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Transparency in Insurance Contract Law

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Transparency in Insurance Contract Law

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Foreword

The concept of "transparency" in insurance is potentially exceedingly wide. Virtually all jurisdictions recognise a duty on the assured to make a fair presentation of the risk when submitting a proposal for cover to the insurers, although there is little consensus on the scope of that duty. Disputed matters as to the duty include: whether it is satisfied by honest answers to express questions or whether there is a spontaneous duty of disclosure; whether facts relating to the assured's character (moral hazard), as opposed to the nature of the risk itself, are to be presented to the insurers; the role of brokers in the placement process; and the remedy for breach of duty.

Transparency is, however, a much wider concept. Potential policyholders are in principle entitled to be made aware of the key terms of coverage and to be warned of hidden traps (such as conditions precedent, average clauses and excess provisions), but there is a range of different approaches. Some jurisdictions have adopted a "soft law" approach, using codes of practice for pre-contract disclosure: since 2018, the EU has introduced minimum standards for marketing and selling policies; Australia has a detailed regime demanding the provision of Key Fact Sheets; yet other jurisdictions rest upon the rather nebulous duty of utmost good faith. The outcome is that unclear or disguised restrictions may not be enforceable.

Leaving aside placement, transparency is also demanded after the policy has incepted. The assured is required to be transparent in the claims process. There is less consistency in national laws as to the operation of transparency by insurers in handling claims. For example, is an insurer required to be open about the various reports commissioned by it into the circumstances of the claim and the amount of the loss?

The present work consists of a series of reports on transparency from a range of civil and common law jurisdictions, along with overview chapters from the editors. The chapter authors are leaders in their respective fields, and all have strong links with the International Association of Insurance Law (AIDA). Each chapter reviews the transparency principles applicable in the jurisdiction covered by it. The difference in approach between nations is a fascinating study of how universally shared problems can be addressed in entirely different ways and with varying solutions.

The two editors, Pierpaolo Marano and Kyriaki Noussia, are both leading lights in AIDA and also highly respected authors and speakers nationally and internationally. They have done a superb job in collating these chapters. Academics, legal and insurance practitioners, researchers, regulators and law reform bodies will find a wealth of valuable—and otherwise inaccessible—information in this volume. Demystifying the differences between the civil and common law approaches is a key theme. Anyone with an interest in insurance law and regulation will benefit hugely from the efforts of the editors and the contributors. All involved are to be congratulated.

University of Exeter, Exeter, UK Rob Merkin QC

Preface

The role of transparency in insurance is multi-faceted, with its importance being undoubtedly critical. In an age where transparency has arisen to a widely acknowledged "maxim" and whereby every aspect of our everyday life—insofar that it entails both private and business interactions—falls under strict regulation to abide with the transparency requirements that legislation imposes, it has become, more than ever before, imperative to look into the subject of transparency in insurance law.

The current work is the first of two parts of an edited and comparative work, which is looking into the topic of transparency in insurance law and regulation in various common law and civil/continental law jurisdictions. The book, which forms Volume I, effectively discusses transparency in insurance contract law in the major common law and civil/continental law jurisdictions. Volume II focuses on the equally important aspect of transparency in insurance regulation in the various common law and civil/continental law jurisdictions.

The jurisdictions selected form some of the major players worldwide in insurance law and in the insurance market; however it has been felt that small jurisdictions must be also inserted, in an effort to provide a varied picture of the different declinations assumed by transparency. In effect, identifying and critically discussing transparency in insurance contract law will help better assess the contemporary challenges imposed in the various legal systems.

In the common law world, transparency is of great importance to the eyes of both the common law legislator and the common law judge. Transparency in common law is depicted within the requirement for the standard terms to be drafted in "plain, intelligible language" and within the notion of utmost good faith. In the more recent years, jurisprudence in some common law jurisdictions (for example, the case of *Tay Eng Chuan v Ace Insurance Ltd* [2008] SGCA 26, [2008] 4 SLR(R) 95 in Singapore) has started depicting a tendency to accept the application of the duty of utmost good faith in a broader manner. Transparency is important in the field of insurance law because insurance is a complex legal product, accompanied by a complex legal framework, which is often supplemented by a seller's market focused on a relatively few insurance companies. This is, even more than elsewhere, apparent in the civil/

continental law jurisdictions, whereby transparency predominantly relates to fairness and is often embedded as a requirement codified within the civil code provisions on good faith. Hence, it follows that any sort of autonomy or relevance of the notion of transparency with respect to the long established concepts of fairness and good faith is variably understood in the civil/continental law jurisdictions.

Notwithstanding the differences that exist in the various legal systems, the overarching aim behind the regulation of transparency is to promote fairness and protect both the assured and the insurer.

The discussion of the notion of transparency in the various regimes has allowed us to recognise that further steps, which would allow the concept to broaden itself, would be highly beneficial. This is even so due to the fact that transparency is not systematically and uniformly enshrined in all legislations; hence the level of shield that it can offer to the assured varies. In effect, transparency helps into making accessible, to insurance customers, all the necessary data and better protect them. It follows from the above that an improved regime of transparency is likely to lead to less litigation. It also follows that transparency should not be applied universally and without limitations or "at all costs". Voices raised against it have argued that the diversity that characterises transparency is more problematic than beneficial. Against this background, with regard to transparency in insurance law, it has been argued that the pre-existing standardisation of the insurance contracts made ground for a common knowledge of parties to an insurance contract and that the current need for total immersion to transparency requirements merely creates havoc, rather than assist the assured to make an informed decision for an insurance product "fit for purpose". It is accepted that the fragmentation that exists at the level of legislation worldwide, which has been enacted to safeguard transparency, should not hinder further efforts to ameliorate its level of existence in insurance contract law. The above arguments apart, it is also admitted that—at the same time—a balance needs to be sought, so that the necessary limits are set and transparency exists only in cases where its application is deemed as absolutely necessary to impose a yardstick and a threshold for the better protection—and not for the detriment—of the parties to an insurance contract.

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Contents

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Abbreviations

1990 Act	Insurance Activity Act
2003 Act	Act on Insurance Activity dated 22 May 2003
ABGB	Austrian General Civil Code (JGS 1811/946) (*österreichisches Allgemeines Bürgerliches Gesetzbuch – ABGB*)
Act nº 1480	Act nº 1480 of 2011
Act nº 20,667	Act concerning the insurance contract nº 20,667 of 2013
Act nº 29,946	Act nº 29,946 Insurance Contract Act
Act on Unfair Practices	Act dated 23 August 2007 on counteracting unfair market practices
ACT	Australian Capital Territory
AGB	General terms and conditions (*Allgmeine Geschäftsbedingungen – AGB*)
AGBG	Croatia and Slovenia Austrian Civil Code of 1811
AGBG	Unfair Terms and Conditions Act (*Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen – AGBG*)
AGCM	Italian Competition Authority
AID	Polish Act on Insurance Distribution
AIRA	Act on Insurance and Reinsurance Activity
ALI	American Law Institute
ALRC	Australian Law Reform Commission
ANZ	Australia and New Zealand
APECOSE	Peruvian Association of Insurance Brokers
APESEG	Peruvian Association of Insurance Companies
APLA	Application of English Law Act
ASF	Portuguese Insurance and Pension Funds Supervisory Authority
ASIC Act	Australian Securities and Investments Commission Act 2001

AtomHG	Nuclear Liability Act (BGBl 1998/170) (*Atomhaftungsgesetz 1999 – AtomHG*).
AVB	General policy conditions (*Allgemeine Versicherungsbedingungen – AVB*)
B2B	Business to business
B2C	Business to consumer
BaFin	German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGB	German Civil Code (*Bürgerliches Gesetzbuch – BGB*)
BGB-InfoV	BGB-Information Duty Regulation (BGB-Informationspflichtenverordnung – BGB-InfoV)
BGH	German Supreme Court (*Bundesgerichtshof – BGH*)
C.Com.	Colombian Commercial Code
CBIRC	China Bank and Insurance Regulatory Commission
CC	Civil Code
CCC	Colombian Civil Code
CE	Spanish Constitution
CEIOPS	Committee of European Insurance and Occupational Pensions Supervisors
CG	General Conditions of Insurance
CIDRA	Consumer Insurance (Disclosure and Representations) Act (CIDRA) 2012
CIDRA	Consumer Insurance (Disclosure and Representations) Act 2012
CIRC	China Insurance Regulatory Commission
CMVM	Portuguese Securities Market Commission
Compact	Interstate Insurance Product Regulation Compact
Cons. Cod.	Consumer Code
Consob	Italian Commission responsible for regulating financial markets
CPA	Consumer Protection Act
CPC	Consumer Protection Code
DFL 251	Decree in Force of Law number 251 about Insurance Companies
dVAG 1901	German Insurance Supervisory Act 1901 (*deutsches Versicherungsaufsichtsgesetz 1901 – dVAG 1901*)
dVVG 1908	German Insurance Contract Act 1908 (dRGBl S 263) (*deutsches Versicherungsvertragsgesetz 1908 – dVVG 1908*).
EBA	European Banking Authority
EGBGB	Introductory Act of the German Civil Code (*Einführungsgesetz zum Bürgerlichen Gesetzbuch – EGBGB*)

EIOPA	European Insurance and Occupational Pensions Authority
ESMA	European Securities and Markets Authority
FAA	Financial Advisers Act
FAIS Act	Financial Advisory and Intermediary Services Act
FCA	Financial Conduct Authority
FernFinG	Austrian Distance Financial Services Act (BGBl I 2004/62) (*österreichisches Fernfinanzdienstleistungsgesetz – FernFinG*)
FFFS	Rules and general recommendations on information concerning insurance and occupational retirement pension
FIDReC	Financial Industry Disputes Resolution Centre
Financial Services ADR	Financial Services Alternative Dispute Resolution
FSA	Financial Service Agency
FSA	Financial Services Authority
FSB	Financial Services Board
FSBA	Financial Services Board Act
FSC	The Financial System Council
FSCA	Financial Services Conduct Authority
FSOC	Financial Stability Oversight Council
FSRA	Financial Sector Regulation Act
GCI	(German) General Conditions of Insurance (Allgemeine Versicherungsbedingungen)
GCI	General Conditions of Insurance (*Allgemeine Versicherungsbedingungen – AVB*)
GIA	General Insurance Association of Japan
GIA	General Insurance Association of Singapore
GTC control	General terms and conditions control (*AGB-Kontrolle*)
GTC	General insurance terms and conditions
HANFA	Act on the Croatian Agency for Supervision of Financial Services
HCA	High Court of Australia
HPC	High People's Courts
IA	Insurance Act
IAC	Insurance Activities Code
IBA	(Swedish) Insurance Business Act
IBA	Swedish Insurance Business Act
IBIPs	Insurance-based investment products
ICA	(Australian) Insurance Contract Act
ICA	(Swedish) Insurance Contract Act of 2005
ICA	Australian Insurance Contract Act
ICA	Swedish Insurance Contract Act of 2005
ICAA	Insurance Contracts Amendments Act 2013

IDA	(Swedish) Insurance Distribution Act 2018
IDD	Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (IDD)
IDD	Insurance Distribution Directive
IMD	Insurance Mediation Directive
INDECOPI	National Institute for the Defense of Competition and the Protection of Intellectual Property
Ins. Code	Insurance Code
IPID	Insurance Product Information Document
IVASS	Italian Institute for the Supervision on Insurance
KHVG	Motor Vehicles Act *(Kraftfahrzeug-Haftpflichtgesetz – KHVG*)
KID	Key Information Document
KSchG	Austrian Consumer Protection Act (BGBl 1979/140) (*österreichisches Konsumentenschutzgesetz – KSchG*)
LCGC	General Conditions of Contract
LCGC	General Contracting Conditions
LCS	29,946 Insurance Contract Act
LCS	Insurance Contract Law
LGDCU or TRLGDCU	Act 26/1984, General Act for Defense of Consumers and Users
LIA form	Life Insurance Advisory Form
Long Term PPR	Policyholder Protection Rules for long-term insurance
LPC	Commerce Code and Law number 19.496
LPC/1994	Act 19.496 on the Protection of the Rights of Consumers of 1994
LPC/1994	Consumer Protection Law number 19.496 of 1994
LTIA	Long-Term Insurance Act
MAS	Monetary Authority of Singapore
MIA	Marine Insurance Act
NAIC	National Association of Insurance Commissioners
NDIR	Natural Disaster Insurance Review
NSW	New South Wales
NSWCA	New South Wales Court of Appeal
PCC	Polish Civil Code
PEICL	Principles of European Insurance Contract Law
PFSA	Polish Financial Services Authority
PI	Professional Indemnity
PICA	Portuguese Insurance Contract Act
PICA	Portuguese Insurance Contract Act of 2008
PIDA	Portuguese Insurance Distribution Act
PISA	Portuguese Insurance Supervision Act
PPRs	2018 Policyholder Protection Rules for long-term insurance

PRIIPs	Packaged retail and insurance-based investment products
RTIC	Regulation on Transparency of Information and Insurance Contracts
SBS	Supervisory Authority (Superintendencia de Banca, Seguros y Administradoras de Fondos de Pensiones)
SERFF	System for Electronic Rates & Form Filing
SFSA	Swedish Financial Supervisory Authority
Short Term PPR	Policyholder Protection Rules for short-term insurance
SMEs	Small and medium-sized enterprises
SOKik	Court of Competition and Consumer Protection
SPC	The Supreme People's Court
STA	Standard Terms Act
STIA	Short-Term Insurance Act
SVS	Superintendency of Securities and Insurance
TCC	Turkish Commercial Code
The Act	Consumer Rights Act 2015
The Control Law	Control Law over Financial Services (Insurance) Law, 1981
The Insurance Law	The Insurance Law of the People's Republic of China
The Maritime Code	The Maritime Code of the People's Republic of China
The SPC Interpretations	The SPC on Certain Issues Concerning the Application of the Insurance Law
TIA	Transparency in Insurance Act
TPD	Total and Permanent Disability
TRLGDCU	Revised Text of the General Act for the Defense of Consumers and Users of 2007
TUF	Legislative Decree 58/1998
Unespa	Spanish Insurance Business Association
UPKiK	Office for Consumer and Competition Protection
VAG 1978	Insurance Supervisory Act 1978 (BGBl 1979/568) (*Versicherungsaufsichtsgesetz 1978 – VAG 1978*)
VAG 2016	Austrian Insurance Supervision Act 2016 (*österreichisches Versicherungsaufsichtsgesetz 2016 – VAG 2016*)
VAG	German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz – VAG*)
VAG-Novelle 1994	Amendment of the Insurance Supervisory Act in 1994 (*VAG-Novelle 1994*)
VersVG	Austrian Insurance Contract Act (BGBl 1959/2) (*österreichisches Versicherungsvertragsgesetz – VersVG*)
VersVG-Novelle 1994	Amendment of the Insurance Contract Act in 1994 (*VersVG-Novelle 1994*)

VVG	Insurance Contract Act (*Versicherungsvertragsgesetz – VVG*)
WG	The Working Group on the Status of Insurance Products, Service, etc.
WG	Working Group

Part I
Civil Law: European Union

Transparency in the Insurance Contract Law of Austria

Sebastian Wöss

1 Introduction

Transparency plays an important role in insurance law. However, this does not mean that transparency as a legal requirement only exists in this field. On the contrary, considerations and efforts to create (more) transparency are made in almost all fields of law. For example, legislation should be drafted transparently[1]; state processes, e.g. the award of public contracts, should be designed in a transparent way.[2] In general, the administration should act transparently.[3] However, transparency has to be applied not only between the legislator respectively the public authorities and the legal subject respectively the citizens and taxpayers but also between private individuals: the customer should be provided with adequate information, depending on the specific situation.[4] In addition, contracts or contractual clauses in particular shall be formulated in such a way that they are understandable and comprehensible to the parties involved.[5] Transparency therefore serves to make processes comprehensible for the individual. As a rule, it is about compensating a gap between the parties involved in a concrete legal relationship. There may be several reasons for this gap: e.g. a knowledge or information advantage on one side, an unequal distribution of

[1] Bdylinski (2015), p. 140 seqq.

[2] Cf. the materials on the Austrian Federal Procurement Act 2006, BGBl. I 2006/17 (*österreichisches Bundesvergabegesetz—BvergG 2006*), 1171 BlgNR 22 GP. 5.

[3] Cf. Art 15 TFEU.

[4] See only the 'information model' pursued by the EU legislator to protect the consumer.

[5] Cf. Art 5 para 1 **Directive 93/13/EEC**.

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the available (financial) resources or an unequal position on the market.[6] Frequently, a combination of several factors occurs. Adequate transparency is intended to compensate or at least to mitigate these discrepancies.

Whether and how much transparency is necessary depends, in particular, on two factors: on the one hand, it depends on the level of complexity of the concrete matter. Thus, transparency considerations and efforts are always focused on circumstances or legal issues that are not necessarily self-evident for the individual and therefore require a corresponding presentation. On the other hand, it strongly depends on the specific market situation. State-imposed and state-regulated transparency is always necessary when there is no competitive market balanced between the supplier and the customer, which guarantees transparency out of itself.[7] This is particularly the case when there is not enough competition between the market participants (whether on the offeror's side or on the customer's side), which allows one party an unfavourable contract design, which leads to an unwanted conclusion of the contract on the other hand.[8]

Keeping that initial situation in mind, transparency must also be seen in the perspective of insurance law. The particular importance of transparency in the field of insurance law already indicated above is now given by the fact that both of the factors outlined before are more pronounced in comparison to other fields of law. Thus, on the one hand, insurance is a complex legal product.[9] It is characterised by a risk description, exceptions from this risk description, counter-exceptions and other 'small print'.[10] In the absence of physically existing contract items, it is less comprehending for the contract parties—in particular but not only for the purchaser of an insurance product—than a contract respectively the content of a contract on the exchange of goods.[11] Above that, the complex legal product is accompanied by a complex legal framework. It consists of European as well as national legal provisions, inaccessible formulations, technical terms, exceptions and counter-exceptions.[12] This interplay of complex legal product on the one hand and a complicated legal framework on the other, supplemented by a seller's market focused on relatively few insurance companies, requires a high level of transparency.

If now one considers transparency more closely from the perspective of insurance law, it must be noted at the outset that the subject is not limited to the insurance contract. On the contrary, it is a topic that concerns insurance law as a whole respectively all of its sub-sectors. The objective is basically the same in each case: it is about keeping the power and/or information gap between the actors involved as

[6] Leverenz (2008), para 3/55.
[7] Stagl (2006), p. 4.
[8] Schimikowski (2007), p. 135.
[9] Dreher (1991), p. 148.
[10] Cf. Wandt (2012), p. 343.
[11] Wandt (2012), p. 343.
[12] Wandt (2012), p. 343.

low as possible.[13] However, the methods with which the legislator tries to achieve transparency, as well as the addressees of the provisions creating transparency, are different. When it comes to transparency in the context of insurance mediation, mostly the relationship between the insurance intermediaries and the policyholder is meant. In terms of content, it is usually about a transparent disclosure of the relationship between the insurance agent and the insurance company towards the policyholder. In particular, it is about his legal and economic dependence on specific insurance companies, his professional qualifications and possible conflicts of interest.[14] If one is, on the other hand, looking at insurance supervisory law under the aspect of transparency, it is primarily a question of transparent rules of procedure, as well as transparent business activities and financing (see Art 268 para 1 and Art 268a Austrian Insurance Supervision Act 2016[15] (*österreichisches Versicherungsaufsichtsgesetz 2016—VAG 2016*)).[16] Finally, transparency in the context of insurance contract law is commonly equated with the requirement for the legislator to create a most possible transparent relationship between insurers and policyholders. In this chapter, the importance of transparency in Austrian insurance contract law will be illustrated. Subsequently, legislator's efforts to create (adequate) transparency are to be shown.

2 The Importance and Definition of Transparency in Austrian Insurance Contract Law

If transparency is discussed in the context of insurance contract law, it often refers to the requirement of transparency (Art 5 para 1 **Directive 93/13/EEC,**[17] implemented into Austrian law by Art 6 para 3 Austrian Consumer Protection Act[18] (*österreichisches Konsumentenschutzgesetz – KSchG*). The first thing that one would think of is the relationship between the insurer and the policyholder. It is characterised by an information and knowledge gap; hence the insurer has to draft the contractual components containing the general policy conditions in a clear and comprehensible way (see below Sect. 3.3.3.4). This is obvious. Thus, the value of Art 5 para 1 **Directive 93/13/EEC** and Art 6 para 3 Consumer Protection Act, which are, in general, intended to ensure a transparent business relationship between

[13] See e.g. the Solvency II Directive, of which the primary objective is—despite the fact that most of the standards are concerned with the regulation and supervision of the insurance and reinsurance industry—the protection of policyholders (recital no° 16 Solvency II Directive).

[14] Wandt (2012), p. 341.

[15] BGBl I 2015/44.

[16] Wandt (2012), p. 343.

[17] **Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ n° L 095 of 21.04.1993**.

[18] BGBl 1979/140.

entrepreneurs and consumers, is undisputed. However, it should be noted that the issue of transparency—especially in insurance law—cannot be reduced to the requirement of transparency of the terms and conditions of the insurance contract alone. Rather, apart from the general requirement of transparency, the legislator tries by a multitude of measures to assure the transparency of the product *insurance* in general respectively in the individual insurance contracts.

Apart from information duties, which are specific to the insurer prior to the conclusion of the contract (Art 128 et seqq Insurance Supervisory Act 2016), the specific requirement of transparency for these duties can be mentioned here (Art 128 para 2 Insurance Supervisory Act 2016). Also, the information duties are based on the nature of the conclusion of the contract (Art 5 et seqq Austrian Distance Financial Services Act[19] (*österreichisches Fernfinanzdienstleistungsgesetz—FernFinG*)),[20] which therefore occasionally also apply to an insurance contract. In addition to these information duties, the legislator tries to achieve transparency through a tight network of substantive and formal requirements to the contract, which is, even though it is of great importance, not limited to the transparency requirement alone. An example is Art 864a Austrian General Civil Code[21] (*österreichisches Allgemeines Bürgerliches Gesetzbuch—ABGB*). The provision states that unusual, surprising and disadvantageous provisions in general terms of contract are invalid.

Furthermore, one should point out that transparency in insurance law is not only one directional (the direction of the insurer to the policyholder). Basically, the before-mentioned aspects in insurance contracts, in particular the requirements of transparency, are higher than in other types of contracts.[22] However, this applies not only to the policyholder but also to the insurer. Thus, the insurer has to insure an initially unknown and uncertain risk (see Sect. 3.3.2).[23] The legislator also attempts to deal with this need for transparency by imposing pre-contractual and ongoing disclosure duties on the policyholder (Art 16 et seqq Austrian Insurance Contract Act[24] (*österreichisches Versicherungsvertragsgesetz—VersVG*)).

If finally the term 'transparency' shall be defined, one can start with the fact that transparency is a state. Something is transparent when it is *comprehensible* (in German *durchschaubar* or *nachvollziehbar*).[25] Transferred to insurance contract law, transparency can therefore, in general, best be described as a condition that makes the insurance product as such, and thus the insurance contract, its content and its consequences, comprehensible to the parties involved. Specifically on the

[19]BGBl I 2004/62.

[20]With the Distance Financial Service Act the Directive 2002/65/EC had been implemented into Austrian Law.

[21]JGS 1811/946.

[22]Wandt (2012), p. 343.

[23]Heiss and Lorenz (2014) pre Article 16–22, para 4 seqq.

[24]BGBl 1959/2.

[25]Cf. Korinek (2016), p. 26.

insurance contract, its form and content, transparency can be understood as comprehensibility supplemented by certainty, clarity and completeness.[26] The insurance contract respectively its parts (in particular the general terms and conditions) must meet these requirements in order to be sufficiently transparent and valid (as a whole). If transparency is meant to be described with the words 'comprehensibility', 'certainty', 'clarity' and 'completeness', there is again much room for interpretation. In brief, and in accordance with the principles developed by the Austrian jurisprudence for the requirement of transparency (Art 5 para 1 **Directive 93/13/EEC** and Art 6 para 3 Consumer Protection Act) (see Sect. 3.3.3.4), the following may be said about the individual points, i.e. that a legal norm is comprehensible if it is understandable to the legal user with regard to its purpose and the legal consequences resulting from it.[27] A legal norm is certain if it does not offer an unjustified margin of discretion and thus, although it is possible to prevent it by a more precise wording, would make it impossible to foresee (interpret) results from the policyholder's point of view.[28] A norm is sufficiently clear if it does not try to conceal the rights that the legal user derives from it or deceive his rights at all.[29] Finally, completeness means that the effects of a legal norm must not be obscured by omitting certain parts.[30]

3 Transparency in Austrian Insurance Contract Law

3.1 Preliminary Remarks

Before the provisions that shall guarantee transparency are described in detail, a few preliminary remarks are beneficial.

Like other European jurisdictions, the Austrian jurisdiction is also broadly defined by European legal standards. This applies in particular to insurance law.[31] At the same time, European directives that are not specifically designed for insurance law are also emanating from this. The European influence makes obvious in several respects: on the one hand, it is clear that information duties of the insurer, as well as the insurance agent, towards the policyholder are becoming more and more extensive according to the 'information model'. These information duties may be directly

[26] See also the explanation of the Austrian Supreme Court (*Oberster Gerichtshof—OGH*)—in turn, however, to the transparency requirement of Art 6 para 3 Consumer Protection Act—to OGH 4 Ob 28/01y.

[27] Wandt (2012), p. 343.

[28] Fenyves (2007), p. 37.

[29] Faber (2003), p. 51.

[30] Fenyves (2014a) pre Article 1, para 106.

[31] See only Baran and Peschetz (2015), p. 4.

linked to the insurance contracts (see Art 17 et seqq, Art 29 **Directive 16/97/EU**[32]) or to b2c contracts (see Art 3 et seqq **Directive 93/13/EEC**). On the other hand, the European legislator also places far-reaching substantive and formal criteria on the (insurance) contract.

However, the modern Austrian insurance law is founded not on European law but rather on German insurance law. This is because both the Insurance Supervisory Act 1978[33] (*Versicherungsaufsichtsgesetz 1978—VAG 1978*), replaced in 2016 by the Insurance Supervisory Act 2016, and the original Insurance Contract Act from 1958, which is still in force, have taken over the German Insurance Supervisory Act 1901[34] (*deutsches Versicherungsaufsichtsgesetz 1901—dVAG 1901*) respectively the German Insurance Contract Act 1908[35] (*deutsches Versicherungsvertragsgesetz 1908—dVVG 1908*).[36]

The Insurance Contract Act 1958 is therefore still the primary source of the Austrian insurance contract law. In addition, some types of insurance are regulated by special acts (for example, the motor vehicle liability insurance, regulated by Liability Against Motor Vehicles Act[37] *(Kraftfahrzeug-Haftpflichtgesetz—KHVG*). Since the Insurance Contract Act (and other acts regulating special branches of insurances) only provides for certain aspects of the insurance contract, the Civil Code applies whenever there is no provision or no more specific provision in the Insurance Contract Act (or the other concerning act).[38] If the contract is to be classified as a b2c contract, the Consumer Protection Act also applies. Finally, if the insurance contract, which is a b2c contract at the same time, is concluded exclusively by means of distant communications, the Distance Financial Services Act applies.

With regard to transparency in insurance contract law, the Insurance Contract Act plays only a subordinate role. Its role is essentially limited to *how* information has to be passed on to the policyholder (e.g. in the case of an agreement to provide the information by electronic means, see also Art 5a para 7 Insurance Contract Act), as well as the legal consequences, which are linked to a non-disclosure of the necessary information (e.g. the right of withdrawal of the policyholder under Art 5b para 2 Insurance Contract Act). The information duties imposed on the policyholder are,

[32]**Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ n° L 26/19 of 02.02.2016 (IDD).**

[33]BGBl 1979/568.

[34]dRGBl S 139.

[35]dRGBl S 263.

[36]This has historical reasons. Thus, both the German Insurance Supervisory Act 1901 and the German Insurance Contract Act 1908 were introduced in Austria in the course of the 'Anschluss' of Austria to the German Reich. After the war, both remained in force under different names and with slight changes. The fact is also worth to be mentioned because it can explain the still existing influence of German literature and jurisprudence on the Austrian insurance law (see also Fenyves 1997, p. 296).

[37]BGBl 1994/651.

[38]Cf. Schauer (2010), p. 195.

however, in the supervisory law. The Insurance Supervisory law is therefore of particular importance. The same applies for the general civil law, which sets out the substantive and formal requirements of a contract, thus also of an insurance contract, and sanctions its non-compliance. If, however, transparency in insurance contract law is understood in a broad sense, the Insurance Contract Act also plays an important role: thus, the customer is obliged to make special disclosures before the conclusion and during the existence of an insurance contract (Art 16 et seqq Insurance Contract Act), which shall prevent the insurer from taking incalculable risks.

With this framework, the legislator tries to ensure the necessary transparency in insurance contract law. The system, as well as the interplay of the respective provisions, will be presented in sequence. In the first place, an overview of the previous legal situation shall be given. Therefore, one element is to be emphasised, namely the amendment of the Insurance Supervisory Act in 1994 (*VAG-Novelle 1994*[39]), which, together with the amendment of the Insurance Contract Act in 1994 (*VersVG-Novelle 1994*[40]), both enacted on 1 January 1995, caused a departure from the *ex ante* control of the insurance conditions by the supervisory authority to a (deeper) *ex post* control by the common courts.

3.2 The Previous Regime

Until the amendment of the Insurance Supervisory Act in 1994, transparency, at least in the relationship between the insurer and the policyholder, was mainly based on insurance supervision law.[41] The majority of the information duties addressed to the insurer were found there. Moreover, the pre-control respectively approval of the general policy conditions, which was also found in insurance supervision law, made the application of the general provisions (Arts 864a and 897 para 3 Civil Code) to the content and formal control of the insurance contract and the general policy conditions largely obsolete. Only the departure from this *ex ante* control by the supervisory authority led to far-reaching changes. This is evidenced by the upcoming activities of the courts concerned about the question of the admissibility of general policy since the amendment.

[39]BGBl 1994/652.

[40]BGBl 1994/509.

[41]However, in the Austrian insurance supervisory law, provisions aimed at providing transparency in the relationship between the insurer and the policyholder are already based on the year 1939 and on the German Supervisory Act 1901 respectively (after the war) the (Austrian) Insurance Supervisory Act 1978. Thus, the German Supervisory Act 1901already contained the first requirements on the transparency of the insurance contract (Art 9 para 1 *leg cit*). The provision had listed some essential elements that the general policy conditions had to contain; e.g. a compulsory risk description, provisions on the duration of the insurance contract, the cases in which compulsory performance should be excluded or abolished etc.).

Formerly, the central provisions regarding the relationship between the insurer and the policyholder were found in Artt 4 para 6, 10 para 1 and 8 para 5 of the Insurance Supervisory Act 1978. Article 8 para 5 of the Insurance Supervisory Act 1978[42] stipulated that the general policy conditions should be submitted to the supervisory authority[43] as part of their business plan before its admission. The supervisory authority had to examine and approve the general policy conditions. Only then were insurers permitted to use them in their insurance contracts.

The aim of the statutory pre-control of the general policy conditions was customer protection.[44] This should have been achieved by creating market transparency. The general policy conditions were, however, reviewed in a quite non-transparent way.[45] Thus, the negotiation of the insurance conditions between the insurance companies and the supervisory authority took place on a small scale and behind closed doors. The approved general policy conditions, specimen conditions and business plans had finally been published, if at all, only in the VersVVers,[46] a journal hardly known outside the insurance industry. If the policyholder wanted to check his insurance contract to determine whether his conditions corresponded to the model conditions, special inquiries had to be made—largely without the current possibilities of the electronic data processing, as well as the Internet. However, the co-operation between the supervisory authority and the insurers could largely prevent serious social injustices. In the daily insurance business, the pre-control and authorisation of the policy conditions led to a standardisation and limitation of the insurance products available on the market. This was, however, certainly intended by the national legislator at that time.[47]

The pre-control of the general insurance condition was, however, not compatible with the European legislator's efforts to create a European single market for insurance products. Thus, it was, and still is, the aim of the European legislators, by means of deregulation of the market, to create the largest possible market for insurance products from which the policyholder could choose the appropriate product. This aim should have been achieved, in particular, by the three generations of life and non-life directives,[48] whereas the pre-control and approval of the general policy conditions had been specifically the victim of the implementation of the third

[42]The provision was situated in Art 4 para 2 of the original version of the Insurance Supervisory Act 1978.

[43]Until 1.4.2002, this was the Federal Ministry of Finance, since then the Financial Market Supervisory Authority (*Finanzmarktaufsicht—FMA*) (Art 1 para 1 Financial Market Supervisory Act, BGBl 2001/97 [*Finanzmarktaufsichtsgesetz—FMAG*] in conjunction with Art 268 para 1 and 2 Insurance Supervisory Act 2016).

[44]Cf. Evermann (2002), p. 4.

[45]To the following: Ertl (1997), p. 2 seqq.

[46]'*Veröffentlichungen des BMF betreffend den Versicherungsvertrag*'.

[47]Evermann (2002), p. 4.

[48]First directive 73/239/EEC, second directive RL 88/357/ EEC, third directive 92/49/ EEC (non-life insurance); first directive 79/267/ EEC, second directive 90/619/ EEC, third directive 92/96/EWG (life insurance).

generation of the directives into national law. This was, however, also in the interests of the Austrian legislator: he mentioned in the materials[49] of the amendment that the 'prudent' handling of the supervisory law would have led to the fact that insurance protection could not keep pace with the realities of the insurance market. Furthermore, he pointed out that the legal regulation of the relationship between the insurer and the policyholder would no longer meet modern requirements.

The implementation of the third generation of policies also led to a system change from a regulated but clear market for insurance products to a wider range of insurance products at the price of a certain market intransparency.[50] At the same time, it represents a partial relocation of 'transparency' from insurance supervisory law to (insurance) contract law.

The legislator has attempted to compensate the legal protection deficit of the policyholder resulting therefrom by increased transparency, both with regard to the content of the insurance contract and its representation. In particular, the system had been replaced by extended information duties of the insurer (in particular the general notification duties in Art 9a Insurance Supervisory Act 1978, as well as the information duties for the life insurances in Art 18b Insurance Supervisory Act 1978, both then relocated to Art 252 et seqq Insurance Supervisory Act 2016 and – the in implementation of the Insurance Distribution Directive (**[EU] 2016/97**)[51]—now situated in Art 128 et seqq Insurance Supervisory Act 2016).

With the entry into force of the Insurance Supervisory Act 2016, the prohibition of a general preliminary examination and approval of the general policy condition has been standardised in Art 272 Insurance Supervisory Act 2016 (see also Art 181 et seqq Solvency II Directive[52]). The partial duty of the insurer to notify the supervisory authority of the general policy conditions only remained in certain types of compulsory insurances, for example in the motor vehicle liability insurance (Art 18 para 1 Motor Vehicle Liability Act).[53] The same applies to the nuclear liability insurance (Art 8 para 1 Nuclear Liability Act[54] (*Atomhaftungsgesetz 1999—AtomHG*)).

[49]EB 11.

[50]For the comparable German situation Wandt (2012), p. 346.

[51]The IDD has meanwhile, in relation to information requirements contained in the directive (Artt 17 seqq IDD), been partly implemented to the Insurance Supervisory Act 2016. Namely by the Insurance Distribution Law Amendment Act 2018 (*Versicherungsvertriebsrechts-Änderungsgesetz 2018—VersVertrRÄG 2018*), enacted on 1.10.2018.

[52]**Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ n° L 335/1 of 17.12.2009.**

[53]Based on Art 30 para 2 directive 92/49/ECC.

[54]BGBl 1998/170.