all the paperwork, should they be so inclined. For those of us who are not, should we not be allowed simply to trust our insurer's advice? Why must a burden be placed upon us thoroughly to check all contract terms before choosing to enter into the contract?

Let us consider the case of an insurer who sold product liability insurance to cork manufacturers who worried about the risk of defective corks ruining the wine of their client wineries. This example is based on a real-life trend which I have personally come across whilst working as a legal practitioner some years ago in Portugal. The product was useless to these customers, because product liability is meant to deal with damage caused by defective products to consumers[73]. No one detected the inconsistency at the contracting stage, hence no extension covering damage caused to their non-consumer direct customers was negotiated.

It is submitted that this episode of insurance misselling could have been dealt with quite adequately under Article 22 of PICA. It is also an example of the importance of complementing transparency requirements with a different set of requirements such as the ones set forth in Articles 20 and 25 of the IDD. The incident could have been prevented if the target market for this product had been correctly identified. Even without the prior identification of a target market, the incident could have been prevented by placing upon the insurer the burden to check that the product it offers to its customers is consistent with their actual insurance demands and needs.

4.4. Financial Contracts as Products: Inconsistency with the Customer's Demands and Needs as Grounds for Remedial Action

Consumers can enter the market to buy physical products confident that they won't be tricked into buying exploding toasters and other unreasonably dangerous products. They can concentrate their shopping efforts in other directions, helping to drive a competitive market that keeps costs low and encourages innovation in convenience, durability, and style. Consumers entering the market to buy financial

[72] See Articles 31(4)(6)(7) and (8) and 37(3) of PIDA.
[73] See Directive 85/374/EEC of 25 July 1985 on liability for defective products.

> *products should enjoy the same protection. (…) How did financial products get so dangerous? Part of the problem is that disclosure has become a way to obfuscate rather than to inform*[74].

Elizabeth Warren, former Harvard Law School Professor of Law and current US Senator for the State of Massachusetts, when she wrote these words in 2007, was advocating an increase in financial markets regulation, and the creation of a new Consumer Financial Protection Bureau. This Bureau was created in 2010. As a contract lawyer, I look at what is essentially the same problem that Elizabeth Warren so aptly identified, but from a different perspective, in search of a different answer to a different question. And my question is: has consent as we know it reached its expiration date as the cornerstone of contract law?

Some law-and-economics authors are moving along this line of reasoning, their idea being that customers of such massively distributed boilerplate contracts are actually purchasing a composite of item-plus-terms rather than just the item itself, the implication being that when some such terms are inappropriate we might classify them as defective and move to apply the rules on the sale of defective products[75]. Some emphasize that, whilst such massively distributed terms might be part of the product, they can hardly be classified as contractual terms proper, given that informed consent is truly neither sought nor provided[76]. Whilst not disposing entirely of consent, I do believe that the protection of insurance customers can best be achieved if one *complements* the informational approach with a different approach consisting of treating financial products much like any other products[77].

If a customer chooses to buy an electrical appliance, that customer will enter into a contract of sale in order to obtain the desired appliance. The contract is merely an aid, a legal means of providing customers with their chosen goods: in this example, the appliance. Financial contracts in general, on the other hand, often do not play such a merely instrumental role. Oftentimes financial products *are* the products. That is certainly the case of insurance contracts[78]. So why not treat them as such?

Financial contracts such as those of insurance are intangible, as assets go. But they are nonetheless assets. They are a product which is supplied or distributed by their manufacturers – such is the language of the IDD. And such, it is submitted, is also the reality of financial contracts. In the case of the sale of goods, the contract is just a legal device conceived so as to transfer the goods. In the case of many financial products, the

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[74] Warren 2007.
[75] See Baird 2006 (passim) and Radin 2017, pp. 529-531.
[76] Radin 2017, pp. 531-533.
[77] See Grigoleit 2012 (also on the limits of the traditional informational approach, albeit from a different perspective).
[78] See Dreher 1991 (passim).

contract *is* the object of the distribution. The providers of financial services distribute a particular type of product which is purely legal in nature: they distribute contracts.

It is submitted that just as customers are not required to read through an electrical appliance's technical specifications and user's manual before choosing to acquire it, they should also not be required to read through a financial contract from cover to cover before deciding to enter into that contract. Because it seems to me that this is exactly what most contemporary financial contract terms resemble: a product's technical specifications and/or user's manual. When I purchase a toaster no one really cares whether I thoroughly understand the science behind it. I do not need to know why it can turn a bread slice into a toast, I only need to know that somehow it will make it happen, once I plug it in, insert my bread slice in the proper opening and press the on button. Why should an insurance contract work out any differently?

Consumers of financial products should not be required to spend any more time checking whether the products they acquire are toxic than consumers of household appliances are required to spend checking that their toasters are not going to explode in their kitchens. Neither should they worry whether the products they require are fit for purpose, unless their own intention in acquiring the product is somehow unusual or unexpected. Someone else should be doing that for them.

Elizabeth Warren's answer was the creation of a new regulator, whose role would be to check the safety and adequacy of financial products. As a private lawyer, I look at the problem differently. I do not advocate a solution which drastically limits freedom of contract. By all means, insurers should remain free to design products as they see fit. Whilst they should be prevented from distributing toxic products to the wider public, for the most part I believe that this problem could best be handled through the shifting of some contractual and pre-contractual burdens. If insurers are legally required to pay attention to their customers' demands and needs and provide products that match them, then they should be made liable in case they fail to fulfil this duty and provide a product that is inconsistent with their customers' demands and needs, insofar as they conform to those of a typical consumer or, if they do not, to the extent that they were actually expressed by their customers prior to their entering into the contract.

Will this new attitude solve all our difficulties as insurance consumers? I dare say it will not. But it is submitted that, provided the new approach is seen as a complement, rather than as an alternative to the more traditional informational approach, an important step forward will be taken when we come to accept that choosing not to read the contract terms from cover to cover should not always be frowned upon and seen as negligent behaviour, but should rather be taken as an acceptance of some measure of risk that the future might bring forth a few unpleasant surprises. That is to say, up to a certain, reasonable extent.

I shall bring forward one last example. When I buy a sofa I usually order a special treatment designed to make the fabric more durable and stain-resistant. Companies

which render this service also offer something akin to insurance: a ten-year extended warranty whereby they commit to come to our homes and clean our sofa whenever a stain should make its appearance. This offer naturally comes with a list of the substances whose stains are covered: a list which I have naturally never bothered to read until the first stain came up. Only then did I read through the list so as to find out whether my stain fell within or without this coverage. I stand by the reasonableness of my behaviour. If knowing this in advance had been essential to my decision to seek out this coverage I would have read it. I chose not to and that is perfectly acceptable behaviour. So now, whenever a stain comes up which is outside the list, if I forget about it and call my service provider they will respectfully tell me that I will have to pay for their cleaning services if I wish to benefit therefrom. Just as a supplier of electrical appliances will inform me that if I had wished my toaster made fluffy toasts, in addition to the more regular ones, I should have bought a different, more expensive model or at least an optional extra device to place on top of my regular toaster, because the one I bought did not come with that function. And that is fine. This is a risk I accept, as a consumer, when I choose not to read the fine print.

The situation would be very different if my toaster had simply been incapable of toasting bread. Then I would have a valid claim, regardless of what I chose to read or abstain from reading. Going back to my list of stainable substances, regardless of what I chose to read at the time of contracting, I would have a valid claim if the list set forth in the contract terms is unreasonable, bearing in mind the typical consumer's demands and needs, or my own concerns and needs, as expressed at the time of contracting. That will be the case, for instance, if the list is limited to a small number of substances which are not normally present in ordinary households, with the exclusion of food or beverages and of all forms of human waste. The same reasoning should apply to insurance and other financial products. Because financial contracts, like any other products, should be *fit for purpose*.

5. Conclusions

In Portugal, the most relevant source of insurance contract law is the Portuguese Insurance Contract Act of 2008 ('PICA').

PICA is currently also the most relevant source of transparency requirements in the formation and throughout the duration of an insurance contract. Information plays a very important role in PICA, there being numerous provisions specifically setting forth or referring to information duties of various kinds and scope, mostly as a direct or indirect result of implementation requirements of EU directives. It was very relevantly preceded by the Transparency in Insurance Act of 1995, which identified the inception of the single European market in the insurance sector as the main driving force behind the growing need for the setting up of minimum transparency requirements in pre and post contractual relations.

Moreover, although the term itself plays no part in traditional contract law, transparency is generally regarded as a key value in pre-contractual negotiations, both parties having a duty to negotiate in good faith and continuing to be subject to the principle of good faith throughout the contract's duration, being bound to act in accordance with this principle both in fulfilling their obligations and in enforcing their contract rights.

'Transparency' in this context is, first and foremost, a reference to the plainness and intelligibility of contract terms, as well as to their exhaustiveness. Strictly speaking it transcends contract terms, also applying to any accounts of a predominantly descriptive or explanatory nature provided orally and/or in writing at or around the time of contracting. It also applies after the contract is concluded, the main principle behind the establishment of post-contractual information duties being that the data that should have been conveyed to the other party, had it existed or been known at the time of contracting, is exactly the same as that which must be conveyed to the other party in case it comes into existence or awareness during the life of the insurance contract.

Whilst being presented as an end in itself, transparency is ultimately also a means to an implicit end: making accessible to insurance customers all the data that they need to take in and process in order to make an informed decision when choosing to enter into an insurance contract or when faced with any relevant issue which may arise during the life of the contract.

Bearing in mind the dramatic increase in information duties and related transparency requirements during the course of the last 20 years, I have argued against putting all one's eggs in the basket of information, and I have questioned whether transparency as an ideal should be allowed completely to replace trust in contractual relations.

Information plays a central role in traditional contract formation models: contracting parties are meant to acquaint themselves with all the terms of the contracts they contemplate entering into so as to make an informed decision whether or not to make a commitment thereto. I have argued that the protection of insurance customers can best be achieved if one *complements* the informational approach with a different approach consisting of treating financial products much like any other products, placing upon the insurer the burden to check that the products it offers to its customers are consistent with their demands and needs.

This view is consistent with the Insurance Distribution Directive (IDD)'s requirements that insurers must maintain, operate and review product oversight and governance arrangements aimed at identifying each product's target market and ensuring that the product is and remains consistent with the needs of that target market throughout its lifetime, that it is distributed to that target market, and that their actual customers are offered the product that best suits their individual demands and needs, because insurance contracts, like any other products, should be *fit for purpose*.

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List of abbreviations

ASF – Portuguese Insurance and Pension Funds Supervisory Authority.

BGB – Bürgerliches Gesetzbuch (German Civil Code),

CMVM – Portuguese Securities Market Commission.

CPA – Consumer Protection Act, as approved by Law 24/96 of 31 July 1996, as amended from time to time, the last of which by Law 47/2014 of 28 July 2014.

EBA – European Banking Authority.

EIOPA – European Insurance and Occupational Pensions Authority.

ESMA – European Securities and Markets Authority.

KID – key information document.

IBIPs – insurance-based investment products.

IDD – Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 (Insurance Distribution Directive).

IMD – Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 (Insurance Mediation Directive).

IPID – insurance product information document.

PICA – Portuguese Insurance Contract Act approved by Decree-Law 72/2008 of 16 April 2008 and amended by Law 147/2015 of 9 September 2015.

PIDA – Portuguese Insurance Distribution Act approved by Law 7/2019 of 16 January 2019.

PISA – Portuguese Insurance Supervision Act approved by Law 147/2015 of 9 September 2015 and amended by Law 7/2019 of 16 January 2019.

PRIIPs – packaged retail and insurance-based investment products.

PRIIPs Regulation – Regulation (EU) No. 1286/2014 of the European Parliament and of the Council of 26 November 2014.

TIA – Transparency in Insurance Act: Decree-Law 176/95 of 26 July 1995.

STA – Standard Terms Act: Decree-Law 446/85 of 25 October 1985, as amended by Decree-Law 220/95 of 31 January 1995.

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