

**Response to the Questionnaire on Transparency of Insurance Contract Terms and Conditions and Pre-Contractual Information by the AIDA German Chapter**

**GERMAN NATIONAL REPORT ON TRANSPARENCY**

**A. Transparency of insurance contracts**

**I. Transparency of insurance contract provisions under general contract law**

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

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

Answer:

German contract law puts a strong emphasis on transparency, which may, insofar, be regarded as one of its guiding principles. Due to the aforementioned, it is commonplace to conclude that some form of standard of transparency exists in all areas of contract law. The most important field of application of the principle of transparency is, however, the requirement of transparency concerning general terms and conditions (in German *Allgemeine Geschäftsbedingungen*, subsequently referred to as AGB).

Ad. 1.: There are some types of contracts for which specific regulations on transparency are provided. This applies especially to contracts between seller or supplier, on one side, and consumer, on the other side, since the latter are regarded as particularly worthy of protection. In order to grant such protection (and to transform certain European directives), the German legislator has for example established special rules applicable to so-called consumer contracts and, even more specific, applicable to specific consumer contracts such as distance selling contracts. Concerning such contracts, German law subjects the seller respectively supplier to a duty to inform the consumer about certain facts and requires such information to be clear and comprehensible (cf. eg. sec. 312c subsection 1 German Civil Code [*Bürgerliches Gesetzbuch*,

subsequently referred to as BGB] in conjunction with Art. 246 sec. 1 and 2 of the *Introductory Act of the German Civil Code* [*Einführungsgesetz zum Bürgerlichen Gesetzbuch*, subsequently referred to as EGBGB] and sec. 360 subsections 1 and 2 BGB). Another example for the principle of transparency as applicable to specific consumer contracts would be the duties of information applicable to travel businesses. Pursuant to sec. 4 of the BGB Information Duty Regulation (*BGB-Informationspflichtenverordnung*, BGB-InfoV), if a travel operator provides a prospectus, it has to contain certain necessary pieces of information. This information must be “legible, clear and precise”. As mentioned before, the absence of a specific standard of transparency for a specific contractual type should, however, not be understood to mean that a transparency test would not apply. In such cases, jurisprudence would usually apply the general standard of transparency – e.g. as part of the method of interpreting contractual clauses –, though this standard might be adopted to a certain degree to better meet the necessities of the type of contract in question.

Ad. 2.: Germany was one of the first countries to develop legal rules applicable to general terms and conditions, though these rules remained for some decades to be exclusively formed by the courts. In the 1970s these rules were transposed by the legislator into the *Unfair Terms and Conditions Act* (so-called *AGBG*), which was subsequently altered especially to meet the requirements of the Council Directive 93/13/EEC of April 1993 on unfair terms in consumer contracts, the transposition of which it subsequently served. In 2002 the *AGBG* was abrogated and its provisions were included into the BGB. In sec. 305 et seq. BGB the principle of transparency is given a central role in regulating the fairness of general terms and conditions. Sec. 305 et seq. BGB set a two-pronged test of transparency:

Firstly, sec. 305 subsection 2 BGB requires transparency concerning the inclusion of the AGB into the contract. Sec. 305 subsection 2 states that standard business terms only become a part of a contract if the user, when entering into the contract, 1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and 2. gives the other party to the contract, in an acceptable manner – which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user – the opportunity to take notice of their contents, and if 3. the other party to the contract agrees to their application.

Secondly, the principle of transparency also applies to the regulatory content of the AGB. Pursuant to sec. 307 subsection 1 sentence 2 BGB, a general term or condition may be regarded as unfair for the mere fact that it is not drafted in a clear and comprehensible manner taking into account the comprehension of an average customer. To substantiate the expression of the average customer, the jurisdiction has to take into account the understanding of Community Law. The European Court of Justice considers a generally reasonable acting, attentive customer, who is capable of self-definition. Concerning general terms and conditions applicable to certain contract types, however, German courts have exhibited a rather strict understanding of what the average customer knows and understands, thus in some instances applying a more consumer friendly interpretation than would be required by the ECJ.

The *contra proferentem* doctrine is established in sec. 305c subsection 2 BGB and serves to interpret ambiguous general terms and conditions. It contains the rule to construe any

unclearly in a general term or condition against the party that proposed its inclusion into the contract.

## **II. Transparency specific rules applicable to insurance contracts**

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

1. Please, indicate which rules must be observed by insurance companies in setting out insurance contract provisions, distinguishing between insurance contract law rules and supervisory rules, and specifying:
  - (a) any rules common to all insurance contracts;
  - (b) whether different rules are applied to the following types of contract:
    - (i) life insurance contracts;
    - (ii) non-life insurance contracts;
    - (iii) particular types of insurance contracts (e.g. accident or sickness policies); and
    - (iv) compulsory insurance contracts;
  - (c) whether there are special rules for insurance investment products, such as capital redemption policies, life insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies);

Answer:

Even more so than in general contract law, an important element of insurance contracts are the *general terms and conditions of insurance* (*Allgemeine Versicherungsbedingungen*, subsequently referred to as AVB). While AGB regularly only concern minor aspects of the contract (with the *essentialia negotii* being individually negotiated between the parties), AVB

relate to the core elements of the insurance contract. The inclusion of AVB is, therefore, vital to give the contract its specific shape. As a consequence, an insurance contract in its typical form is a pre-formulated standard contract which is (almost as a whole) covered by sec. 307 subsection 1 sentence 2 BGB, meaning that all its provisions must be clear and comprehensible. This test of “clarity and comprehensibility” requires – pursuant to the interpretation of sec. 307 subsection 1 sentence 2 BGB by the German Federal Court (*Bundesgerichtshof*, BGH) – that the AVB reveal to the policyholder the economic disadvantages and encumbrances accompanied by the conclusion of the insurance contract. However, it has to be taken into account that insurance as a “legal product” – which exists (greatly simplified) only on paper and within the framework the law sets for the contract – is highly complex. Which is why it is rather common to assume that the average policyholder would not be able to fully understand the accurate content of an insurance provision even where the insurer were to use its best efforts to draft such provision as comprehensible as possible. Insofar the shortcomings of the level of transparency required when drafting the contract is in some way accommodated by a requirement of transparency when distributing the contract. Hence, it is the duty of the insurer respectively of the insurance intermediary to inform and to advise the policyholder (secs. 6 and 7 and 60–62 of the German Insurance Contract Act [*Versicherungsvertragsgesetz*, subsequently referred to as VVG]). Each of these provisions explicitly asks for the realization of transparency (for more information about the duty to accomplish a specific risk and demand analysis and the duty of documentation cf. answers in part C).

Cost transparency is utterly important for life insurance contracts because of their peculiarity as long-term capital accumulation instrument. It is vital to inform the policyholder to what extent his premium will be used to cover the insurer’s overhead and for this reason will not be available to accumulate capital. Beyond sec. 7 subsection 1 VVG, the German legislator defines further duties of pre-contractual information in the Regulation on obligations to disclose information in the case of insurance contracts (*Verordnung über Informationspflichten bei Versicherungsverträgen*, subsequently referred to as VVG-InfoV). There is furthermore a specificity in that life insurers or pension funds which provide occupational pensions schemes are not only to inform its policyholders (which will usually be the employer which buys insurance cover for its employees by way of a group insurance contract) but also the insured persons. This duty is regulated under sec. 10a subsection 2 VAG and is a supervisory law duty; whether a corresponding private law duty exists is still debated.

Regarding the setting out of insurance contract provisions, the insurance supervisor is basically charged with supervising whether the insurers meet the transparency requirements to which they are subject towards the policyholders (sec. 81 subsection 1 of the *German Insurance Supervisory Act*, VAG). Furthermore, sec. 10 VAG sets a supervisory law standard of transparency for the AVB by setting out the minimal content of general terms and conditions of insurance. The omission of any of these requirements set out by sec. 10 VAG or a fault concerning any of these requirements do, however, not result in the invalidity of the contract in question. As a public law provision (with no private law effect), sec. 10 VAG only provides a public law duty to rework the contractual provisions (with effect for the future) by request of the supervisory authority according to sec. 81 VAG.

Sec. 10a VAG old version used to provide for consumer information for all insurance contracts esp. by a consumer information leaflet providing information in accordance with

part D of the Annex about the essential facts and rights under the insurance contract before conclusion and during the term of the contract. Due to subsection 2 the consumer information was required to be in writing, or in text form in the case of distance contracts. The information was to be presented in a clearly organised format; the wording must be unambiguous and comprehensible, in German or in the native language of the policyholder. While these requirements (in general) still apply to insurance contracts, they may no longer be found in the VAG, since sec. 10a VAG was revised in 2008. The duty to inform, which hitherto had a curious form between supervisory and contractual duty, was rather transferred into the VVG and is now to be regarded as a contractual duty (this is not to say that a systematic violation of the duty to inform could not necessitate the insurance supervisory authority to take action). This information duty will be discussed at a later stage (see infra B).

Sec. 10a subsection 1 VAG deals with transparency in the special situation of multiple applications: Application forms shall contain only as many applications for the conclusion of legally independent insurance contracts that clarity, legibility and comprehensibility are not affected. The applicant shall be informed in writing, with particular emphasis placed on the legal independence of the policies for which applications have been submitted, including the relevant general policy conditions, the periods of validity of the applications and the term of the contracts.

Subsection 3 of this provision requires that prior to concluding a private health insurance contract, the interested person shall confirm receipt of an official information sheet issued by the supervisory authority, which explains the different principles behind the statutory and private health insurance systems.

2. Please, indicate the consequences of infringing transparency duties under contract law and insurance contract law, specifying:
  - (a) whether and under which circumstances infringement will affect a contract or individual contractual provisions (invalidity of contract or individual contractual provisions, termination of contract or other events);
  - (b) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;
  - (c) whether any other consequences of infringement have been provided for;
  - (d) which consequences may follow infringement of supervisory rules, such as prohibition or restriction from continuing to conclude the contract involved and/or pecuniary penalties. Further specify whether any adopted measure involving penalties or restrictions on the activities of an insurance company is subject to the right to apply to the courts; and

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

Answer:

There are various consequences of the infringement of transparency duties under contract law and insurance contract law. On the level of the provision itself, its effectiveness depends on the regulatory content. An intransparent provision is invalid if it affects the policyholder to his detriment (sec. 307 subsection 1 sentence 1 BGB). On the contrary, a provision with mere declaratory content that only reproduces the legal provision has not to conform to the principle of transparency, unless the legal provision is incomplete and needs completion by the contract (cp. BGHZ 147, 373 = VersR 2001, 839 = NJW 2001, 2012).

The contract, in general, maintains its effectiveness regardless of the ineffective provision (sec. 306 subsection 2 BGB). The gap of the ineffective provision – unless the gap does not need to be filled since the contract provides a reasonable solution as it is – can be filled by a statutory provision or by applying a supplementary interpretation of the contract (sec. 306 subsection 2 BGB in conjunction with secc. 133, 157 BGB). Only if an adherence to the contract, even taking into account the alteration according to subsection 2, is an undue hardship for one party, the contract can be regarded as void (sec. 306 para. 3 BGB).

In such cases, where the contract is to be regarded as invalid, the legal rules of unjust enrichment apply (secc. 812, 818 BGB). Other than that, the insurer may owe damages to the policyholder on the grounds of the general principle of contractual damages (secc. 311, 280 BGB in conjunction with sec. 241 subsection 2 BGB). Damages may generally arise only under the condition that a breach occurred, the duty breaching party is liable for this breach and a damage to the other party emerged.

The supervisory authority may prohibit the use of an invalid standard term, even if a court has not yet declared the invalidity of the standard term (cp. BVerwGE 107, 101 = VersR 1998, 1137 = NJW 1998, 3216; BVerwGE 108, 325 = VersR 1999, 743).

According to sec. 81 subsection 2 VAG the supervisory authority may issue any orders with respect to the undertakings, the members of their management boards and other managers, or persons controlling the undertaking, which are appropriate and necessary to prevent or remedy irregularities. In particular, the supervisory authority may prohibit combinations of loan transactions and insurance contracts if the sum insured exceeds the loan. It may also prohibit insurance undertakings or insurance intermediaries, either generally or for individual classes of insurance, from granting policyholders any special allowances in any form; it may also prohibit insurance undertakings – either generally or for individual classes of insurance – from concluding and renewing preferential contracts.

The remedy taken by the supervisory authority only has a *de facto* binding effect upon the judge petitioned in a case brought by an insured person against the insurer – or vice versa – concerning a clause regarded as invalid by the supervisory authority. The civil courts are free in applying a different interpretation of the clause in question than did the supervisory authority.

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

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

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

### **I. Pre-contractual information under general contract law**

Please indicate whether:

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

#### Answer:

Beyond the primary performance relationship between the contractual parties, additional protective duties are provided by German contract law (sec. 242 subsection 2 BGB) which oblige both parties to have consideration for the other party. From this may derive the duty to inform the other party about important information crucial to the contract before its conclusion. The principle of [*utmost*] *good faith (Treu und Glauben)* considering the circumstances of the particular case frames this duty. Furthermore the intensity of a potential threat of the contract’s purpose and the scope of a potential damage of the other party may be taken into consideration.

As stated above, the German Civil Code determines in sec. 312c subsection 1 BGB that the pre-contractual information has to be clear and comprehensible. This provision – through cross reference to art. 246 subsections 1 and 2 *EGBGB* – provides a catalogue of preconditioned information which has to be covered by distance selling contracts. Moreover, the duty to inform before the contract is concluded is also specifically provided for *consumer loan contracts (Verbraucherdarlehensverträge)* in sec. 491a BGB which refers to further provisions in art. 247 *EGBGB*.

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

1. Please, indicate whether there are separate rules governing the following types of contract:
  - (a) life insurance contracts;
  - (b) non-life insurance contracts;
  - (c) particular types of insurance contracts (e.g. accident or sickness policies);
  - (d) compulsory insurance contracts; and
  - (e) insurance investment products, such as capital redemption policies, life insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies).

Answer:

With the enactment of the German Insurance Contract Act in 2008 the insurer's duty to inform was substantially enlarged and broadened. This duty is accompanied by the duty to advise and to document (secc. 6, 7 VVG). Further substantiation on pre-contractual information was set out in 2007 by the regulation on duties to inform with regard to insurance contracts (*VVG-InfoV*). It comprises a comprehensive catalogue of basic information relevant to all insurance contracts as well as additional requirements for life insurance, accident and occupational disability or substitutive insurance contracts.

Notwithstanding the actual arrangement of business conduction, i.e. what model an insurer applies to conclude its contracts, the reformed VVG imposes on the insurer a legal duty to inform the policyholder on certain aspects of the product in question. Sec. 7 VVG (in connection with the *VVG-InfoV*) thus contains a substantial regulation of the matter and

affords the policyholder a personal claim against the insurer to be informed. In this way, it, arguably, differs from sec. 10a old VAG (in connection with Annex D to the VAG), the rule it replaces, which was regarded by some as a purely supervisory rule not granting any private claims to the policyholder. There are several other aspects in which the new sec. 7 VVG has changed the old system of providing information. This information duty applies to all insurance contracts (irrespective if the policyholder is a consumer or not).

The insurer has to transmit to the policyholder in a timely manner before his contractual declaration its contractual terms including the general conditions of insurance as well as the information as required by the VVG-InfoV. The latter mentioned regulation, which has been enacted on the basis of sec. 7 subsection 2 VVG, provides for certain information to be given to all applicants (sec. 1), some information to be given only to applicants for special insurance classes or types (life insurance and comparable insurances: sec. 2; health insurance: sec. 3) and some information only to applicants who are consumers in the sense of sec. 13 BGB (so called information sheet: sec. 4). The VVG-InfoV other than this pre-contractual duty to inform, also provides for what information an insurer has to disclose when it contacts the policyholder via telephone (sec. 5) and what information it generally has to transmit to the policyholder during the term (sec. 6). The duty to inform has to be observed towards all policyholders, except for the information provided for by sec. 4 VVG-InfoV which applies only towards consumers. Only insurance contracts covering a large risk in the sense of sec. 210 VVG do not entail a duty to inform. In those cases, pursuant to sec. 7 subsection 5 VVG, the insurer only has to inform about the applicable law and the competent supervisory authority, and even that only if the policyholder is a natural person.

For a brief overview of the required information: sec. 1 VVG-InfoV requires the insurer to inform about its own person – e.g. its name, its address – about its performance under the provisioned contract – e.g. general conditions of insurance, the nature, extent and due date of its performance and the price and total costs of insurance – about the modalities of contract – e.g. its mode of conclusion, its term and possibility of termination, the possibility of revocation, and about possible legal remedies, especially the possible access of the policyholder to an extra-judicial complaints and grievance procedure. If the contract is a life insurance, or similar insurance contract as required by sec. 2 subsections 4 et seq. VVG-InfoV, sec. 2 VVG-InfoV additionally requires information especially on the share in the surplus, e.g. the mode of calculation of the benefits of the contract, the way acquisition and distributions costs are debited from the premium (i.e. explanation of the *Zillmer*-method), the surrender value. Pursuant to sec. 154 VVG in connection with sec. 2 subsection 3, if the insurer includes a model calculation he has to meet specific requirements. The duties of sec. 3 pertaining to the insurer of a health insurance are quite comparable to those of sec. 2.

A new speciality exists for consumers, who now have to be provided with a product information sheet, sec. 4 VVG-InfoV. It was feared by jurisprudence that a large number of insurers would be induced by the new law to fulfil their duty to inform in a very formalistic manner by handing over voluminous information materials, rather with the intent to cover themselves against any sort of liability than with the goal to inform the policyholder as effectively as possible. To avert such a negative effect of the comprehensive duty to inform and to protect the consumer against a possible hypertrophy of information, the legislator, thus, chose to obligate the insurer to hand over a product information sheet, which is to highlight the essential elements of insurance. The product information sheet, which is to bear this name

in its title, is to precede all other information that is to be given (sec. 4 subsection 5 sentence 1 VVG-InfoV), i.e. the product information sheet must never be “hidden” amongst the other information material but is to lie on the top of the heap. In it, the necessary information, as non-exclusively enumerated by sec. 4 subsection 2 VVG-InfoV, shall be presented in a concise, clearly arranged and coherent manner, while pointing out to the policyholder that the information is non-conclusive, sec. 4 subsection 5 VVG-InfoV.

The pivotal question concerning the duty to inform will, however, be what exactly is to be understood, when requiring the information to be turned over *in a timely manner* before the policyholder’s contractual declaration. This requirement excludes the application of the model of policy (as hitherto exercised by German insurers, i.e. turning over all necessary information only at the moment at which the insurer accepts the offer made by the policyholder), it nevertheless remains unclear how much in advance the information has to be transmitted in order to be considered timely in the sense of sec. 7 subsection 1 sentence 1 VVG. In interpreting the indefinite term “in a timely manner” it is only certain that the latest possible moment must be that at which the policyholder communicates its contractual declaration, i.e. acceptance or more typically offer. It may, however, in several cases be preferable to assume an earlier moment for the information to be timely. Considering the wording of the legal rule, it seems to be preferable to interpret the prerequisite of timeliness on a case to case basis, taking into account the group of persons the policyholder belongs to and the nature of the product offered. This certainly precludes any dogmatic approach requiring for example for a three day period to be observed in all cases. Rather one should give regard to the following factors: appropriate amount of protection of the policyholder against undue pressure to decide without having the necessary information, concrete circumstances of the contract conclusion, the type, the scope and the importance of the deal. Furthermore, in all cases where the timeliness of the information might be controversial, one should apply the principle one could baptise as “*in dubio pro consumer protection*” and tend to interpret “in a timely manner” to the disadvantage of the person being obligated to inform.

In practice, this would mean that there would especially have to be drawn a distinction between “simple” and “complicated” insurance products. This would mean that a product, such as for example a traveller’s baggage insurance or a funeral expense insurance, consisting of rather concise general conditions of insurance and being easy to understand products would entail a duty to inform, which would be properly performed as long as the policyholder had the opportunity to read over the information material, esp. the GCI, right before communicating its declaration of intent. The same would basically be true for standardised everyday policies, such as generally personal liability insurance, motor vehicle insurance etc., where the applicant already has a basic idea of the nature of the product and will hence only need a few minutes in order to detect possible particularities of the product in question. In both cases, it is only necessary that the policyholder *could* have read the information, not that he *actually* did it. Another standard should be applied to products that are more complex in nature, often contain difficult to understand conditions and tend to be long-term insurances. Such is namely the case for a large part of insurances of persons, such as life insurances, occupational disablement insurances or health insurances. Here it seems preferable for the policyholder to have the information several days before making his contractual declaration. Notwithstanding these attempts at an interpretation of the term “in a timely manner”, it should be highlighted that the establishment, of how this term is to be understood, is expected to be operated by the courts.

There are, however, some exceptions to the requirement of information before the policyholder's declaration. Firstly, pursuant to sec. 7 subsection 1 sentence 3, first half-sentence VVG the information material has only to be transmitted without undue delay after the contract conclusion, if the contract on demand of the policyholder is concluded via telephone or another mean of communication that does not allow for the information in written form to be transmitted to the policyholder prior to contract conclusion. Secondly, the same applies pursuant to sec. 7 subsection 1 sentence 3, second half-sentence VVG where the policyholder by a separate written declaration explicitly waives his right to be informed prior to his contractual declaration.

Other than the duty to advise, the duty to inform is owed exclusively by the insurer. This means that the policyholder has no independent claim under sec. 7 VVG or secc. 59 et seqq. VVG against the insurance intermediary (i.e. insurance agents [*Versicherungsvertreter*]) to be informed but only against "his" insurer (against the insurance intermediary he may have a claim for "other" information). In practice, this means that the insurance agent, when turning over the information material to the applicant, acts strictly as the agent of the insurer in order to fulfil the latter's obligation to inform. Any faults of his will be attributed to the insurer under sec. 278 subsection 1 BGB. *In concreto* one could say that the insurer is held by law to organise its business transaction in a way to ensure that the information material is reliably transmitted to each and every applicant at the appropriate time. Hence the insurer may not exculpate itself by raising that it transmitted the information at the appropriate point in time to the insurance agent. A more differentiated answer has to be given, where the insurance contract is mediated not by an insurance agent but by an insurance broker (*Versicherungsberater*) in the sense of sec. 59 subsection 3 VVG. Here the insurer may fulfil its duty by turning over the information material to the insurance broker, who will act as the agent of the applicant (so-called *agency-model* [Stellvertretermodell]). It would then be the insurance broker's *contractual* duty to turn over this information to the applicant. If he neglects to do so, the policyholder would still not have a claim against the insurer and would not be able to revoke the contract but might be able to claim damages under the contract concluded with the insurance broker against the latter.

As it has been pointed out, the insurance information has to be transmitted *in a timely manner* before the policyholder's contractual declaration. Which brings us to the question, how a breach of this duty is sanctioned. The legislator, especially considering its aim to abolish the model of policy (i.e. the prior practice of insurers to deliver the information material only with the policy at the moment of their contract acceptance), could have provided for insurance contracts only to be concluded after all information has been transmitted. Such an approach would, however, not have best served the interests of the policyholder, which in many cases will have a legitimate interest to have an effective insurance contract, notwithstanding any belated information. The legislator, hence, chose to sanction a violation of the duty to inform in a twofold manner: On one hand sec. 8 subsection 2 no. 1 VVG provides that the two-week revocation period for the policyholder shall only start at the moment at which all information has been received by the policyholder and on the other hand the policyholder may claim damages.

The requirements that must be met for a policyholder to revoke the contract under sec. 8 VVG and the legal effects that such a revocation has under sec. 9 VVG will not be outlined in detail. For the purpose of this questionnaire, it may suffice to point out that the policyholder's

right to revoke the contract pursuant to sec. 8 subsection 2 no. 1 VVG does not terminate until two weeks after the required information material has been received in its entirety by the policyholder. By effect of this rule, the insurer is sanctioned for its breach of the duty to inform by a prolonged power to revoke by which the policyholder can terminate the contract until the insurer fulfils its duty. As a worst case scenario this can mean, provided that the insurer at no moment fulfils its duty completely, that the policyholder has an *eternal right to revoke* (*ewiges Widerrufsrecht*).

Furthermore a violation of the duty to inform may result in a claim for damages. It is, insofar, conceivable that the policyholder claims for damages for a breach of a pre-contractual duty under sec. 280 subsection 1, 311 subsection 2 no. 1 BGB. A particular problem which is raised by this general possibility to claim damages consists in the question if the premiums that have been paid – for insurance cover that has been provided – may also be claimed (at least in part) as damages. In this case the contract conclusion would be the damage caused by the breach of duty. It has been promoted that it would be impermissible “to claim the termination of the contract [sic!] and the restitution of the contributions that correspond with the time period between the inception of coverage and the receipt of the declaration of revocation”. This theory is based on the assumption that sec. 9 VVG provides exclusively for the possibility to reclaim paid premiums. This is a false conclusion. The legislator itself has pointed out that sec. 9 VVG is not an all-encompassing *lex specialis* by clarifying that in those cases, in which sec. 9 VVG does not apply, the legal consequences of a revocation are taken from the general law of obligations, i.e. sec. 346, 357 BGB. Concerning sec. 346 BGB nobody assumes that it would exclude the possibility to claim damages. Insofar it can be taken that sec. 9 VVG at a maximum precludes claims for damages on paid premiums in those cases in which it applies (i.e. where the cover was incepted with the policyholder’s accordance before the expiration of the limitation period for revocation; the policyholder was instructed about the power of revocation, the legal effects of a revocation and the payable amount of money by way of an instruction notice). Even this conclusion seems, however, not to be called for by the law. Sec. 9 VVG wishes to put the policyholder in a better position than he would be under the general law of obligations by enabling him to reclaim the paid premiums without allowing the insurer to set off this claim (under sec. 346 BGB) against the value of the service it rendered (which would usually be the exact amount of the premium) and without necessitating a proof of fault. Sec. 9 VVG is on the contrary not intended to cut off other (fault-based) claims the policyholder might have. Insofar the policyholder may always claim the paid premiums as damages. Such a claim will, however, in many cases still be difficult to substantiate.

2. Please, indicate the obligations applicable to all insurance contracts and those applicable to special types of insurance contracts, specifying whether:
  - (a) there is a duty for the insurer to inform the policyholder about the rights and obligations arising from the contract, even if only covered by the general conditions of a contract of adhesion that are known or knowledgeable to the adhering party;
  - (b) there are specific information duties in relation to the object and

characteristics of insurance coverage;

- (c) there are information duties also in relation to the policyholder's statutory obligations (e.g. in compulsory insurance); and
- (d) there is a duty to assess whether the relevant insurance product is adequate to meet the insured's cover needs and to direct his or her choice to a more suitable product; and
- (e) there are any information duties as to potential conflicts of interest between the insurer and the insured.

Answer:

There is a duty for the insurer to inform the policyholder about various details of the contract as well as facts about the expectable costs and the insurance company itself in written form applicable to all insurance contracts (sec. 7 subsection 1 VVG combined with the provisions of the *VVG-InfoV*). The insurer has to inform the policyholder about the rights and obligations arising from the contract including general terms and conditions in due time before the contract is concluded, to provide him with specific information in relation to the object and characteristics of insurance coverage as well as to the policyholder's statutory obligations (cf. for more detail supra B.1). The duties to inform as regulated by sec. 7 VVG in connection with the *VVG-InfoV* also regard many (if not most) of the policyholder's statutory obligations.

With sec. 6 subsection 1 VVG, the German Insurance Contract Act provides a rule that obliges the insurer to survey the policyholder's desires and needs and advise him as well as to justify his recommendation for a specific insurance. To which extent these requisites demand compliance depends on the complexity of the insurance, the situation of the policyholder, and the proportion between the advising effort and the insurance premium.

While a duty to inform existed already under the old law – even though it was more limited and more casuistic in nature – the duty to advise is a genuinely innovative feature of the new reformed VVG from 2008. Under the old VVG it was assumed that it was in each contractual party's personal sphere of responsibility to gather all information necessary and to evaluate if a product in question fits the particular needs one attempts to satisfy. It was insofar universally believed that a duty to advise could only attach to circumstances that distinguished the case at hand from ordinary cases of the same kind. There was rather a duty not to give wrong advice than a duty to give advice. It should be remarked that the legislator seemed to regard this situation, which is the standard for the vast majority of all other contracts, as unacceptable for insurance contracts and even, when talking about the need for reform of the old VVG, mentioned the duty to advise as the very first field which needed thorough reform. The need for reform was especially generated by the Insurance Mediation Directive, which obligated Germany to implement a duty to advise for all insurance

intermediaries and insurance consultants into national law. The German legislator regarded it as nonsensical to burden the insurance intermediary with a personal duty to advise while not letting a comparable duty fall upon the insurer itself, especially taking into consideration that it is not the insurance intermediary (this is not completely true for the insurance broker) but the insurer who is the contractual party of the policyholder. Insofar it was decided to implement the directive in a way to give the policyholder separate claims against the insurance intermediary and the insurer alike, while trying to form the insurer's duty to advise as closely as possible after the duty of the insurance intermediary, which the directive required to be implemented. This goal of reform was achieved by including a broad duty to query, to advise and to document binding on the insurer (sec. 6 VVG) and on insurance intermediaries respectively insurance consultants (secc. 60 et seqq., 68 VVG).

The insurer's duty to advise as provided for by sec. 6 VVG is manifold: pre-contractually the insurer has to query the applicant about his wishes and needs, if and to the extent that the occasion calls for it, it has to, where appropriate, give him objective advice, it has to motivate its advice and it has to establish a sufficient documentation of the query, the advices and their motivation, that it has to furnish the policyholder with. Furthermore sec. 6 subsection 4 VVG obligates the insurer to query and advise the policyholder and document it even after the conclusion of the contract and throughout the term of the insurance relationship, as far as it becomes recognisable to the insurer that there is reason to do so. As a general rule the insurer will aim to fulfil these duties through its insurance agents.

As can already be seen, the duty to advise does not exist for all cases – but it is need-oriented – and where it exists its implementation will differ from case to case giving consideration to the specific needs of the situation and the applicant. On the following pages, the duties that flow from sec. 6 VVG will be individually addressed.

In a first step, this is a truly innovative feature of the new law, the insurer is held to uncover a possible need for advice by questioning the applicant. This duty does, however, only exist if and to the extent that the complexity of a proposed insurance product or the person of the policyholder or his personal situation give reason to it. How these indefinite terms have to be interpreted exactly remains rather unclear. The legislator confined itself to stating only that sec. 6 VVG was not to implement a duty of extensive enquiry and investigation, but was only to safeguard a proper giving of advice by obligating the insurer to focus on and react to the information provided by the policyholder. This means that the insurer, usually acting through its insurance agents, is not held to “snoop” around and “dig into” the affairs of the policyholder, but is only required to take in what the policyholder tells him and ask questions where such seem necessary and appropriate.

The necessity of a question may be indicated by circumstances relating to the three factors enumerated by sec. 6 subsection 1 sentence 1 VVG, i.e. the difficulty to be understood that the offered product poses (its complexity), the person of the policyholder and his situation. This means, firstly, that the duty to query will increase the more complex the offered insurance product gets. If the product the policyholder seeks is a simple, easy to understand product, such as a dog liability insurance, the insurer in many cases will not be obligated to ask any questions at all or at least very little. It might be quite different where the interest to be insured can be covered by various types of complicated products. Such is for example the case where the applicant tells the insurer that he wishes to conclude a “life insurance”.

Already the multiple variables and options that are applicable to such a product – one may conclude a term (life) insurance, a universal life insurance, a unit-linked life insurance, a complementary occupational disability insurance etc. – make it seem indispensable for the insurer to query about the motivation to conclude such a product and the needs of the policyholder, and base its advice on that information.

Secondly, circumstances lying in the person of the policyholder may indicate questions. It is, hence, of importance to what extent the applicant is willing and able to formulate his wishes. If he articulates a clear and narrow desire to cover a certain risk, query and advice may be limited to a minimum. Again one must, however, take into consideration the targeted insurance product. If one looks at a very complicated insurance contract, such as especially a life insurance, even the most refined and eloquent applicant will usually leave some questions open, which need to be addressed.

Thirdly, the insurer must take into consideration the concrete situation of the policyholder, in order to establish if questions are indicated. This may mean for example that a certain situation may make it necessary to limit the insurer's questions to a minimum, even though in other situations more questions would have been called for. E.g. if an applicant is late for his flight and wants to conclude at the airport a travellers' baggage insurance, the insurer would be held to give consideration to the time constraint. In most cases the criterion of the concrete situation will, however, rather be important to indicate additional questions. If for example the insurance agent is on the premises of an applicant, who wants to conclude a personal liability insurance, and notices a dog it may be indicated to ask, if the applicant already possesses a policy to cover claims for dog owner's liability (cf. sec. 833 subsection 1 BGB), and if not to advise that the sought after personal liability insurance does not cover such claims and that an independent cover might be advisable.

All in all, the insurer will be held to base its assessment for the need of questioning on an overall view. While the legislator believes that the insurer, through its agents, will in practice *always* question its customers in a way to establish the information necessary for an appropriate advice, there still remains some uncertainty of how inquisitive the insurer will be "forced" to be in order to fulfil the duty to query under sec. 6 subsection 1 sentence 1 VVG. It is especially open for discussion what circumstances will necessitate a query, when such circumstances are deemed recognisable for the insurer (question of the level of diligence expected) and what extent of questions certain circumstances entail.

The duty to query is in most part not an isolated duty but is meant to supplement the duty to advise. Insofar the insurer is obligated to question the applicant in order to unveil the necessity for advice. In a second, step the insurer has, hence, to offer the applicant advice on options, on possible difficulties etc. by basing itself on the information gathered by the query. Such advice is not to be given bareboned but it is to be motivated, i.e. the insurer has to tell the applicant what it regards as possible options or maybe the most advisable option and why such is, in its opinion, the case.

As for the duty to query, the duty to advise only exist if and to the extent that the complexity of a proposed insurance product or the person of the policyholder or his personal situation give reason to it. Insofar, what was said about the duty to query applies *mutatis mutandis* to

the duty to advise. In a nutshell, it may be said that the insurer has to advise on all circumstances that are of a certain importance for the applicant in question, as far as they have some relation to the targeted insurance product, are recognisable for the insurer, possibly after a query, and provided that an advice can reasonably be expected of the insurer.

The last restriction of this definition is due to sec. 6 subsection 1 sentence 1 VVG, which specifies that advice has to be given, “while taking into consideration an appropriate relation between the expenditure from advising and the premiums to be paid by the policyholder”. Insofar the duty to advise is limited by an economic factor. Regularly an insurance contract with a low premium will be a less complex product, which does not require an intricate advice. It would, on the one hand, insofar be disproportional to require the insurer to give lengthy advice on an insurance product that produces an annual premium of €60,--. On the other hand, even a low-premium product may require a more thorough advice if all the other factors pre-dominantly point towards its necessity. Regarding the legislative intent of sec. 6 VVG – to safeguard appropriate advice – one should probably understand the requirement of economic proportionality in a way that *in dubio* advice should always be given, if it is otherwise indicated, but that such advice may be limited to a proportionate level, thus concentrating on the essential elements of the product in question, in case of a low-premium policy.

Furthermore, even though this is not explicitly mentioned in sec. 6 VVG, one has to limit the duty to advise by a more universal factor of reasonability. If one considers the sphere of interests of the applicant and of the insurer, both having in several instances interests that are rather diametrically opposed, it cannot be expected of the insurer to give the applicant a completely objective advice as would be expected of an insurance broker or consultant. Insofar the insurer is not held to point out that a comparable insurance product would be obtainable from another insurer at a lower price, or that other insurance undertakings offer policies which are better suited to fit the applicant’s needs.

In a third step, it is incumbent on the insurer to document, usually through its agents, the query (pertaining to the wishes and needs) and the advices as well as the reasons for which they were given. While the query and advice is not subject to any form requirements, and will for the most part be operated orally, the documentation of it must be made in written form. Pursuant to sec. 6 subsection 2 sentence 1 VVG, the insurer is held to transmit this documentation to the applicant *before* the conclusion of the contract. For the most part, the documentation will be established by the insurer, acting through its insurance agent, during the sales talk, and in many cases a carbon copy, a copy or a print-out will be handed to the applicant immediately following the sales pitch. It is to be expected, and it is already a widespread practice, that the insurance agents will use a standard transcript form that the insurance undertaking will devise (for all products or different forms for different products). By using such standard forms, which will only be filled in by the agent, the insurer sees to it that the documentation will later meet the requirement that the documentation has to be given in a “clear and coherent way”.

The duty to document does only exist to the extent, meaning that it is usually not the “if” but only the “how” (extent) that is in question, that the complexity of a proposed insurance product gives reason to it. There seem to be no special problems attached to the element “complexity of insurance” in this context, sec. 6 subsection 1 sentence 2 VVG. Insofar one

may reasonably refer to what has been said above. In practice this differentiating element will, however, probably invoke insurers to establish different standard transcript forms for different insurance products (as to their complexity) rather than applying a “one-fits-all” form.

What concerns the duty to query and to advise, it is not completely clear at what latest moment they must be fulfilled, as the law is silent on this question. It can be deduced by an *argumentum e contrario* from sec. 6 subsection 2 sentence 1 VVG, which provides that the documentation has to be transmitted *before* the conclusion of the contract, that the duty to query and to advise must be fulfilled at an earlier moment or at least at the same moment as the duty to document. The question, hence, becomes if the insurer would fulfil its duty to query and advise if it did so *after* the policyholder’s contractual declaration but *before* the conclusion of the contract. Such a stance could be taken by raising the fact that sec. 7 VVG (duty to inform) provides for similar duties, yet provides explicitly that the information has to be received before the policyholder’s contractual declaration. By remaining silent, sec. 6 VVG, when contrasted with sec. 7 VVG, could be understood to leave it open to the insurer when it wishes to query and advise as long as it is before the contract conclusion. Such a reading of sec. 6 VVG would, however, render this rule *ad absurdum*. It was the clear legislative intent to create a legal environment in which consumers were given all the information and advice necessary to make an informed choice. This goal would be countered if the advice could be given only after the policyholder has already made his choice. Even though in most cases the policyholder could still revoke the contract after he received the advice, it seems to be more in line with the legislative intent and the whole system of the new VVG, not to refer the policyholder exclusively to his right to revoke but to require the insurer to query and advise before the policyholder’s contractual declaration.

There also remains an ambiguity as to the point in time at which the duty to document must be fulfilled. While it is clear that the documentation material must (only) be transmitted to the policyholder before the contract conclusion – *nota bene* not before the policyholder’s contractual declaration – sec. 6 subsection 2 VVG leaves the question open, at what time the documentation must be established. *In concreto*: Does the insurer violate its duty if the transcript of the sales talk is not established during the conversation but only after it in the form of minutes from memory? Considering the fact that the law does not address this problem, it seems reasonable to assume that the legislator wanted to give the insurer (and the insurance intermediaries) the choice to establish a “live” transcript or a transcript from memory.

As for the duty to inform there are some exceptions to the requirement of an advice before the policyholder’s declaration. Firstly, according to sec. 6 subsection 6, first half-sentence VVG insurance contracts covering a large risk in the sense of sec. 210 VVG do not entail a duty to advise. Secondly, the duties provided by sec. 6 subsection 1 sentences 1 and 2 VVG, furthermore, do not obligate an insurer, if the contract is a distance selling contract in the sense of sec. 312b subsections 1 and 2 BGB. Documents have only to be transmitted without undue delay after the conclusion of the contract, if the contract on demand of the policyholder is concluded via telephone or another mean of communication that does not allow for the information in written form to be transmitted to the policyholder prior to contract conclusion. Thirdly, the same applies pursuant to sec. 7 subsection 1 sentence 3, second half-sentence VVG where the policyholder by a separate written declaration explicitly waives his right to be informed prior to his contractual declaration. It should be especially highlighted that the

occasional and rather coincidental usage of means of telecommunication does not make a contract into a distance sales contract: Otherwise it would be left open for the insurer to rid itself of its duty to advise.

The most important exception must be seen in the possibility for the applicant to waive his right to advice. While this exception of sec. 6 subsection 3 VVG has been widely criticised for endangering the legislative intent, it must be regarded as a needful and self-evident rule of law. It would be highly problematic to force upon an applicant a lengthy advice that he does not wish to obtain. Not to have such an exception would lead to absurd situations, where an applicant, who may himself be well versed in the field of insurance contract law, would tell an insurance agent exactly what he wants and that he does not need any advice and the insurance agent would be forced to give him the advice anyways, thus treating the applicant in a rather disrespectful way by disregarding his wishes. One could for example imagine an insurance agent, who wants to conclude an insurance contract for himself: Should such an applicant be forced to take an advice, he does not wish to obtain? Hence the law pursuant to sec. 6 subsection 3 VVG allows a waiver of the right to be advised (and the duty to document or both) but made it compulsive that such a waiver was operated by way of a separate written declaration, in which the insurer must explicitly instruct the policyholder that a waiver may have a detrimental effect on his option to claim damages against the insurer. Insofar the waiver of the right to be advised is subject to stricter form requirements than is the waiver for the right to be informed. The former requires an explicit cautioning of the insurer to be included in the waiver. It can be taken from sec. 6 subsection 3 VVG that the legislator presumed that in practice the waiver will be a document established by the insurer. This waiver must be a separate written document which then is to be signed by the applicant (yet not necessarily by the insurer). It is insofar to be remarked that the refusal to respond to the insurer's query (or to a single question in it) in the sense of sec. 6 subsection 1 sentence 1 VVG, may not be presumed as a waiver in the sense of sec. 6 subsection 3 VVG. The only result of such a refusal is that to the extent of this refusal a need for advice (and thus a duty to advise) does not exist. Again it should be mentioned that the possibility to waive one's right to be advised is meant to be an exception of the general rule that all policyholders are to be advised. If insurers were to undertake it to use such waivers across the board they would run the risk that the waivers might be ruled null and void, thus opening a flood gate to claims for damages, or that the BaFin would intervene.

Another waiver which is not subject to the strict form requirements of sec. 6 subsection 3 VVG, exists concerning the right to obtain the written documentation before the conclusion of contract. Pursuant to sec. 6 subsection 2 sentences 2 and 3 VVG, the applicant may (even orally) elect to receive the advice only in oral form before the conclusion of contract. The same applies *ex lege* to a contract for provisional cover, where the insurer does not have to transmit the documentation for the contract of provisional cover but only for the proposed main insurance contract. In both cases the insurer, however, has to transmit the written documentation without undue delay after the contract has been concluded, unless the policyholder has signed a waiver under the strict form requirements of sec. 6 subsection 3 VVG. It equally does not have to send the documentation even after the contract conclusion, pursuant to sec. 6 subsection 2 sentence 3, second half-sentence VVG, if the contract is subsequently not concluded or if the contract for provisional cover relates to an obligatory insurance (in the sense of secc. 113 et seqq. VVG). Pursuant to sec. 62 subsection 2 sentence 2 VVG the insurance intermediary, other than the insurer, is only exempted from sending the documentation after the conclusion of the contract if the contract for provisional

cover relates to an obligatory insurance. By an *argumentum e contrario* the insurance intermediary is, in all other cases, obligated to transmit the documentation even if the contract is subsequently not concluded.

Another question would be, if the right to obtain the documentation exists, if the applicant has not waived his right to receive it *before* the contract conclusion, yet he has on the other hand made it clear that he does no longer intend to conclude a contract with the insurer in question. Even though such a duty seems very problematic from a dogmatic standpoint, as it over-extends a pre-contractual duty, despite the fact that the pre-contractual relationship has been terminated, it seems to be implemented by the new VVG. By its wording and its systematic position in the law sec. 6 subsection 2 sentence 3, second half-sentence VVG indicates that its only intention is to extend the exemptions from the duty to transmit the documentation *before* the conclusion of the contract to the time *after* the conclusion of the contract. This reading of sec. 6 subsection 2 sentence 3, second half-sentence VVG is further supported by a comparison with sec. 6 subsection 2 sentence 3 of the *Commission's Draft Bill*, which stated: "The duty pursuant to phrase 1 [=being the duty to document as a whole, and not only the duty to inform after contract conclusion] is dispensed, if the contract is not concluded." As the legislator did not pick up this formulation, it made it clear that it only wished to exempt the insurer from its duty to document at a later moment, where the insurer was already exempted to document at an earlier moment.

It will be an interesting question if the courts will, nevertheless, apply to those cases, that are exempted from the duty to advise under the VVG, the duty to advise under the general law of obligation. In this sense the courts could choose to obligate an insurer to advise, even though an exception of sec. 6 subsection 6 VVG applies, if the necessity for advice is apparent to the insurer and the giving of advice is possible and may reasonably be expected. It is, however, also possible that the courts will regard sec. 6 VVG as exclusive, thus making it impossible to apply other duties of general contract law. Favourably one should respect the legislator's intent (and/or the parties' declared intentions) and regard sec. 6 VVG in principle as exclusive. However, an exception should be made where it would have to be regarded as a perversion of law not to give the insurer a duty to advise. Additionally, it must be remarked that the insurer is not allowed to raise sec. 6 subsection 6 VVG in those cases, where he did not have a duty to advise but chose to give (wrong) advice anyway.

Sec. 6 subsection 4 sentence 1 VVG, furthermore, obligates the insurer to query and advise "its" policyholders throughout the term of their insurance relationship. Again such a duty exists only under the condition that there is a recognisable necessity for advice. Other than for the pre-contractual duty to query and advise, sec. 6 subsection 4 VVG does not (exclusively) enumerate the circumstances that may give birth to a duty to advise. It rather states that a duty exists "as far as it becomes recognisable to the insurer that there is reason to query and advise the policyholder". This means that the reason must not necessarily lie in the insurance product, the policyholder or his situation, but may also lie in other factual or legal circumstances, such as especially a change of the legal regime applicable to the held policy. Practically the insurer will first have to contact the policyholder and tell him about the "problem" that he might have and query if it actually is a problem. Based on this it is held to give its advice.

Other than the pre-contractual duty this advice-giving does not have to be documented, as sec. 6 subsection 4 sentence 1 VVG states only that the duties of sec. 6 subsection 1 sentence 1 VVG are applicable throughout the contractual term. It does not refer to the duties of sec. 6 subsection 1 sentence 2 and subsection 2 VVG. Very importantly, the policyholder may only waive his contractual right to be advised throughout the term on a case-by-case basis. This means that no general waiver is possible neither in the general conditions nor in a separate document, by which a policyholder abstractly waives his right to be informed for the future. The policyholder may only waive his right each time individually. This waiver must be in writing, but does not need to meet the strict form requirements of sec. 6 subsection 3 VVG.

Other than the duty to inform, the duty to advise is owed by the insurer *and* by the insurance agent. This means that the policyholder has two independent claims to be advised – one under sec. 6 subsection 1 and 2 VVG and one under sec. 61 subsection 1 and sec. 62 subsection 1 VVG – against the insurer *and* against the insurance agent that mediated the contract. The insurer and the insurance agent are jointly and severally liable concerning this duty. Hence the duty to advise must only be fulfilled once. This means that the fulfilment of the duty by the insurance agent also extinguishes the duty of the insurer and *vice versa*. In practice this means that the insurance agent, when consulting or advising the applicant, acts not only as the agent of the insurer in order to fulfil the latter's obligation but also for himself to fulfil this own duty.

A question that is raised by this joint and severable liability is if *both* joint and several debtors are under all circumstances liable for a wrong or incomplete advice. Here one has to distinguish two different cases. If the insurance agent had knowledge about the circumstances that would have necessitated an advice or if it was he who gave a wrong advice, the insurer is also liable for this failure to advise (correctly). Pursuant to sec. 70 VVG, knowledge of the insurance agent is attributed to the insurer and his actions are attributed to the insurer via sec. 278 BGB. Differently if the insurer had knowledge about the circumstances that would have necessitated an advice or if it was he who gave a wrong advice. There is no mechanism that would attribute the insurer's knowledge or actions to the insurance agent. The latter would insofar only be liable, if he himself heard about the circumstances or the insurer's advice and it were to become apparent to him that (additional) advice is needed or that given advice needs to be corrected.

Furthermore a joint and several liability does not exist concerning the contractual duty to query and advise during the term of the contract. This duty is only incumbent on the insurer but not on insurance agents. Such a duty does, however, often contractually exist for insurance brokers and insurance consultants.

This brings us to the question who owes query and advice in the case the applicant applies an insurance broker. The insurance broker is without a doubt at least (pre-)contractually – actually it is contractually concerning his contract with the applicant – liable for such advice. This is the (main) obligation of the contract he concludes with the applicant and it is furthermore provided by secc. 61 et seq. VVG. More interestingly pursuant to sec. 6 subsection 6, second half-sentence VVG, the insurer *does not* have a duty to advise if the contract is mediated by an insurance broker. This exception seems to be explicable already by

the reason that there exists no direct pre-contractual relationship or contact between the insurer and the applicant if an insurance broker is interposed. In most cases this exception is quite reasonable as the applicant chose the broker also with the intent not to come into direct contact with the insurer, and thus cannot reasonably expect to receive direct advice by him. Furthermore it would be rather absurd if the insurer were obligated to give the insurance broker – as the agent of the applicant – the advice, as the broker will usually be well versed in the field of insurance law. A problem arises, however, if one regards the contractual duty to advise during the term of the contract (sec. 6 subsection 4 VVG). Sec. 6 subsection 6 VVG provides that sec. 6 subsections 1–5 VVG are inapplicable if the contract was concluded by an insurance broker. If the contract for brokerage, as in many cases, was concluded for the mediation of the contract *and* for the servicing of the portfolio this exception poses no problem. Here the insurance broker has a contractual duty to advise during the term of *his* contract with the policyholder. One comes to a different result, if the contract was concluded by an insurance broker, who exclusively owed the mediation of the contract. Here, if one stays faithful to the letter of the law, neither the insurer (because of sec. 6 subsection 6 VVG) nor the insurance broker (because no contractual nor statutory duty exists) have a duty to advise. As this seems unacceptable and not in line with the legislative intent, a *teleological reduction* has to be operated on sec. 6 subsection 6 VVG. Insofar the insurer should at least in those cases be obligated to give advice, where it becomes apparent to it that the insurance broker was only mandated to conclude the contract for the policyholder.

Sec. 6 subsection 5 VVG and sec. 63 VVG each grant the applicant an individual claim for damages if the duty to advise was breached by the insurer and/or by the insurance intermediary. What concerns the insurer and the insurance agent they are jointly and severally liable, as has been pointed out before. Concerning the insurance agent, it is to be reiterated that he may only be held liable, if he is *personally* responsible for the violation of the duty, as there is no attribution of knowledge or action from the insurer to the agent, but only the other way around.

Furthermore, it should be highlighted that the duty to transmit the documentation does only give rise to a claim for damages under sec. 6 subsection 5 VVG and thus only against the insurer. Sec. 63 VVG, on the other hand, which regulates a claim for damages against the insurance intermediary, does only refer to a breach of the duties of sec. 60 and 61 VVG. The insurance intermediary's duty to transmit the documentation is, however, included in sec. 62 VVG. In most cases this will not pose a big problem as the duty to transmit the documentation is not very susceptible to cause damage, as long as the duty to query and advise was properly performed. It has, however, been remarked that there are exceptions. Especially in those cases, where the applicant was "flooded" with information during the sales talk he may prove that he would have taken different actions if he would have received the documentation at a proper time and been able to scrutinise the advice with the proper amount of time and in the tranquillity of his home.

As the duty to advise is a statutory case of a pre-contractual duty in the sense of sec. 311 subsection 2 no. 1 BGB, the claim for damages exists whether or not a contract was later concluded. This does naturally not encompass the duty to transmit the documentation after the conclusion of contract – if the right to a posterior transmission was waived –, as this duty only exists if the contract was concluded. And where there is no duty to be breached, there is no claim to be raised.

This brings us to the burden of proof of such a claim for damages. According to the general principles of civil procedure, the policyholder bears the burden of proof concerning the breach, the damage and their causality and assigning the insurer the burden concerning possible exceptions. From the wording of sec. 6 subsection 6 sentence 2 and sec. 63 sentence 2 VVG it can be taken that the insurer respectively the insurance intermediary bear the burden of proof concerning fault. This means that a breach of duty creates a refutable appearance of fault, so that it is up to the insurer to prove that he acted diligently. If the courts will operate a (further) shift of burden concerning any of these elements is to be seen. There is, however, a strong believe that the courts will expect the insurer to furnish proof of the documentation and hence of the advice, which would *de facto* be a partial shift concerning the proof of the breach. Furthermore, it must be mentioned that the *Reform Commission* was of the opinion that the non-compliance with the duty to transmit the documentation will shift the burden of proof concerning the duty to advise to the insurer. Insofar the policyholder would only be held to *raise* a concrete non-compliance with the duty to advise and it would be up to the insurer to prove that this non-compliance did not occur. Lastly, the Federal Government has mentioned that, if a breach of duty has been proven, it is the insurance intermediary (or the insurer), who has to furnish proof that the damage would also have occurred if he had given a correct advice. Furthermore, it is to be assumed that the policyholder would have conformed his actions to the advice. Insofar the burden of proof concerning causality would be shifted. Seeing these effects, one understands at what a disadvantage an applicant is, who has received wrong advice but did not conclude a contract with the insurer in question and therefore did not receive documentation. Also one can tell how inadvisable it seems for any applicant, irrespective if he is well versed in the insurance field or quite the opposite, to waive his right to advice or isolatedly waive his right to receive a written documentation.

Furthermore it should be mentioned that the fact that the insurance agent will now be jointly and severally liable towards the policyholder may have another important procedural effect. If the insurance agent is joined in the law suit he may no longer be offered by the insurer as a witness in the sense of sec. 373 Code of Civil Procedure (*Zivilprozessordnung*, subsequently referred to as ZPO). If joined to the suit, the agent's testimony could only be introduced into the proceedings as proof, if the policyholder would request the court pursuant to sec. 445 subsection 1 ZPO to submit him to a "party interrogation" (*Parteivernehmung*). The insurer, on the other side, could not request the insurance agent to be interrogated as a party, as, in principle, the ZPO allows only for the other party to demand the interrogation of opposing party. Hence the insurer loses one of its most effective means of proof, making it the more necessary that the documentation is handled with the utmost care. The policyholder, on the other hand, may in the future increase his likelihood of winning a law suit against the insurer by directing the law suit against insurer and insurance agent jointly.

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

1. Under law of contract.

Please, indicate:

- (a) whether and under which circumstances infringement will affect a contract or individual contractual provisions (invalidity of contract or individual provisions, termination of contract or other events);
- (b) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;
- (c) any criteria applicable to the identification (also in relation to the burden of proof) and the quantification of the losses or injuries to be compensated for; and
- (d) whether any other consequences are provided for.

Answer:

Due to an infringement of the requirements for incorporation of standard business terms into the contract according to sec. 305 BGB the standard terms will not become part of the contract.

An infringement of pre-contractual information obligations as stated above can have different consequences depending on the circumstances of the individual case. Does the insurer fail to inform the policyholder before the conclusion of the contract, it is possible that the policyholder draws wrong conclusions about the risk covered by the insurance contract. Thus he may be subject to a mistaken content or meaning of his declaration of intent. In these cases the policyholder may have the right to avoid the contract (sec. 119 subsection 1, first alternative and subsection 2 BGB combined with sec. 142 subsection 1 BGB). Already effected expenses have to be refunded by the insurer based on the rule of undue enrichment (sec. 812 subsection 1 sentence 1, first alternative BGB).

As well as every other contract, the insurance contract may be terminated for cause without notice (sec. 314 subsection 1 BGB). To terminate the contract, a reasonable deadline has to be set (sec. 314 subsection 3 BGB). The consequence of the termination before the expiry of the insurance contract are governed by sec. 39 subsection 1 sentence 1 VVG which states that the insurer is only entitled to the insurance premium within the time of the insurance coverage. More importantly every policyholder has a power to rescind the contract for 14 days after having received all necessary information (for life insurance contracts 30 days). As highlighted above, this period only starts to run at the moment at which all necessary information was transmitted to the policyholder. If any necessary element of information was not transmitted this period will not start to run and as such the policyholder enjoys an eternal power to rescind the contract.

Damages may be granted if a breach of the pre-contractual duty to inform has arisen, the insurer has to be liable for this breach and the policyholder has to bear the damage arising from the breach of a pre-contractual duty (secc. 280, 311 BGB). To identify the losses or injuries to be compensated for, the difference hypothesis applies. The financial situation after the loss occurred of the wronged party has to be compared to the financial situation without the occurrence of the loss. The difference forms the loss. As to the burden of proof, each party has to prove the presence of the prerequisites of the provision pleaded for. Concerning damages for a breach of the duty to inform and the duty to advise (and the respective burden of proof) please refer to the above and below.

2. Under law of insurance contract.

Please, indicate:

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

Answer:

In addition to the consequences provided by the law of contract, the law of insurance contract has no additional impact on the effectiveness of the contract and the individual contractual provisions itself. More importantly every policyholder has a power to rescind the contract for 14 days after having received all necessary information (for life insurance contracts 30 days). As highlighted above this period only starts to run at the moment at which all necessary information was transmitted to the policyholder. If any necessary element of information was not transmitted, this period will not start to run and as such the policyholder enjoys an eternal power to rescind the contract.

An infringement of the duty to advise and to document the advisory process may result in damages being awarded to the other party (sec. 6 subsection 5 VVG). Concerning damages for a breach of the duty to inform and the duty to advise (and the respective burden of proof) please refer to the above.

The supervisory authority may in principle take any supervisory measure that is suitable and necessary to hinder or eliminate an irregularity. Such supervisory measures would hypothetically even include the revocation of the authorization for certain classes of insurance or for the whole of business operations if there is evidence of irregularities to an extent so serious that continuation of business will jeopardize the interests of the insured (sec. 87 subsection 1 no. 3 VAG). Keeping in mind that German public law puts a very strong emphasis on the principle of proportionality, it seems very unlikely that the non-observation of information duties would ever lead to the revocation of the authorization. In the normal course the supervisory authority would have to take (many) other supervisory measures against the insurer in question before applying this measure of last resort.

#### **IV. Insurance intermediaries**

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

In law of insurance mediation it is the legal relationship between insurer and intermediary, the status and the legal powers and duties of the intermediary but also his professional qualification and potential conflicts of interest that trigger a demand for transparency.

1. Indicate whether an insurance intermediary’s activity:
  - (a) is unregulated;
  - (b) is subjected to supervision rules;
  - (c) is subjected to supervision rules only for specific classes of professional intermediaries, such as insurance agents or brokers; and

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

Answer:

In 2002 the EU passed the Insurance Mediation Directive (2002/92/EC). The directive – that does not cover the insurer's staff – creates a duty for every intermediary to be registered, sets (minimal) requirements of professional qualification and good repute to serve as requisites for registration, and demands compulsory cover, typically by way of conclusion of a professional liability insurance. Furthermore, it institutes duties to inform, to advise and to document to which the insurance intermediary is subject. The German legislator implemented the directive essentially in the following areas: through supervisory law in the Insurance Supervisory Act (secc. 80, 80a and 80b VAG), in the trade regulation (sec. 34d GewO), and in the *German Insurance Contract Act* (secc. 59–73 VVG). In addition, there are the regulations covering the *insurance mediation and advice, insurance mediation regulations* (*Versicherungsvermittlungsverordnung*, subsequently referred to as *VersVermV*), as well as finally the regulations governing obligations to provide information with insurance contract (*VVG-InfoV*) which in fact are not directly aimed at the insurance mediators, but should also provide the customer with certain information.

Concerning insurance intermediation, the German Insurance Contract Act mainly distinguishes between insurance agent and insurance broker (sec. 59 VVG). The insurance agent is in contrary to the insurance broker to a certain extent proxy to the insurer and thus primarily represents the insurer's interests (secc. 69 et seqq. VVG).

The insurer may only cooperate with mediators who either in the meaning of sec. 34d GewO have a permit (subsection 1), are exempted from the permit (subsection 3) or are not subject to any permit (subsections 4 and 5). Only a person who intends to mediate the conclusion of insurance contracts commercially as an insurance broker or insurance agent fall under sec. 34d GewO and thus can work as an insurance mediator of an insurer.

2. Indicate the following, specifying the source of the relevant obligation (statutes and/or supervisory rules):
- (a) intermediaries' duties of pre-contractual information, specifying whether there are separate rules applying to the following types of contract:
- (i) life insurance contracts;
- (ii) non-life insurance contracts;

- (iii) particular types of insurance contracts (e.g. accident or sickness policies);
  - (iv) compulsory insurance contracts; and
  - (v) insurance investment products, such as capital redemption policies, life insurance policies linked to an investment fund or to a stock index (so-called unit-linked policies and index-linked policies); and
- (b) whether there are different and/or additional duties placed upon particular classes of intermediaries.

Answer:

In sec. 11 VersVermV, the German legislator implemented the stipulations on information obligations of the mediators of the EU Insurance Mediation Directive (art. 12). With the first establishment of the business contact, the insurance intermediary must inform the policyholder in a clear and understandable manner in textual form about personal data and his business status including Commercial Register data. In order to disclose conflicts of interest, he must also state the direct or indirect participation of more than 10 % in an insurance company or the alike. Furthermore, the address of the arbitration board (i.e. the Ombudsmann) in cases of conflicts between insurance mediator and policyholder has to be stated.

Similar to the provisions applicable to the insurance company itself, the insurance broker has a duty to advise and document the advisory process (secc. 61, 62 VVG). He must base his advise on a sufficient number of insurances offered on the market and by insurer in order to give recommendation, based on special criteria, which insurance contract is suitable to satisfy the needs of the policyholder (sec. 60 VVG). This shall also apply to the insurance agent. Insofar the regulation has a declaratory character as the insurance agent fulfils his status-related obligation to the policyholder.

As to the insurance intermediaries other duties to inform or advise see above.

3. Indicate which consequences may follow infringement by the intermediaries of information duties, specifying:
- (a) whether and under which circumstances infringement may result in damages or other compensation being awarded to the other party to a contract;

- (b) whether and under which circumstances the insurer-and-principal is liable to the policyholders and the insured for losses caused by the intermediaries;
- (c) whether the authority supervising insurance intermediaries' activity may inflict penalties; and
- (d) whether and under which circumstances penalties may also be inflicted on the insurers-and-principals.

Answer:

According to sec. 18 VersVermV in conjunction with secc. 144 et seqq. GewO, breaches of sec. 11 VersVermV are sanctioned as administrative offences. The information duties of the insurer as stated above and its liability for infringements of these duties remain.

Sec. 63 VVG regulates damages of the insurance intermediary if the policyholder suffers damages through a breach of the information, advice and documentation obligations. Subsection 1 sentence 2 explicitly states that this will not apply if the insurance intermediary is not responsible for the breach of obligation.

Depending on the legal classification of the intermediary to the policyholder the duties to inform, advise and document in the sense of secc. 60, 61 VVG differ. An infringement of these information duties by an insurance agent enables the policyholder to further recourse against the insurer (damages under the terms of secc. 280, 311 BGB in conjunction with sec. 6 VVG and sec. 278 BGB) joint and several to the agent's own liability according to sec. 63 VVG. If an insurance broker concludes the contract with the policyholder, the insurer's duties under sec. 6 VVG to advise and to document do not apply (cf. on these points also supra).

**C. Publicity of insurance products: Transparency and fairness**

Please, indicate:

1. whether there are any special transparency and fairness duties to be observed in advertising insurance products;
2. whether any controls on advertising are in place, specifying:
  - (a) the types of advertising placed under control; and

- (b) whether prior approval procedures are in place;
3. which consequences may ensue from non-performance of transparency and fairness duties.

Answer:

There are no specific legal provisions to explicitly cover advertisement activities of insurers in Germany. Insofar the Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb [UWG]*) applies. Pursuant to the general clause of sec. 3 UWG, all unfair commercial practices shall be impermissible. Within sec. 4 et seqq. UWG examples for unfair and misleading practices are given. Unfair practices are for example the use of commercial practices that are suited to impairing the freedom of decision of consumers or other market participants through applying pressure, the exploitation of a consumer's mental or physical weaknesses, the use of covered advertisement, the use of price reductions, premiums or gifts and promotional contest or games of an advertising nature (if their conditions remain intransparent), the discrediting or denigration of competitors and their products (sec. 4 UWG). Competitors are furthermore to not use practices that are susceptible of misleading the public (sec. 5 UWG) and are not to mislead the public by omitting material facts in their publicity (sec. 5a UWG).

Whilst the insurance industry insofar is subject to the same standards as all other industries in Germany concerning their publicity, there is a particularity insofar as the insurance industry has given itself Insurance Competition Guidelines (*Wettbewerbsrichtlinien der Versicherungswirtschaft, WettbRL*). This WettRL is a sectorial self-restriction of the industry and does not have the power of law. It is insofar not binding in the interpretation of sec. 3 et seqq. UWG but may only serve as a rough guideline for interpretation. The WettRL may, however, be considered as an industry practice (in German: *Handelsbrauch*) and can be given regard wherever such practices are relevant within the UWG.

Furthermore, it is possible that the insurance supervisory authority regulates the form that advertisements may take by way of passing guidelines (*Rundschreiben*). To give an example, in 1995 the German insurance supervisor disallowed for insurers to advertise their contracts with the current share in the surplus where it is apparent that the share will have to be lowered in the (near) future. The legal effect of the violation of such a *Rundschreiben* is not entirely clear. Other than possible legal actions undertaken by the insurance supervisory authority (which might regard the violation of a *Rundschreiben* as a irregularity), such a *Rundschreiben*, while not binding on civil court judges, might hold a strong indicative effect – which would cause such judges to regard the advertisement as unfair in the sense of the UWG.

## **V. Open Answer:**

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

### **Provisions:**

#### **German Civil Code (BGB)**

Full citation: Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt] I page 42, 2909; 2003 I page 738), last amended by Article 1 of the statute of 27 July 2011 (Federal Law Gazette I page 1600)

#### **Section 305**

##### **Incorporation of standard business terms into the contract**

(1) Standard business terms are all contract terms pre-formulated for more than two contracts which one party to the contract (the user) presents to the other party upon the entering into of the contract. It is irrelevant whether the provisions take the form of a physically separate part of a contract or are made part of the contractual document itself, what their volume is, what typeface or font is used for them and what form the contract takes. Contract terms do not become standard business terms to the extent that they have been negotiated in detail between the parties.

(2) Standard business terms only become a part of a contract if the user, when entering into the contract,

1. refers the other party to the contract to them explicitly or, where explicit reference, due to the way in which the contract is entered into, is possible only with disproportionate difficulty, by posting a clearly visible notice at the place where the contract is entered into, and

2. gives the other party to the contract, in an acceptable manner, which also takes into reasonable account any physical handicap of the other party to the contract that is discernible to the user, the opportunity to take notice of their contents,

and if the other party to the contract agrees to their applying.

(3) The parties to the contract may, while complying with the requirements set out in para. (2) above, agree in advance that specific standard business terms are to govern a specific type of legal transaction.

#### **Section 305c**

##### **Surprising and ambiguous clauses**

(1) Provisions in standard business terms which in the circumstances, in particular with regard to the outward appearance of the contract, are so unusual that the other party to the contract with the user need not expect to encounter them, do not form part of the contract.

(2) Any doubts in the interpretation of standard business terms are resolved against the user.

### **Section 306**

#### **Legal consequences of non-incorporation and ineffectiveness**

(1) If standard business terms in whole or in part have not become part of the contract or are ineffective, the remainder of the contract remains in effect.

(2) To the extent that the terms have not become part of the contract or are ineffective, the contents of the contract are determined by the statutory provisions.

(3) The contract is ineffective if upholding it, even taking into account the alteration provided in para. (2) above, would be an unreasonable hardship for one party.

### **Section 307**

#### **Test of reasonableness of contents**

(1) Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user. An unreasonable disadvantage may also arise from the provision not being clear and comprehensible.

(2) An unreasonable disadvantage is, in case of doubt, to be assumed to exist if a provision

1. is not compatible with essential principles of the statutory provision from which it deviates, or

2. limits essential rights or duties inherent in the nature of the contract to such an extent that attainment of the purpose of the contract is jeopardised.

(3) Para.s (1) and (2) above, and sections 308 and 309 apply only to provisions in standard business terms on the basis of which arrangements derogating from legal provisions, or arrangements supplementing those legal provisions, are agreed. Other provisions may be ineffective under para. (1) sentence 2 above, in conjunction with para. (1) sentence 1 above.

### **Section 312c**

#### **Giving information to a consumer in distance contracts**

(1) The entrepreneur must give information to the consumer with distance contracts under Article 246 sections (1) and (2) of the Introductory Act to the German Civil Code [Einführungsgesetz zum Bürgerlichen Gesetzbuch].

(2) In telephone calls arranged by himself, the entrepreneur must at the beginning of every conversation expressly disclose his identity and the business purpose of the contact.

(3) In the case of financial services, the consumer may demand at any time in the duration of the contract that the entrepreneur provides him with the terms of the contract, including the standard business terms, in a document.

(4) More extensive restrictions in the use of means of distance communication and more extensive duties to provide information under other provisions are unaffected.

## **German Insurance Contract Act 2008 (VVG)**

Full citation: Insurance Contract Act of 23 November 2007 (Federal Law Gazette I page 2631), as last amended by Article 2 (79) of the Act of 22 December 2011 (Federal Law Gazette I page 3044)

### **Section 6**

#### **Advising the policyholder**

(1) If the difficulty in assessing the insurance being offered or the policyholder himself and his situation gives occasion thereto, the insurer must ask him about his wishes and needs and, also bearing in mind an appropriate relation between the time and effort spent in providing this advice and the insurance premiums to be paid by the policyholder, the insurer shall advise the policyholder and state reasons for each of the pieces of advice in respect of a particular insurance. He shall document this, taking into account the complexity of the contract of insurance being offered.

(2) Before the contract is concluded, the insurer shall provide the policyholder with the advice in writing, clearly and comprehensibly stating reasons. This information may be provided verbally if the policyholder so wishes or if and insofar as the insurer guarantees provisional cover. In such cases the information shall be provided in writing to the policyholder without undue delay as soon as the contract has been made; this shall not apply where a contract is not made and to contracts in respect of provisional cover in the case of compulsory insurances.

(3) The policyholder may waive the right to advice and documentation thereof in accordance with para.s (1) and (2) by a separate written declaration in which the insurer explicitly indicates that such waiving may have an unfavourable effect on his option for asserting a claim for damages against the insurer in accordance with para. (5).

(4) The obligation under para. (1), first sentence, shall also apply after the contract has been made for the entire term of the insurance agreement insofar as it is clear that the insurer recognises that the policyholder requires information and advice. The policyholder may in individual cases waive the right to advice by written declaration.

(5) If the insurer breaches an obligation under para.s (1), (2) or (4), he shall be liable to indemnify the policyholder for any loss or damage resulting therefrom. This shall not apply if the insurer is not responsible for the breach of obligation.

(6) Paras (1) to (5) shall not apply to contracts of insurance covering a large risk within the meaning of section 210 para. (2) or if the contract is negotiated with the policyholder by an insurance broker or if it is a distance contract within the meaning of section 312b (1) and (2) of the German Civil Code.

### **Section 7**

#### **Information provided to the policyholder**

(1) The insurer shall inform the policyholder in writing of his terms of contract, including the general terms and conditions of insurance, as well as the information set out in a statutory ordinance referred to in para. (2), in good time before the policyholder submits his contractual acceptance. This information shall be provided clearly and comprehensibly in keeping with the means of communication employed. If, upon the request of the policyholder, the contract is concluded by telephone or using another means of communication which does not permit the information to be provided in writing prior to the policyholder's contractual acceptance, that information must be provided without undue delay after the contract is made; this shall also apply if the policyholder explicitly waives the right to information by a separate written declaration prior to submitting his contractual acceptance.

(2) The Federal Ministry of Justice shall be authorised, with the consent of the Federal Ministry of Finance and in consultation with the Federal Ministry for Food, Agriculture and Consumer Protection, to determine the following by statutory ordinance without the consent of the *Bundesrat* for the purposes of providing comprehensive information to the policyholder:

1. which details of the contract, in particular in respect of the insurer, the benefit offered, the general terms and conditions of insurance and the right of revocation shall be provided to the policyholder,

2. which other information shall be provided to the policyholder in respect of life insurance, in particular regarding the expected benefits, their determination and calculation, regarding a model calculation, and acquisition and distribution costs, insofar as these are set off against insurance premiums, and regarding other costs,

3. which other information shall be provided in respect of health insurance, in particular regarding the development and form of insurance premiums, and the acquisition and distribution costs,

4. what information shall be provided to the policyholder if the insurer has contacted him by telephone, and

5. in what manner this information is to be provided.

When determining the notifications in accordance with the first sentence, the information required in accordance with 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 insurance and amending Directives 73/239/EEC and 88/357/EEC (OJ EC L 228 p. 1), Directive 2002/65/EC 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 Directives 97/7/EC and 98/27/EC (OJ EC L 271 p. 16), as well as Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life insurance (OJ EC L 345 p. 1), shall be observed.

(3) The statutory ordinance referred to in para. (2) shall, furthermore, specify what information the insurer must communicate in writing throughout the policy period; this shall in particular apply in the case of changes to information previously supplied, further in respect of health insurance in the event of increases in insurance premiums and regarding the possibility of changing tariffs, as well as in respect of life insurance with surplus sharing regarding the development of the policyholder's entitlements.

(4) The policyholder may at any time throughout the policy period demand that the insurer send him the terms of contract, including the general terms and conditions of insurance, in the form of a document; the costs of the first dispatch shall be borne by the insurer.

(5) Para.s (1) to (4) shall not apply to insurance contracts covering a large risk within the meaning of section 210 subsection (2). If under such a contract the policyholder is a natural person, the insurer shall inform him in writing prior to the conclusion of the contract of applicable law and the competent supervisory body.

## **Section 60**

### **Basis on which insurance intermediary provides advice**

(1) The insurance broker shall be obligated to base his advice on a sufficient number of contracts of insurance and insurers available on the market so that he is in a position to make his recommendation, based on professional criteria, regarding which contract of insurance is suited to meeting the needs of the person wishing to take out insurance. This shall not apply if he explicitly informs the person wishing to take out insurance in individual cases prior to contractual acceptance of the limited selection of insurers and contracts.

(2) An insurance broker who informs a person wishing to take out insurance of the limited selection in accordance with para. (1), second sentence, and an insurance agent must inform the person wishing to take out insurance on which market and information basis they are providing their services, and must state the names of the insurers on the basis of which they are giving advice. The insurance agent must also name the insurer on behalf of whom he is working and whether he is working exclusively for him.

(3) The person wishing to take out insurance may waive the right to the notifications and information in accordance with para. (2) by separate written declaration.

## **Section 61**

### **Insurance intermediary's duties of advice and documentation**

(1) If the difficulty of assessing the insurance being offered or the person wishing to take out insurance himself and his situation gives occasion thereto, the insurance intermediary must ask the person wishing to take out insurance about his wishes and needs and, also bearing in mind the relations between the time and effort spent providing the advice and the premium to be paid by the policyholder, must advise the person wishing to take out insurance and state

reasons for each piece of advice given in respect of a particular insurance. He must document this in accordance with section 62, taking account of the complexity of the contract of insurance being offered.

(2) The person wishing to take out insurance may waive the right to the advice or documentation in accordance with para. (1) by separate written declaration in which he is explicitly informed by the insurance intermediary of the fact that a waiver of the right may have a unfavourable effect on the option the person wishing to take out insurance has of asserting a claim for damages against the insurance intermediary in accordance with section 63.

## **Section 62**

### **Time and form of the information**

(1) The policyholder shall be provided, in a clear and comprehensible written form, with the information in accordance with section 60 (2) before submitting his contractual acceptance, and the information in accordance with section 61 (1) before the contract is concluded.

(2) The information in accordance with para. (1) may be given orally if the person wishing to take out insurance so wishes, or if and insofar as the insurer grants provisional cover. In such cases the information must be provided to the person wishing to take out insurance in writing without undue delay after the contract has been made, at the latest together with the insurance policy; this shall not apply to contracts for provisional cover for compulsory insurances.

## **Section 210**

### **Large risks, open policy**

(1) The restrictions on the freedom of contract under this Act shall not apply to large risks or to open policies.

(2) Large risks within the meaning of this provision shall be:

1. risks of the transport and liability insurance indicated at Nos. 4 to 7, 10 (b) as well as Nos. 11 and 12 of the Annex to the Insurance Supervision Act, Part A,

2. risks of the credit and suretyship insurance indicated at Nos. 14 and 15 of the Annex to the Insurance Supervision Act, Part A, where the policyholders exercise a commercial, mining or freelance activity if the risks are relevant thereto, or

3. risks of the property, liability and other indemnity insurance indicated at Nos. 3, 8, 9, 10, 13 and 16 of the Annex to the Insurance Supervision Act, Part A, where the policy holders exceed at least two of the following characteristics:

a) Euro 6,200,000 balance sheet total,

b) Euro 12,800,000 net turnover,

c) an average of 250 employees per fiscal year.

If the policyholder belongs to a group of companies which must prepare a consolidated financial statement in accordance with section 290 of the Commercial Code, in accordance with section 11 of the Disclosure Act of 15 August 1969 (Federal Law Gazette I page 1189)

in the respectively valid version or in accordance with the requirements of the law of another Member State of the European Community or of another Contracting Party to the Agreement on the European Economic Area which concurs with the Seventh Council Directive 83/349/EEC of 13 June 1983 based on Article 54 (g) of the Treaty on consolidated accounts (OJ L 193 of 18 July 1983, page 1) in the respectively valid version, the figures contained in the consolidated financial statement shall be material to the establishment of the size of the enterprise.

### **Act Against Unfair Competition (UWG)**

Full citation: “Act Against Unfair Competition in the version published on 3 March 2010 (Federal Law Gazette [*BGBI.*] Part I p. 254”

#### **Section 3**

##### **Prohibition of unfair commercial practices**

- (1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors, consumers or other market participants.
- (2) Commercial practices towards consumers shall be illegal in any case where they do not conform to the professional diligence required of the entrepreneur concerned and are suited to tangible impairment of the consumers ability to make an information-based decision, thus inducing him to make a transactional decision which he would not otherwise have made. Here reference shall be made to the average consumer or, when the commercial practice is directed towards a particular group of consumers, to the average member of that group. Reference shall be made to the perspective of the average member of a group of consumers who are particularly vulnerable and clearly identifiable because of their mental or physical infirmity, age or credulity, if it is foreseeable for the entrepreneur that his commercial practice will affect the latter group only.
- (3) The commercial practices towards consumers, listed in the Annex to this Act, shall always be illegal.