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**EXPERT COMMITTEE ON ETHICAL ISSUES
AND PROFESSIONAL STANDARDS**

**DRUG TESTING BY INSURANCE COMPANIES:
NATIONAL LEGISLATION, REGULATIONS
AND PRACTICES IN EUROPE**

Final Summary

by Joaquim RODRIGUES

After the adoption of the opinion on drug testing in the educational and professional environments, the Committee of Experts on Ethical and Deontological Issues decided to address the matter of drug testing by insurance companies in life, health and other insurance contracts. In this connection, I requested, on behalf of the Committee of Experts, the co-operation of representatives of all the Member States, including members of the Committee of Permanent Correspondents of the Pompidou Group.

The aim was to collate all available information on legislation, regulations and usual practices in this field in a wide range of Member States of the Group¹. We have received replies from Slovakia, Greece, Sweden, Hungary, Luxembourg, Norway, Croatia, Portugal and Ireland². The main substance of the information forwarded (most of it in a very concise form) has been included in a final summary, accompanied by a number of observations.

1. Slovak Republic.

“...From all collected information, generally speaking in the Slovak Republic commercial insurance companies don't implement drug testing by contracting life and health insurance. Insurance companies are included in private sector and civil legislation (Civil Code).

The general rights and obligations connected to commercial insurance are written in some paragraph of Civil Code which is the basic and principal Legislative Act for all commercial insurance companies.

In the Civil Code we don't find any kind of regulation connected to drug testing. The Civil Code defines the obligatory items of insurance contract. It is defined that the insurance contract should include the general insurance conditions. It is up to the insurance company to create details of these conditions.

In the Civil Code, the paragraph connected to the insurance of an individual, is the only one statement about the use of alcohol and addictive drugs. If a person's injury is caused by his/her use of alcohol or addictive drugs the insurance company has a right to decrease the amount insured. The general insurance conditions also state that the insurance company is not obliged to pay any insurance if the insured person has committed suicide or he/she consciously creates an accident to get the insurance money.

¹ The letter sent to all Member States is as follows:

Dear colleague,

The Pompidou Group's Platform on Ethical Issues and Professional Standards, following its work on drug testing at school and in the workplace, has decided to turn its attention to the questions raised by the drug testing introduced by insurance companies for the purposes of life, health and other insurance contracts. The priority task is to list the relevant legislation, regulations and practice in a larger number of European states, and I have been asked, as a member of the Platform, to carry out this task. In this context, I should like to ask for your help. What I should like to receive from you in practice is:

1. a copy (or abridged version) of the relevant legislation, regulations or other standards (in English, French, Spanish or Italian);
2. any credible/reliable information that is available about the practices (and their scope) adopted by insurance companies in your country, including - in so far as is possible - the frequency with which courts are involved in the resolution of disputes.

I have been told that, in certain countries, autonomous bodies exist to supervise, control and regulate activities in this sphere; this role is performed in other countries by a government department. The source of information will be either the government or the responsible autonomous body, as appropriate. On behalf of the Platform on Ethical Issues and Professional Standards, I should like to thank you for your co-operation. Please send me your information by e-mail or ordinary mail by 20 February at the latest.

Lisbon, 21 January 2009

² I would like to thank Anna May (Ireland), Josipa L. Andreic (Croatia), Elisabet Svedberg (Sweden), István G. Takács (Hungary), Simone Schram (Luxembourg), Arnaldo Oliveira (Portugal), Hege C. Bredesen (Norway) and Zuzana Jelenkova (Slovakia).

Some information collected from insurance companies practice when we are speaking about standard insurance (not about the higher price insurance) and which are incorporated to the general insurance conditions:

When the insurance contract is signed the person who wants to be insured (“the insured person”) is obliged to fill out the questionnaire including the questions about his/her health and contact and date on his/her general practitioner. Usually the question about use of tobacco, alcohol and drugs is included in that questionnaire. The insured person is obliged to answer honestly. If the answers are not true or are incomplete the insurance company has a right to annul the insurance contract, or if the contract has been signed, the insurance company has the right to decrease the amount insured or not to pay the entire sum of insurance.

In connection with the question about use of drugs, insurance companies sign the contract when insured person declares in the questionnaire that he/she doesn't use drugs since more than five years and after an examination of his/her health is satisfactory for insurance company. If the period of drug use is lower than five years the contract is usually not signed by insurance company.

The insurance company has a right to examine the health of the insured person before the contract is signed as well as during the duration of contract. The insurance company examines reports from medical institutions where the insured person is treated or insured person is obliged to visit the doctor of the insurance company. I didn't receive any kind of information that the contracted doctor tested the insured person specifically for drugs.

Finally, in the Slovak Republic there are two international reinsurance and financial services groups: Munich Re Group and Swiss Re. These groups reinsure the majority of Slovak insurance companies and define for them common standards which are incorporated into the general insurance conditions. These standards have an international character which are common in other EU countries.”

2. Greece

“The only legal text of any possible interest here is Law No. 2472/1997 on the protection of personal data. This legislation ensures the protection of individuals' private lives, but it also comprises provisions on the rights of individuals' vis-à-vis insurance companies. The Law can only be relied on by analogy and by interpretation.

Insurance companies ask individuals applying for insurance to fill in a questionnaire on their state of health. The questionnaire comprises questions on drug addiction. Only elderly people are required to take medical examinations in order to establish their state of health. There has never, to our knowledge, been any legal dispute between insurance companies and individuals.”

3. Sweden

“The main principle in Sweden is that within health and medical care secrecy should be maintained regarding information about the health of an individual or other personal information, if it is not clear that this information can be revealed without causing negative consequences for said individual or next of kin. (Source: Secrecy Act; SFS 1980:100, chapter 7, § 1c).

Swedish insurance companies usually require a potential customer to fill out a declaration of health upon signing an individual's personal insurance. With a completed and signed declaration of health, the customer gives the insurance company a "general power of attorney", which makes it possible to obtain information about him or her. This "power of attorney" gives its holder the right to take certain measures (judicial actions) on behalf of the principal and there are no limits regarding time, nor care provided. If the information in the declaration of health is such that the risk assessor at the insurance company judges that additional information is needed, it will be obtained through medical records, doctors' assessments and information from the Swedish Social Insurance Agency. The insurance company may keep the information obtained from medical records, doctors' assessments, the Swedish Social Insurance Agency, etc. even if the customer cancels his or her insurance or stops paying for it. According to existing regulations companies have to keep this kind of information for at least ten years after the customer's death and many companies keep this kind of delicate information about the individual for an even longer period than that. The National Board of Health and Welfare maintains that the manner in which insurance companies currently use "general powers of attorney" needs to be curtailed through a law or regulation.

At the Swedish Ministry of Justice, an investigation is supposed to be underway which is to look at the regulatory framework regarding the possibilities of insurance companies obtaining medical information about (potential) customers.

In addition: The Swedish Financial Supervisory Authority oversees the companies in the financial market. The authority functions, among other things, as the national watchdog of 3700 financial companies, including insurance companies."

4. Hungary

"Regarding the question by the Pompidou Group Platform on Ethical Issues and Professional Standards on the questions raised by the drug testing introduced by insurance companies for the purposes of life, health and other insurance contracts, we can provide you with the following answers.

1. Copies of relevant legislations. Please find attached the English version of Hungarian Criminal Code (Btk.) and the Hungarian Civil Code (Ptk.). Possession, acquisition etc. of illicit drugs (not use of drugs) is considered a criminal act in Hungary based on the Btk. 282.§ (1). The rules and regulations regarding insurance companies can be found in the Ptk. 560-566.§ paragraphs.

Regarding interpretation of the Civil and Criminal Law we can state the following:

1. Illicit drug use is a criminal act in Hungary.
2. Data on drug use is a personal data protected by the Law on Data Protection (Avtv. 2. § 2.b), more specifically in this case it belongs under insurance privacy by the Law on Insurances and Insurance Companies (Bit 153.§).
3. According to the Ptk. 205.§ (3), the insurance company has the right to assess health risk factors relevant to the health or accident insurance contracts.
4. If the insured denies to undergo parts of assessments prior to the signing of the contract, the insurance company has the right to deny the signing of the contract based on the lack of cooperation. This can be true of drug tests.
5. In case of a positive test the insurance company may not report this to the police as it would be a criminal act (Btk. 177/A.§). In case of a legal request by the prosecutor or the police it has to provide information.

6. If the insured lies to the insurance company on questions related to drug use when it was asked, the company may deny paying in cases caused by those conditions that were withheld at the times of assessing them (Ptk. 540.§ (3)).

2. Practice. We do not know of any literature or research in this field, what we could do is that we called several insurance companies. The answers were all the same by the different companies. There are different life insurance packages. The more valuable, or more costly the insurance is, the more the issue of drugs comes into focus. At the lower levels there is no question regarding drugs. As you go higher there are health questionnaires that include questions on present and/or previous drug use. At even higher levels there is a questionnaire plus blood and/or urine samples for the purpose of detecting traces of drugs in the body.

We have no information on the scope of this practice, however all the companies said on the phone that when the insurance is costly they definitely do testing.

We do not have any information on the frequency with which courts are involved in the resolutions of disputes (we do not know of such a case)."

5. Luxembourg

"Further to your request for information on practices and legislation on the role played by private insurance companies in drug testing in the workplace, we would like to submit the following information:

- drug testing is not explicitly included among the legal obligations of insurance companies;
- as an example of common practice for life insurance policies (general conditions), insurance companies reserve the right to ask physicians having treated the insured person for any additional information required for assessing the circumstances and causes of claims;
- insurance companies must comply with the Law of 2 August 2002 on protection of individuals vis-à-vis personal data processing;
- we have no data on the number of cases submitted to the courts on this sensitive subject.

The subordinate national supervisory agency is the *Commissariat aux Assurances* (Insurance Commission). This public body operates under the authority of the Ministry of Finance and the Budget, has a separate legal personality from the State and enjoys financial independence. For further information see <http://www.commassu.lu>."

6. Norway

“We have no information indicating that Norwegian insurance companies use drug testing. When a person wants to take out insurance he/she has to fill in a form on personal statement of health including if he /she uses or has used drugs. According to the insurance act the insurance companies can only ask for information of relevance to their evaluation of the risk. The insurance company can ask the insured for permission to obtain relevant information from health personnel and others who can have relevant information. A licence from the Data Inspectorate is required for the processing of sensitive personal data (health information).”

7. Portugal

1. Legislation/regulations

The Portuguese statutory texts governing insurance contracts in general and life and health insurance contracts in particular comprise no specific provisions on drug testing for persons wishing to take out an insurance contract. The main applicable general prescriptive provisions are as follows:

1.1 Law No. 46/2006 of 28 August 2006, Article 4 c), prohibiting insurance contracts discriminating against persons on ground of disability or aggravated health risk;

1.2 Law No. 12/2005 of 26 February 2005, Article 12, prohibiting insurance companies from subjecting applicants for insurance contracts to genetic testing;

1.3 Law No. 12/2008 of 12 March 2008 (*), Article 6, prohibiting insurance companies from using the applicant's sex as a factor in calculating the insurance rates and setting out the conditions under which gender differentiation is acceptable (on the basis of “actuarial data” and “relevant and accurate statistics”);

1.3 Legislative Decree No. 72/2008 of 16 April 2008, prohibiting discriminatory practices in insurance contracts and detailing such discriminatory practices (against persons with disabilities and in cases of aggravated health risks – Article 12), as well as the conditions and procedures applicable to medical examinations, where provided for (Article 178);

1.4 Statutory Provision No. 8/2008-R of 6 August 2008, issued by the Portuguese *Instituto de Seguros*³ (*), laying down the conditions under which insurance companies can provide for “differential” insurance rates in their contracts.

2. Practices⁴

2.1 In life insurance contracts in which risk is a factor, insurance companies usually require applicants to fill in a preliminary questionnaire. The latter, especially where the amount of the contract exceeds a certain threshold (€ 50 000), comprises questions on drug-taking (type, quantity, frequency and date of the last consumption). Applicants answering these questions in the affirmative must go on to fill in a second, more specific questionnaire, which is provided by the insurance and reinsurance companies in such cases, usually immediately followed by a series of tests.

³ National agency responsible for regulating and supervising this sector.

⁴ Information supplied by the *Instituto de Seguros*, collected under a survey of insurance companies with authorisation to operate in Portugal.

2.2 The information supplied by insurance companies on the consequences of such a situation for the applicant (answering the specific questionnaire and taking the tests) is insufficient (case-by-case examination and, sometimes, consultation by the insurance company of the reinsurance companies' rate-setting registers).

(*) These two standard-setting texts transpose Directive 2004/113/EC of the Council of 13 December 2004 into Portuguese law.

8. Croatia

“About the questions raised by the drug testing introduced by Insurance Companies for the purpose of life contracts I would like to inform you that in Croatia there is no regulation and practice about this topic. I contacted a few Insurance companies, and according to the information they have given us, they do not pursue drug testing before a person takes out a life insurance contract.

When a person wants to take out an insurance policy, he/she has to complete a questionnaire. One of the question is about the condition of health, diseases (if there any) and a question: “Have you ever regularly used or you are now using alcohol or other substances, or medications”.

Insurance companies do not check authenticity of answers, because they assume the answers are truthful. People who want to take out an insurance policy for more than 30.000 Euros or in case they are older than 60 years have medical examination (but doesn't include drug testing). When an insurance company receives a claim payout, in the case of death or in the case of accident – the medical documentation/or a police report/ about cause of that condition – and if it is caused by drug use could be a good reason not to pay out an insurance benefit.”

9. Ireland

“Your first question requested a copy of any legislation or standards in relation to drug testing by insurance companies for the purpose of life, health and other insurance contracts. I have made enquires from the Department of Finance and the Financial regulator here in Ireland. They have informed me that they are not aware of any such legislation, regulations or practice in this area in Ireland.

In relation to your second question on any reliable information that is available about the practices and their scope adopted by the insurance companies, I contacted the Irish Insurance Federation (www.iif.ie) who refer to leaflets on Applying for Life Assurance which they stated deal with the issue. These leaflets are available at ^a..link <http://www.iif.ie/ConsumerInformation/LifePensions/Protection/tabid/139/langage/en-GB/Default...>”

Summary and observations

1. Where legislation and regulations are concerned, the following are generally deemed sensitive:

1.1 before acceptance of the contract:

1.1.1 questions concerning the obtaining and protection by insurance companies of information relating to the situation and state of health of the applicant for insurance, as well as the conducting of additional examinations for the same purpose;

1.1.2 questions concerning decisions either to accept or refuse insurance or to increase the rates;

1.2 after signing the contract:

1.2.1 the consequences (obligations and rights) of accepting the contract, including the insurance companies' right to refuse to pay out in the event of an accident.

The fundamental rights to respect for private life and non-discrimination are relevant in this context.

2. In the specific field of drug testing⁵, the following findings have been made:

2.1 **overall**, none of the States have any legislation/regulations or specific provisions on testing (Ireland, Croatia, Portugal, Luxembourg, Greece, Slovakia and Sweden);

2.2 **several** of the countries have legislation which explicitly or implicitly entitles insurance companies, in certain situations:

- to examine the state of health of an applicant for insurance of an insured person in the event of accident and, in this context, to conduct tests (Greece, Hungary, Portugal, Slovakia, Croatia, Sweden and Luxembourg);
- to increase the rate applied (in the case of alcohol and drug users) (Norway and Portugal);

2.3 **other** countries have legislation which entitles them:

- to refuse to sign the contract (where the customer refuses to co-operate) (Hungary);
- to refuse, in the event of an accident/death, to pay out where the insured person has supplied inaccurate/erroneous information (Hungary and Slovakia) or where these events were the result of drug-taking (Croatia);

2.4 **some** countries have legislation which:

- confines the information requested by insurance companies exclusively to risk evaluation (Norway);
- specifies the situations in which an increase in (or a differentiation of) the rate is possible (Portugal);
- specifies the conditions to be fulfilled for conducting medical examinations (where these are provided for) (Portugal).

Protection of fundamental rights vis-à-vis the legitimate interests of insurance companies manifestly varies from one State to another. In other words, the balance which States have struck between protecting citizens' fundamental rights and defending the legitimate interests of economic operators diverges considerably.

The protection of sensitive personal data is, in all cases, explicitly guaranteed by law.

3. In connection with the **practices** adopted by the countries in this sample, and with due regard to the fact that most available information comes from insurance companies,

3.1 broadly speaking, the questionnaires comprise questions on alcohol consumption and drug-taking;

3.2 medical examinations, including drug testing, are commonly conducted, either where the insured amount exceeds certain limits or where the applicant is elderly;

⁵ Unspecified, embracing screening tests and blood and urine sampling.

3.3 the refusal to insure, suspension of the insurance contract and increased rates are common where the applicant is considered as a current drug-taker, as is the refusal to pay the amount insured (in the event of accident or death) if drug testing proves positive;

3.4 a number of countries generally conduct an examination of the insured person's state of health during the period covered by the contract.

Some information sources have indicated that, alongside the major disparities in protection of the fundamental rights of citizens by the States and the balance struck between the exercise of these rights and legitimate private economic interests, there is a *deficit* in regulation and control of (wrongful) practices by insurance companies. Given that such practices are generally dictated by **reinsurance** multinationals, it would be useful if

- international and regional co-operation bodies such as the Council of Europe could deal with these questions from the human rights protection angle;
- the Pompidou Group could promote awareness of this issue in its field of action.

Lisbon, 15 July 2009
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