

KATARZYNA MALINOWSKA

Consumer protection in e-insurance in European Union law

The purpose of the article is to present a summary of the ideas and current tendencies present in the European Union in respect of consumer protection in e-insurance. Most of all, the goal is to state whether the traditional instruments applied with the aim to protect policyholders are suitable for the needs of e-commerce in insurance. First of all then, the issue of consumer protection in the European Union in the age of information society has been analysed with a particular focus on its evolution and the nature of protective instruments. Secondly, the article discusses specific issues of consumer protection in online insurance, including the nature of consumer protection in insurance services and the character of e-insurance versus traditional insurance from the point of view of a policyholder's protection. Further, an analysis has been made of specific legal instruments, which seem to be characteristic of online contracts. These are, in particular, pre-contractual information duties in e-insurance, information duties during the term of a contract, the right of withdrawal and choice of law in e-insurance. The duties imposed on entrepreneurs in this respect result from the E-commerce Directive, Directive on distance selling of financial services as well as such duties which are imposed by the sectoral legal regulations, such as IMD, Directive 92/49 concerning non-life insurance, as well as Directive 2002/83 concerning life insurance. In conclusion, the author recapitulates European legal tendencies in insurance, such as prospective changes to the Insurance Mediation Directive (IMD II) and their impact on consumer protection.

Key words: e-insurance, e-commerce, consumer, financial services, information society.

Introduction

The title of this article concerning e-insurance within the context of consumer protection appears to embrace a very broad spectrum of problems. One of its purposes is to present a kind of summary of the evolution of the ideas and current tendencies present in the European Union in this respect¹. In turn, this may allow an analysis of the instruments of consumer protection in insurance offered through electronic means. There can be no doubt that consumer protection within

1. See for example: E. Łętowska, "Europejskie prawo umów konsumenckich". Warszawa: C.H. Beck, 2004.

the area of e-insurance plays an important role, as most of the legal provisions regulating this branch of the insurance industry aim at attaining such protection for consumers. That is why this article will address the idea of consumer protection in the EU, with the aim of pointing out which elements are adequate for the functioning of protection in insurance, and specifically within the e-insurance sector. Subsequently, an analysis of the current tendencies will be presented.

The article will not encompass a detailed analysis of the problems faced by Polish law, as the issues subject to consideration are analysed from the European perspective and focus on the differences between various national legal systems resulting from the specifics of national systems as well as from the differences in implementation of European legal instruments². This is also why aspects related to the implementation of the Directive on Consumer Rights have been omitted. Though Poland decided to regulate certain issues concerning insurance contracts in the Act implementing the Directive, the Directive itself excludes the financial services from the scope of its application³.

1. Consumer protection in the European Union in the age of the information society

Evolution of consumer protection in the EU – an outline

Consumer protection in the EU can be characterised as multi-dimensional, but for the purposes of this article, it will be presented only within the scope of contractual relations. Since the European structures were first created, in the 1950s, consumer protection has experienced a long evolution – starting from the necessity of interpreting it in line with the regulations concerning market operation, through the gradual adoption of direct and uniform consumer protection in subsequent treaties (Unified European Treaty, Maastricht Treaty, Amsterdam Treaty)⁴ up to the sophisticated norms present nowadays. At the beginning, there was quite a clear concept that consumer protection was not a goal as such, but that its purpose was to ensure the smooth operation of the common market⁵. In the Rome

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2. This trend, however, is subject to changes as minimum harmonisation is said to be not sufficient and leads to differences in the implementation across the Member States; in consequence, full harmonisation appears to be predominant, for example the E-commerce Directive and the new Directive on consumer rights are fully harmonised; see also: M. Ebers, "From Minimum to Full Harmonization – The Proposal for a Directive on Consumer Rights", *InDret* 02, [2010], accessible at: SSRN: <http://ssrn.com/abstract=1638992>; and V. Mak, "Full Harmonization in European Private Law: A Two-Track Concept", *European Review of Private Law, Forthcoming* 20 [2012]: 213–235, accessible at: SSRN: <http://ssrn.com/abstract=1960653>.
 3. Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council. In recital 32 of the preamble, which excludes the Directive's application to financial services, it is stressed that "Member States should be encouraged to draw inspiration from existing Union legislation in that area when legislating in areas not regulated at the Union level, in such a way that a level playing field for all consumers and all contracts relating to financial services is ensured". See the Polish Act on Consumer's Rights dated 30 May 2014, O.J. of 2014, item 827.
 4. Unified European Treaty, O.J. L 169 of 29 June 1987, Maastricht Treaty, O.J. C 191 of 29 July 1992, Amsterdam Treaty, O.J. C 340 of 10 November 1997.
 5. K. Marak and K. Poroś, „Ochrona konsumenta usług finansowych w świetle prawa wspólnotowego” in: *Ochrona konsumenta usług finansowych*, ed. B. Gnela (Warszawa: Wolters Kluwer, 2007), 138.

Treaty of 1957, consumer protection could have only been derived from Article 2, which introduced as one of the Community goals – the protection and improvement of the standard of living. The assumption of that time that the mere creation of the opportunity for equal competition on the market would ensure protection to consumers appeared, however, to be illusive⁶.

That is why in the subsequent legal instruments adopted by the European Union (hereinafter also referred to as the “EU”), consumer protection has appeared in a more direct way, primarily in the form of consumer programmes⁷ adopted by the Council of Ministers of the European Community⁸ and then introduced by the Single European Act of 1987 – this was still, however, within the frame of creating an internal market in order to make it, by means of the Maastricht Treaty, one of the main policies of the Union⁹. This evolving strategy was strengthened subsequently by the Amsterdam Treaty, which indicated as one of the tasks of the Community the promotion of a high level of consumer protection. As well as this, it added the rights of information and education to the scope of this protection, and took steps to protect these rights. It is accepted that from that moment, consumer protection was confirmed as one of the strategic goals of Europe – a goal in itself, and not only as a tool for introducing the internal market¹⁰.

At present, consumer protection is unarguably, along with health protection (which is indeed related), one of the main pillars of European politics. 2013 was the final year in the five-year-long period of the previous strategy of the EU within the field of consumer protection¹¹. It was to serve the purpose of strengthening the consumer position in the EU, ameliorating the welfare of society and improving competition and innovation in the economy. It should however be underlined that the consumer’s situation needs further improvement due to the increasing complexity of products and services, as well as the ageing of the European population. The financial crisis has also had an impact on the situation and consequences related to the difficulties of making an appropriate choice on the free market. As the report prepared in the summary of the European Commission activity during the period 2007–2013 confirms, the awareness of consumers as to their rights has undoubtedly increased. The main contribution to this is attributed to the impact on information policy, including the information duties imposed on entrepreneurs. This aimed to ensure a process of conscious decision making, though it did not eliminate all the problems. In fact, to the contrary, it must be stressed that information overload can more and more often be observed, and this may even hamper the exercise of consumer rights¹². Therefore, consumer information still remains a main weak point, and emphasis should be now put on the transparency of the goods and services offered to consumers so as to eliminate the negative consequences of the information overload.

6. E. Łętowska, “Europejskie prawo umów konsumenckich” (Warszawa: C.H. Beck, 2004), 8.

7. K. Marak and K. Poroś, “Ochrona ...”, 135.

8. *Consumer protection in the Treaty of Rome was developed at the Paris Summit in 1972*; First action program on consumer policy [Official Journal C 92, 25 April 1975] 1972; see also: E. Wieczorek, “Ochrona konsumenta” in *Ochrona Praw Jednostki*, ed. Z. Brodecki (Warszawa: Lexis Nexis, 2004), 313.

9. It has been regulated by Article 3 enacted at that moment as contributing to the improvement of consumer protection as well as whole separate Title XIV on consumer protection.

10. See also: E. Łętowska, “Europejskie...”, 12.

11. The 2007–2013 EU Consumer Strategy, COM [2007] 99 final.

12. G. Low, “A psychology of Choice of Laws”, *European Business Law Review* 24 (3) (2013): 379–380.

Problems of this kind have become more and more visible with the increase of online transactions¹³. Ideas aimed at solving the problems of electronic relations have been reflected in the new Directive on consumer rights. The Directive substantially increases entrepreneurs' information duties¹⁴. The current status of pro-consumer policies is described, in the document adopted in May 2012, as the heart of the single market, and one of the priorities of European Commission activity¹⁵. Subsequent actions of the European Commission within the field of consumer protection policies are also related to the Europe 2020 strategy. In this respect, the communication *A European Consumer Agenda – Boosting confidence and growth*¹⁶ was adopted. It recognised pro-consumer policies as a priority.

During recent years, the EU has faced additional challenges, which, in a substantial way shape pro-consumer policies. They are associated with the reality of the information society. The European documents reflecting the development of the internal market stress that the internet has revolutionised the daily life of the Europeans in a way comparable to the industrial revolution in previous centuries. There is no doubt that electronic commerce and services rendered online affect all aspects of our lives¹⁷, and bring the potential for economic development of an unknown scale¹⁸. Another important factor in relation to the European economy is the fact that online services are transnational by nature, so they can naturally accelerate the process of European economic integration and the creation of the internal market, and could thus become the tool that has been wanted for the last 50 years¹⁹. And though the share of online transactions when compared to the total number of transactions carried out in the whole EU is still not substantial, the pace of its increase is quite significant²⁰.

However, it is stressed that the electronic vision of Europe requires additional actions on the part of European bodies, as nowadays a kind of patchwork of various pieces of legislation, principles, rules, standards and market practices can be observed. The consequence of this is a lack of coherence and operability of the consumer protection system within the field – this, in turn, affects confidence in online services. Such confidence, reflected in public opinion polls, is one of the factors of economic development²¹. With above in mind, the effective creation of a transnational online services market is feasible mainly due to the increase in consumer confidence in this form

13. Commission Staff Working Paper, Consumer Empowerment in the EU, 14–15, Brussels 07 April 2011, SEC (2011) 469 final.

14. Inter alia, they refer to the obligation to reveal the total costs of the sale of products, prohibition of excessively increasing the costs of electronic transactions and [the obligation to ???] extend the time for withdrawal from an online agreement.

15. This year we will focus on stepping up the enforcement of EU consumer legislation, which is one of the key priorities of the European Consumer Agenda that the Commission adopted in May 2012.; http://ec.europa.eu/dgs/health_consumer/information_sources/consumer_affairs_events_en.htm.

16. Commission Staff Working Document, on knowledge-enhancing aspects of consumer empowerment 2012 – 2014, Brussels, 19 July 2012, 3 as well as *A European Consumer Agenda – Boosting confidence and growth*, COM (2012) 225, final.

17. Commission Communication to the European Parliament, the Council, the Economic and social Committee and the Committee of the Regions, A coherent framework for building trust in the Digital Single Market for e-commerce and online services, Brussels XXX, COM (2011) 942, 1.

18. It constitutes 21 percent GDP in G8 countries within last five years; COM (2011) 942.

19. Idem.

20. It amounted to approx. 3 percent in 2010; COM (2011) 942.

21. Report COM (2012) 225 final.

of offering services and goods. Such confidence should be built via proper information strategies²². European regulators are fairly convinced that realising such a vision of Europe will bring significant benefits to consumers, such as lower prices and better choice and quality of goods and services; all this stems from an increased number of transnational transactions.

The nature of the protective instruments

Though some significant changes have taken place in social relations during the last 40 years (as a result of the continuous adjustments made by the EU, both in terms of pro-consumer policies and legal instruments) it seems that the concept of consumer protection has not changed. It focuses on ensuring consumer access to information, thus reducing the information deficit on their part. Such an approach reflects one of the main pillars of personal rights, i.e. the right to information²³. Within contractual relations, the right to information plays the most significant role, as it enables a consumer to make a free and conscious decision as to the conclusion and performance of the contract. Such an approach also entails that the specific content of the European protective instruments is included in directives, and that there is relatively small interference within the material aspects of contractual relations.

The concept that forms the basis of consumer protection in domestic law, and also in insurance, can be described in one sentence: a consumer well protected means a consumer well informed. Such a quote may seem a simplistic way to reflect on such a complex problem, however, as we look closer at the specific protective instruments adopted by the EU, it can be clearly noted that all of them aim at raising consumer awareness and ensuring proper information on contractual terms, and, in consequence, focus on the information symmetry between the parties. It could be said that this is the *de facto* goal of all protection instruments, no matter what direct effects they have. The same goal is to be attained by provisions on unfair market practices, forbidden advertising and marketing techniques, as well as pre-contractual information duties. They all aim to protect information transparency within the scope of terms of services or quality of goods sold.

In my opinion, they also concern the issue of the choice of law and the right of withdrawal. These rights, apart from those of a strictly informative character, are the main protection instruments applied by the European legislator. In spite of the fact that those rights directly concern the material aspects of a contract, what their real goal is should be considered. The right of withdrawal from an agreement without a reason (known as cooling period), guaranteed for a certain time after its conclusion, is *de facto* the right to learn thoroughly the content of a contract, without having to bear any negative consequences. In particular, this applies to contracts concluded online, i.e. in conditions difficult for immediate analysis of the contract's content or the contractual obligations resulting from the law.

The purpose of the right of withdrawal is, therefore, to eliminate the information imbalance between parties, as it is guaranteed mainly for distance contracts (and insurance contracts), and the cooling period is designed to enable a consumer to learn in detail the contract terms as already concluded and compare them to advertisements and the information received from an entrepreneur before concluding a contract, as well as to allow the same to acknowledge the essence of the services or goods sold.

22. Commission Staff Working Document on knowledge-enhancing aspects of consumer empowerment 2012–2014, Brussels 19 July 2012, SWD (2012) 235 final.

23. Apart from this the following rights are also mentioned: the right to [social?] security, healthcare, protection of economic interests, representation and the right to a remedy for damage suffered.

Similar effects should be produced by the clauses concerning choice of law, i.e. the best most possible access to the information on contractual rights and obligations, as well as the consequences of the contract, should be ensured. No doubt, such a purpose is to be fulfilled when the law applicable to the contract is the domestic law of the consumer, i.e. of the country of his habitual residence. Such complex regulation of the above-mentioned issues was intended to replace the harmonisation of the material contract law. Has this aim been achieved? We can come to the contrary conclusion when we compare the dynamics of the cross-border transactions and the ongoing attempts to integrate material contract law in the EU.

The legal and factual situation concerning the subject matter and scope of the information duties imposed on entrepreneurs in various branches of industry is not an easy one, as in spite of consistent assumptions as to the goals to be reached by the protection instruments, the EU has not developed any coherent system within this scope so far. Quite to the contrary, the fragmentation of the legal solutions, along with the lack of a complex regulation, is often underlined²⁴. The negative consequences of this situation affect both parties to contractual relations and it is claimed to be a cost-creating factor within the internal market. The practical effect is, however, visible mostly within the domestic markets of the Member States that have implemented the legal provisions adopted at EU level. It can also be seen in the financial services, which are notable for their level of complexity.

2. Consumer protection in online insurance

The specific nature of consumer protection in insurance services

Consumer protection in insurance does not differ from the general concept adopted by the EU in this respect, though it is not identical from the functional point of view. It results from several factors concerning the nature of insurance, such as the complexity level of an insurance contract, and the continuous character of an insurance relation. Other important aspects also seem to be a much higher than average disproportion in negotiation power experienced by consumers *vis a vis* financial institutions, the adhesive character of consumer insurance, as well as the type and importance of the values protected by the insurance, such as health, life and property of the insured.

Analysing consumer protection in insurance in the EU, it should be stressed that the scope of this protection is outlined by the regulations concerning financial services²⁵ and additionally by three generations of insurance directives. In relation to the general principles concerning consumer protection, we may often see rules being broken and, in many cases, we can observe the multiplication of the same rules. This, however, is mainly a problem of domestic legal systems into which the European legal provisions have been implemented. Some of these rules do not apply to insurance, but on the other hand there are a substantial number of duties which do not appear in branches other than those of the insurance industry. To sum up, the types of protection

24. K. Marak and K. Poroś, "Ochrona ...", 142.

25. Insurance is a type of services belonging to the category of financial services, which were listed in the Directive on Distance Marketing of Consumer Financial Services among banking services, credit, investment, pension and payment services [Directive 2002/65].

instruments in insurance relate to: (1) pre-contractual information duties, (2) right of withdrawal, (3) choice of law rules, (4) protection against abusive clauses.

Below, only the specific aspects of items (1)–(3) will be analysed in greater detail, as the protection against abusive clauses in insurance does not differ from that available under the general rules of law.

The specific nature of e-insurance versus consumer protection in insurance

An attempt to distinguish the specific nature of e-insurance from the general rules of consumer protection leads to the statement that basically there are no substantial differences both as to the idea of consumer protection and to the manner of its implementation. Representatives of insurance bodies at the European level indicate that “the focus of the regulation must be on ensuring comparable levels of protection for all consumers. To achieve this outcome, the regulation must be flexible enough to be adapted to the channel concerned”²⁶. This concerns not only insurance but also other services provided at distance, and by electronic means.

For the sake of further analysis, it is necessary to define such services. The definition of “on-line” includes all services provided at distance, by electronic means, at the request of the recipient, against payment of remuneration. It includes then the electronic commerce of goods, as well as the rendering of services, social networks, professional training or e-learning. The exclusions from the above definition concern the services provided by public entities.²⁷

The above definition, as well as having been proposed in documents of the European Commission of an informative rather than a normative character, has also been reflected in European legislation. And, although there is no legal definition of e-insurance, this notion surely results from the regulation of e-commerce (hereinafter referred to as the “ECD”)²⁸. Such an approach allows one to refer to the European directive and situate it in the context of e-commerce, regulated to some extent in the ECD²⁹. However, it should be stressed that although most of the Member States

26. Insurance Europe, Press Release of 5 July 2012: “EC retail package must focus on consumer protection”. www.insuranceeurope.eu.

27. The definition proposed in the Communication of the Commission COM (2011) 942.

28. According to the definitions of an electronic contract that may be found in statutes and academic documents, the term encompasses both contracts that are concluded and performed via electronic means, via the Internet (e.g. downloading information from a website), as well as such contracts which are only concluded online, but performed *off-line*, where the use of electronic means is not necessary or not feasible (e.g. physical delivery of tangible products bought on-line). All this leads to the conviction that the main factor distinguishing an electronic contract from other types of contracts is the conclusion of a contract through electronic means used by both parties to the contract as well as the lack of simultaneous presence of the parties. Thus, an electronic contract will, by nature, be a distance contract (a feature which is also important for applying specific consumer protection). See Judgment of 23 March 2010 – joined cases C-236/08 to C-238/08, where, „by electronic means” is defined as meaning that „Service is sent initially and received at its destination by means of electronic equipment for the processing... and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means”.

29. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) O. J. L 178, 17/07/2000 P. 0001 – 0016.

implemented the provisions of the ECD in due time³⁰, this has not led to the introduction of more precise definitions of an electronic contract into domestic laws. Most of them focus on the introduction of information requirements related to the conclusion of contracts by electronic means³¹.

The ECD is intended for the regulation of the information society and defines, *inter alia*, online services – this definition might be applied to online insurance. Online services are defined as “a wide range of economic activities which take place on-line; these activities can, in particular, consist of selling goods on-line (. . .) information society services are not solely restricted to services giving rise to on-line contracting but also, in so far as they represent an economic activity, extend to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service” (recital 18 of the preamble to the ECD). As results from the goal defined in the directive, “the coordinated field covers only requirements relating to on-line activities such as on-line information, on-line advertising, on-line shopping, on-line contracting” (recital 21 of the preamble to the ECD).

The above shows that the basic criterion for e-commerce activity is the manner of performance thereof, i.e. at distance, by electronic means of communication, with the use of the Internet (on-line). In consequence, e-insurance can be defined as insurance services rendered at distance, by electronic means, however, in this aspect, the nature of the insurance contract should be taken into account. When we talk about an insurance product or insurance service, in both cases this means the insurance contract and its content³². E-insurance, will then mean, from the formal point of view, an insurance contract concluded at distance, with the use of electronic means of communication. The specific nature of e-insurance as compared to traditional insurance is based, therefore, on the manner of concluding the agreement and the mere content (wording) thereof. The notion of rendering services at distance should be then treated only as a mental shortcut, as we should distinguish in this respect the stage of concluding the insurance contract by electronic means from the stage of its performance. The performance of the insurance contract, taking into account its legal nature, consists of ensuring protection in case of adverse circumstances³³ and as such does not exhaust actions performed online.

30. Belgium: Loi du 11 mars 2003 sur certains aspects juridiques des services de la société de l'information visés à l'article 77 de la Constitution. MB Ed. 2 du 17/03/2003 p. 12960 (C - 2003/11126) ; Spain : Ley 34/2002 de 11^{de} julio, de servicios de la sociedad de la información y de comercio electrónico BOE n° 166 du 12/07/2002 p. 25388 ; France : Loi n° 575 du 21/6/2004 pour la confiance dans l'économie numérique; Ordonnance n° 2005–674 du 16/6/2005 relative à l'accomplissement de certaines formalités contractuelles par voie électronique.

31. Though there were several problems regarding the scope of application of the ECD, which ended in preliminary rulings of the ECJ, the example of which is Google France Sarl, Google Inc v Luis Vuitton Malletier SA and others (2010) in which the Court stated that “an internet referencing service constitutes an information society services consisting in the storage of information supplied by the advertiser”; or case L'Oreal v eBay (2011), where it was stated that “an online marketplace was an information society service”.

32. K. Malinowska, “Umowa . . .”, 53 and publications listed therein, in particular M. Dreher, “Die Versicherung als Rechtsprodukt: Die Privatversicherung Und Ihre rechtliche Gestaltung” (Tübingen: Mohr, 1991).

33. See for example Article 3 of the Polish Act on Insurance Activity dated 22 May 2003.

As was pointed out, the services rendered by electronic means are by nature transnational and, therefore, they have a great potential for increasing the scope and potential of the internal market in the EU. Removing legal barriers in this respect has been set as one of the goals of the EU. This must lead to the ensuring of protection to consumers using such kinds of services. Bearing in mind the difficulty in integration of private law (the example of an insurance contract is the most significant in this respect), one of the main instruments of protection still remains the information policy³⁴.

No doubt, there is a legal difference between consumer protection in e-insurance and in traditional insurance. This results from the fact that ensuring a comparable level of protection requires more advanced solutions. The information deficit on the consumer's side is much more pronounced in online financial services than in those provided in the traditional way. Similarly, as with other distance contracts, the consumer has a limited opportunity of acknowledging the subject matter and terms of the contract. Therefore there is an obvious need for strengthening protection within the field of information duties, with the emphasis put on the pre-contractual information duties. In consequence, the right of withdrawal is also much broader. Analysing the particular types of instruments available to consumers, we should come to the conclusion that all of them are a kind of "right to information". This is consistent with the abovementioned general principles of consumer protection in the EU.

Pre-contractual information duties in e-insurance

There is no doubt that in insurance the biggest emphasis is put on the information provided to a policyholder by an insurer before concluding an insurance contract. This results from – duties resulting from the E-commerce Directive ("ECD"), Directive on distance selling of financial services ("DMD") as well as such duties which may be imposed by the sectoral regulations. The codifying of the rules concerning the pre-contractual duties in insurance was proposed long ago. It is believed that this would be an encouraging factor as regards concluding insurance online. This could lead to a situation in which the rules of "general good" are not imposed by the Member States, which in turn would improve transparency and consumer protection³⁵.

The **E-commerce Directive** does not apply to all aspects of providing insurance services; certain exclusions within the field exist. Such exclusions concern the offering of insurance directly by insurers; in the case of intermediaries, the directive applies in full³⁶. In fact, the ECD constitutes a part of the regulation package that also consists of third generation insurance directives, the DMD and the Directive on insurance mediation ("IMD").

34. Communication from the Commission: Review of Directive 2002/65 of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directive 97/7/EC and 98/27/EC, Brussels 6.4.2006, COM (2006) 161 final;

35. http://www.knf.gov.pl/Images/dobro_ogolne_ubezpieczenia_tcm20-7668.pdf; A. Tarasiuk-Flodrowska, A. Wnęk, "Praktyczne problemy funkcjonowania w Polsce oddziału zagranicznego ubezpieczyciela z państwa Unii Europejskiej", *WU* 4/2009; D. Fuchs, „Dobro powszechne [ogólne] jako wyznacznik ewolucji wspólnotowego prawa ubezpieczeń gospodarczych” in *Prawo gospodarcze Wspólnoty Europejskiej na progu XXI wieku* ed. C. Mika (Toruń: TNOiK "Dom Organizatora", 2002); R. Stefanicki, „Ograniczenia swobodnego przepływu usług (kapitału) usprawiedliwione względami interesu publicznego w świetle orzecznictwa Europejskiego Trybunału Sprawiedliwości”, *Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego* 3 (2005).

36. Directive no. 92/49, Article 31 and Directive no 2002/83, Article 36 and Annex 3.

Many questions arise as to the scope of application of the ECD with respect to contractual principles, or modification thereof with respect to electronic contracts. One of the specific questions concerns the issue of whether using internet technology as regulated by the ECD entails only the obligation of recognising a new, electronic form, or whether it has a broader impact on contract law, such as for example, contractual liability rules. The vague provisions of the ECD entailed the necessity of the European Court of Justice being involved in this respect³⁷. No doubt, the ECD Directive has had an impact on the contractual obligation within the scope of pre-contractual information duties. They also apply in the field of insurance, and concern the information on the service provider (in this case – the insurer) that would enable the constant, easy access to all data including their name, address, email address, registration information, and also ensure equal means to enable the access to such data from the registry, as well as information on a relevant supervisory authority (Article 5 of the ECD). The other part of the obligatory information refers to prices: these are to be indicated clearly and unambiguously and, in particular, must indicate whether they are inclusive of tax and delivery costs.

The reports prepared by the European Commission for the EU Member States within the scope of implementation and functioning of the implemented provisions show that not only the content of the information matters, but most of all, the manner of its presentation is of importance. This seems to be particularly important as regards the “information overload” stressed before³⁸. The problems of trust and confidence in relations with consumers are some of the points in the strategy adopted by the European Commission within Europe 2020.

The DMD is a horizontal directive which applies to all kinds of financial services, including insurance. For the most part it regulates pre-contractual information duties. An important role of regulation included in the DMD refers to the moment when the information is provided to the consumer,

37. The Judgment of the Court (Grand Chamber) of 23 March 2010, joined cases C-236/08 to C-238/08, where the scope of Article 14 of the ECD and the scope of liability of entities involved in rendering services of information society resulting therefrom were considered; the Judgment states as follows: “Article 14 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) must be interpreted as meaning that the rule laid down therein applies to an internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser’s activities, it failed to act expeditiously to remove or to disable access to the data concerned”. Same standpoint was presented in case C-324/09 where, ECJ (Grand chamber) stated that “Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’) must be interpreted as applying to the operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting them. Where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realized that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31.”

38. Communication from the Commission to the Council and the European Parliament, Review of the Distance Marketing of consumer Financial Services Directive (2002/65/EC), COM (2009) 626 final, 7.

and manner thereof. Specific regulation in this respect is included in Article 3, indicating the types of information to be provided before a distance contract is concluded and focuses on the clear and transparent manner in which this should be done. The information must be made clear, shall be provided in a clear and comprehensible manner in any way appropriate to the means of distance communication used, with due regard, in particular, to the principles of good faith in commercial transactions, and the principles governing the protection of those who are unable, pursuant to the legislation of the Member States, to give their consent, such as minors.

Moreover, the information on contractual terms should be passed to the consumer on paper or on another durable medium available and accessible to the consumer in good time before the consumer is bound by any distance contract or offer. In cases where the contract has been concluded at the consumer's request using a means of distance communication which does not enable the provision of contractual terms and conditions and information beforehand, the supplier should fulfil his obligation immediately after the conclusion of the contract. Also, this right to information is afforded to a consumer at any time during the contractual relationship, when he may, at his request, receive the contractual terms and conditions on paper. In addition to the above, the consumer is entitled to change the means of distance communication used, unless this is incompatible with the contract concluded or the nature of the financial service provided.

The IMD is another set of rules aimed not only at enlarging the internal market in insurance distribution, but also at improving the level of consumer protection. The rules of consumer protection again focus on the right of information. The duties imposed on intermediaries concern mostly the information and insurance advice to be provided to a consumer in relation to the conclusion of the insurance contract, as well as within the scope of the intermediary's status (whether they are dependent or not dependent *vis a vis* the insurer)³⁹. The directive is nowadays a subject of intensive legislation work at the EU level, with the aim being to replace it with IMD II.

The **third generation insurance directives**, i.e. **Directive 92/49 concerning non-life insurance and Directive 2002/83 concerning life insurance** relate equally to 'traditional' insurance and e-insurance, and do not introduce any differences in the obligations imposed on insurers with respect to the information duties. The scope of the obligations depends, rather, on the type of insurance. The Directive concerning life insurance includes a wide regulation of the pre-contractual information duties. The specification of the information to be provided to the insured is set in Annex III to the Directive, which divides the information duties only into two types: the information on the insurer⁴⁰ and the information on the obligation⁴¹. The scope of information in non-life insurance is very limited

39. See for example: M. Serwach, „Broker jako strona umowy brokerskiej” in *Broker w świetle prawa i praktyki ubezpieczeniowej*, ed. M. Serwach (Łódź: Wydawnictwo Uniwersytetu Łódzkiego, 2012), 99 et seq.

40. This information includes the name of the insurer, its legal form, name of the Member State where the seat of the management body is located as well as the branch, or representative office that concludes the agreement.

41. Such information includes: a definition of each benefit and each option, a term of the contract, means of terminating the contract, modes of payment of premiums and duration of payments, means of calculation and distribution of bonuses, an indication of surrender and paid-up values and the extent to which they are guaranteed, information on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate; for unit-linked policies: a definition of the units to which benefits are linked, an indication of the nature of underlying assets for unit-linked policies, the arrangements for application of a cooling-off period, general information on the tax arrangements applicable to a given type of policy, the arrangements for handling complaints concerning contracts by policyholders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body,

in comparison with life insurance. Such information is included in the Third Non-Life Insurance Directive and mostly refers to the information on the choice of law as well as the manner of handling complaints reported by the insured⁴².

It is obvious that currently the Insurance Directive cannot constitute an exhaustive basis for concluding e-insurance from the point of view of consumer protection. A comparison of the provisions of the ECD and the DMD shows that apart from the information strictly concerning insurance, they include much more comprehensive provisions with respect to consumer protection. Even then applying only the basic rules of legal reasoning, such as *lex specialis derogat legi generali* or *lex posteriori derogat legi priori*, we must come to the conclusion that the Insurance Directives would be applicable in e-insurance only in an auxiliary way and only in a few cases, bearing in mind the scope of regulation included therein. This is also true with respect to life insurance, where most of the extended information included in the Third Life Insurance Directive is covered by the provisions of the ECD and the DMD.

Information duties during the term of the contract

It is characteristic in insurance that information duties are also imposed on an insurer during the term of the contract, following its conclusion. This refers mostly to life insurance, which is usually not only a continuous legal relation but also a long term one. In situations where an investment factor is involved, there also appears a change of the contract's content over time. This is why, apart from the general and specific insurance terms, the insured should also receive information on the insurer, as well as on the subject matter of the contract, during the whole term of the insurance period (the scope of such information is listed in the Annex III points (a) (4) to (a) (12) of the Annex III to the Third Life Insurance Directive. The information must be provided to the insured in the case of a change of insurance terms or a change of the law applicable to the insurance contract, and annually as regards the information on the amount of bonuses.

Right of withdrawal⁴³

As was pointed out above, in the opinion of the author, the right of withdrawal expresses in fact the consumer right to information, and during the 'cooling period', the consumer may rethink his intention to remain in the contractual relationship, in particular if the contract is, as in the case of insurance, a continuous contract, or if the consumer has been informed of the contractual terms after the conclusion thereof. The right of withdrawal is not regulated in the ECD, thus, in insurance contracts, the source of the right of withdrawal is the DMD, as well as the Insurance Directives.

without prejudice to the right to take legal proceedings, law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the assurer proposes to choose.

42. Article 31 of the COUNCIL DIRECTIVE 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-Life Insurance Directive) *Official Journal L 228, 11/08/1992 P.0001 – 0023*).
43. For a very informative and interesting view on this issue see: Jan M. Smits, "The Right to Change Your Mind? Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law", *Penn State International Law Review* 29 (2011), 671–684; Maastricht European Private Law Institute (M-EPLI) Working Paper No. 2011/01 (2011).

The right of withdrawal has been provided in Article 6 of the DMD, which grants the consumer a right to withdraw from the contract within 14 days from the conclusion thereof, without the chance of any contractual sanctions applying or the necessity of giving a reason for withdrawal. The right of withdrawal, as has been provided in the Insurance Directives, does not depend on the manner in which an insurance contract is concluded (online or offline). It results directly from the Life Insurance Directive⁴⁴, which in recital 45 of the preamble, introduces the obligation to provide a policyholder with the right of “*cancelling the agreement*” within 14 to 30 days after the conclusion thereof. A similar obligation appears in the Non-Life Directive. As regards life insurance contracts concluded at distance (Directive 90/619/EEC), the cooling period amounts to 30 calendar days counting from the moment the consumer obtains the information on the concluding of the insurance contract, or from the day when consumer is provided with the contractual terms and information, whichever is later.

The right of withdrawal is included in the report of the European Commission concerning the impact of the DMD on cross-border financial services⁴⁵. Some problems concerning the legal nature of the right of withdrawal were identified here. Poland was mentioned as one of the examples of countries where such problems appear. The right of withdrawal, as regulated in the Directives, is a right, which, when applied, has legal effect for the future (*ex nunc*), and this has legal significance with respect to compulsory insurance. In the Polish legal system, a withdrawal means, as a rule, that the contract is treated as not concluded (*ext tunc*) (art. 395 (2) of the Polish Civil Code). In relation to the above, it was necessary to modify the right of withdrawal and to state expressly in the provisions implementing EU law that the right of withdrawal can have legal effect only for the future⁴⁶.

Choice of law in e-insurance

Only as a short note, it should be mentioned that the issues of the choice of law (or conflict of laws rules) for contractual relations with consumers in the insurance sector, including e-insurance, are subject to a regulation called “Rome I”⁴⁷. It is applicable directly in the Member States, replacing in this respect the domestic rules of private international law, as well as replacing relevant provisions in the Second Generation Insurance Directives, which were primary sources of insurance regulation in this respect. At the time of enacting the Insurance Directives, this solution was treated as a temporary one in relation to the abandoned idea of integrating insurance contract law⁴⁸. The mandatory

44. Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance O.J. L 345, 19/12/2002 P. 0001 – 0051.

45. Final Report, Part. I. General Analysis, Impact of Directive 2002/65/EC concerning the distance marketing of consumer financial services on the conclusion of cross-border financial service contract between professionals and consumers, Project SANCO/2006/B4/034, 82.

46. Such a solution was also necessary for the reason that the notion of withdrawal from a contract is not consistent and some authors claim that we must not recognise only one right of withdrawal but its legal character depends on the type of a contract and other factors, and also, that the parties enjoy the contractual freedom as regards shaping the legal consequences of a right of withdrawal under a contract. See for example: G. Tracz, “Sposoby jednostronnej rezygnacji z zobowiązań umownych” [Manners of unilateral termination of legal relations], (Warszawa: Wolters Kluwer, 2008); B. Jelonek-Jarco, “Contractual right of withdrawal” (art 395 par. 2), PS 6/2008.

47. Regulation (EC) no. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [O.J.U.E L of 4 June 2008, no 2008.1776].

48. See more in: K. Malinowska, “Umowa...”, 56.

character of the Rome I provisions with respect to consumer contracts is of substantial importance. As was stressed in the preamble to the Regulation, “as regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules” (recital 23). It is an exception to the general rules, according to which “a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract” [Article 3].

The choice of law concerning insurance has been regulated in Article 7 of the Regulation and the division between large risks insurance⁴⁹ and the other risks (also known as “mass risks” or “consumer risks”) insurance has been made in this respect. While in large risks insurance the freedom of choice of law remained the main principle, mass risks insurance is subject to quite a restrictive approach. The choice of law is possible only within the scope of laws related to the location of the risk⁵⁰ or a law connected with the habitual residence or citizenship of the policyholder. The connecting factor related to the habitual residence of the policyholder (the insured) caused a serious discussion with respect to the method of interpreting the connecting factors, i.e. whether the dynamic or, rather, static interpretation should be approached⁵¹ – this discussion ended at the ECJ. Although the case in question concerned solely tax issues, one may ask whether it means that the law applicable may change along with the change of the habitual residence of the policyholder, from one state to another (in accordance with the Rome I Regulation, it is the place of commitment)⁵². The connecting factor related to the place of residence is also used in the Brussels Regulation, where it takes the notion of “domicile” with respect to both insurers and policyholders, both corporate and natural persons. It is claimed that “habitual residence” factor satisfies the needs of both online and offline contracts

49. The large risks have been defined in Article 5 (d) of the First Council Directive of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (73/239/EEC) O.J. L 228 , 16/08/1973 P. 0003 – 0019.

50. The country in which the risk is situated is determined in accordance with Article 2 (d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1 (1) (g) of Directive 2002/83/EC.

51. The matter resolved by the European Court of Justice concerned the possibility of imposing taxes on the insurance policy in a situation where the habitual residence of a policyholder changed after the conclusion of an insurance contract (where such taxes may be applied only by the Member State of the commitment). According to the static interpretation, the Member State of the commitment is being specified on one occasion when the contract is concluded (thus, only the Member State where the policyholder had habitual residence at the moment of concluding the insurance contract may impose taxes in this respect). On the other hand, the dynamic interpretation was supported, according to which, the Member State of the commitment may change if the habitual residence changes (from one premium payment to the next); Opinion of Advocate General Kokkott (2012), points 30–32.

52. Finally, the Court’s judgment followed the dynamic interpretation in terms of taxes; however, the Court stated in the justification that the issue of the law applicable to the contract should be treated independently of taxes, arguing that it is possible to interpret the provisions concerning “state of commitment” to the effect that the applicable law does not change when the policyholder transfers his habitual residence, as the law applicable is not to affect the fiscal arrangements; Judgment of the Court of (First Chamber) of 21 February 2013, case C-243/11 RVS Levensverzekeringen NV v Belgische Staat.

with respect to the protection of consumers⁵³. The parties to an insurance contract may make use of the choice of law freedom only when the relevant Member State (the law of which is applicable to a given contract), affords a wider choice of law than the Regulation. Some additional rules are applicable to compulsory insurance, as in a situation of conflict of laws of two Member States – here the priority belongs to the law of the state which imposes the obligation to insure.

As was stated, the above rules are fully applicable to e-insurance, as no separate principles have been worked out in this respect. Though there are some doubts as to whether the existing rules are suitable for online relations, it seems that the manner of regulating the connecting factors in the Rome I Regulation, such as habitual residence of the policyholder or the risk location are flexible enough to also be applicable to an insurance contract concluded with the use of electronic means.

Conclusions – European legal tendencies in insurance and its impact on consumer protection

The issue of a consumer being aware of the content of a contract and his rights arising from a contract is one of fundamental aspects of consumer protection. As the analysis carried out by the European Commission shows, it does not consist solely of the legal aspects, but also such non-legal circumstances as language and legal culture⁵⁴. This is also why the instruments applied by the EU are not able to ensure in a bottom-up manner the success of the cross-border services rendered with the use of the electronic means. The only instrument that has not been implemented in this respect is the full integration of insurance contract law. As it is documented, the official EU attempts to harmonise insurance contracts failed a long time ago. The current work undertaken in academic circles now have a bottom-up and comparative character. It can be expected that the effect of such work will be more practical and this will affect the development of transnational insurance in a positive way. As we observe the tendencies and the impact put on the equality of the parties to the contract, questions can be raised as to whether such trends lead to a change within the insurance contract's long lasting principles, for example transforming the good faith principle in its old-fashioned meaning (binding, mostly, the policyholder into the transparency principle, binding both parties. Some of these questions we must leave unanswered and wait for the results of the free development of the market and its practice, supported by the European legislator.

As stressed several times in this article, the concept of consumer protection in e-insurance does not differ from the general idea adopted by the EU with respect to consumer protection. The differences in the particular provisions result from the fact that online contracting requires more sophisticated instruments in order to achieve the same result and levels of protection. This is also true with respect to legislation tendencies in the EU. The current trend is to extend protection to all distribution channels, including not only online contracting and intermediaries but also any kind of direct distribution of insurance. Such an example is the draft of IMD II (Insurance Media-

53. Though, according to the Rome I Regulation, the requirement of 'directed activity' – i.e. specific invitation or advertising is particularly important for application of the 'friendly' to consumer rules of choice of law; see also: Green Paper, 31.

54. Communication..., COM [2009] 626 final, 8.

tion Directive)⁵⁵, which aims to ensure a comparable level of protection regardless of which distribution channel is applied. The same idea is present in the works on *common frame of reference* in the field of insurance, i.e. PEICL. An analysis of all these drafts shows that they focus to a great extent on the right to information to be properly ensured to the policyholders and the insured⁵⁶.

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55. Proposal for a Directive of the European Parliament and of the Commission on insurance mediation, Brussels, XXX, COM (2012) 360/2, 2012/0175 (COD).

56. The goal of the Commission is to ensure a comparable level of protection to the one conferred on the investment products regulated by the MiFID (Markets in Financial Instruments Directive). It relates to not only life insurance products with investment element (PRIPs) but also any other.

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Ochrona konsumentów w e-ubezpieczeniach w prawie Unii Europejskiej

Celem niniejszego artykułu jest podsumowanie koncepcji i aktualnych tendencji widocznych w Unii Europejskiej w obszarze ochrony konsumentów w e-ubezpieczeniach. Chodzi przede wszystkim o ustalenie, czy tradycyjne instrumenty stosowane w celu ochrony ubezpieczających są odpowiednie z punktu widzenia wymogów handlu elektronicznego w ubezpieczeniach. Jako pierwsza analizie poddana została kwestia ochrony konsumentów w epoce społeczeństwa informacyjnego, ze szczególnym uwzględnieniem specyfiki instrumentów ochronnych. Następnie omówiono konkretne aspekty ochrony konsumentów w ubezpieczeniach online, w tym istotę ochrony konsumentów usług ubezpieczeniowych oraz charakter e-ubezpieczeń zestawionych z ubezpieczeniami tradycyjnymi z punktu widzenia ochrony ubezpieczających. W dalszej kolejności zbadano konkretne instrumenty prawne, które wydają się być typowe dla umów zawieranych przez internet. Należą do nich w szczególności przedumowne obowiązki informacyjne, obowiązki informacyjne istniejące w okresie obowiązywania umowy, prawo odstąpienia oraz wybór prawa właściwego w e-ubezpieczeniach. Obowiązki nakładane na przedsiębiorców w tym zakresie wynikają z Dyrektywy o handlu elektronicznym i Dyrektywy w sprawie sprzedaży na odległość. Ponadto obowiązki takie określają sektorowe regulacje prawne, jak np. Dyrektywa IMD, Dyrektywa 92/49 w sprawie ubezpieczeń innych niż ubezpieczenia na życie oraz Dyrektywa 2002/83 dotycząca ubezpieczeń na życie. W podsumowaniu autorka przedstawia europejskie tendencje w prawie ubezpieczeń, w tym przyszłe zmiany przepisów Dyrektywy w sprawie pośrednictwa ubezpieczeniowego (IMD II) oraz ich wpływ na problematykę ochrony konsumentów.

Słowa kluczowe: e-ubezpieczenia, e-handel, konsument, usługi finansowe, społeczeństwo informacyjne.

KATARZYNA MALINOWSKA, PH.D. – legal counsel, a partner in BMSP Boryczko Malinowska i Partnerzy as well as a member of the Management Board of the Chamber of Insurance and Risk Management and a member of the Research Council of the Polish section of AIDA (Association Internationale de Droit des Assurances).