News & Views

Risk Assessment vs. Right to Privacy: The Access to Health Information on the Insurance Candidate through Questionnaires and the Right to Privacy

Maria Inês de Oliveira Martins*
Faculty of Law, University of Coimbra, Portugal

Abstract
The need of private insurers for information on the candidate’s health risks is recognized by the law, which places pre-contractual duties of disclosure upon the candidates. When the risks are influenced by health factors, e.g. in the case of life- and health insurances, it implies the provision of health information by the candidates, who thus voluntarily limit their right to privacy. This consent, however, often happens in a context of factual coercion to contract. Next to this, from a legal standpoint, the collection of personal information must respond to the principle of proportionality. Against this background, this article assesses the compatibility of questionnaire techniques that rely on open-ended health related questions with the right to privacy, as protected by Portuguese and international law. It then analyses the extent of pre-contractual duties of disclosure as defined by the Portuguese Insurance Act, which requires the candidate to volunteer all the relevant information independently of being asked for it. In doing so, the article also refers to some other European countries. It concludes that the relevant Portuguese legislation is incompatible both with Portuguese constitutional law and with international law.

Keywords
private insurance; right to privacy; health information; insurance questionnaire; informed consent; principle of proportionality

1. Introduction: The Essentials of the Problem
The economic sustainability of the activity of private insurance companies is closely connected with their ability to assess correctly the risks to be covered. The assessment aims, first of all, at determining the value of the sums the insurer will have to pay in the future. Secondly, it serves the diminution of risk asymmetry, thus avoiding adverse selection phenomena. Since the insurance candidate is closer to the person (who may be the candidate himself) or goods upon which the risk impends, he/she tends to know more than the insurer about the circumstances

*) Acknowledgement: I would like to thank Prof. Dr. Henriette Roscam Abbing for her valuable and thorough advice on this manuscript.
that influence the contract. This leads to the fact that the subjects most willing to take out an insurance contract — and who thus appear as candidates to insurance — are those most likely to represent higher risks.

Here lies the possibility of adverse selection: in the fact that the market forces select the potential contractual partners in a way that is adverse to the interests of the insurer. To avoid this phenomenon, the insurer must prevent the occurrence of market selection, which requires him to select himself the risks that he will cover, and set the respective premiums. In order to avoid adverse selection, the insurer has interest in gathering as much relevant information on the candidate’s situation as possible, so he can set premiums accordingly. When the risk to be insured is dependent upon the health conditions of the candidate — as is the case with health, life or dependency insurance — such a corrective selection implies the gathering of information concerning the health of the candidate. The insurer can then basically make use of two information collection methods: on the one hand, he can collect information directly from the candidate, by the means of insurance questionnaires or by *ad hoc* medical examination; on the other hand, he can access information previously collected on the candidate and kept by other entities, namely, by health institutions.

The collection of information cannot, however, be pursued at any cost. Firstly, because health information is entailed within the sphere of privacy of the candidate. Additionally, because the applicable law may not admit some groups facing aggravated health risks to be denied access to insurance coverage that represents an essential social good.

Today, subjects more and more depend on private insurance to access housing (credit life-insurance), health care (health insurance) and social security (life insurance, dependency insurance, disability insurance). The exclusion from insurance can thus mean the same as social exclusion. Even when there is not a legal obligation to buy insurance, a powerful factual coercion may exist forcing the subjects to acquire it.\(^1\) Since the collection of health information appears as a condition of the access to insurance, there is a growing “awareness that medicine is increasingly becoming an instrument for the distribution of “social goods” outside health care, when they become scarce”.\(^2\)


\(^{2}\) We quote from the Report “Medical Examinations preceding employment and/or private insurance: a proposal of European guidelines”, elaborated by a Committee of Experts near the Council of Europe and published in S. Gevers, “Medical examinations preceding employment and/or private insurance: a proposal for European Guidelines”, *European Journal of Health Law* 7(2) (2000) 145-172, p. 149. This Report shall henceforth be referred to as the “1999 Report”. We should add here that though the quoted statement refers only to medical examinations preceding insurance, the same reasoning can be applied to already existing health information on the candidate, since it often results from previous medical examinations. 1999 Report elaborates guidelines concerning the use of medical examinations, in particular for
Within this framework, and with regard to the national and international law applicable in Portugal, this paper shall focus on the tension between the right to privacy and the need for a correct risk assessment, analysing the limits that the right to privacy of the candidate can impose on the health information collection by the insurer. We shall in particular deal with the problems raised by the collection of information directly from the candidate by means of an insurance questionnaire. The specific questions raised by the use of genetic information, since they deserve a special and separate legal treatment, are hence excluded from the scope of the investigation.3

2. Right to Privacy and Insurance Risk Assessment

2.1. Right to Privacy v. Freedom of Economic Initiative

The aspect of the right to privacy with which the collection of information by the insurer can specifically interfere is what can be referred to as “informational self-determination” — that is, the right that certain aspects of the life of the person remain unknown (to others and also to him- or herself, as the informational self-determination co-involves both a right to know and a right not to know certain aspects of one’s own life) and the right to control the knowledge that others have of his or her life. Under Portuguese law, this right is directly protected by Articles 26 of the Portuguese Republic Constitution and 80 of the Portuguese Civil Code. This right is accompanied by other specific rights, which function as its guarantee.4 For what matters here, that is the case of the right to protection of personal data, as set out in Article 35 of the Portuguese Republic Constitution and in the Law on Protection of Personal Data (LPPD).

Under international law applicable in Portugal, the protection of the right to privacy sometimes appears as a feature of a right to private life conceived in a broader sense. That is the case with Article 12 of the Universal Declaration of Human Rights (UDHR), Article 17 of the International Covenant on Civil and Political Rights (ICCPR), Article 8 of the European Convention on Human Rights (ECHR) and Article 7 of the Charter of Fundamental Rights of the European Union (CFREU), which protect the right to privacy or private life in similar terms. As the wording of the European Court of Human Rights (ECtHR) goes, employment and insurance purposes. It sustains that the Council should develop a Recommendation adopting those guidelines. That Recommendation has not, though, so far been adopted.

3) See Arts. 11 and 12 of the Oviedo Convention and its Protocol concerning Genetic Testing for Health Purposes, of 27 November 2008; in Portugal, this issue falls under Law 12/2005, of 26 January 2005, which forbids insurance companies from requesting or using any genetic information concerning their present or future clients.

this right should not be limited to “an ‘inner circle’ in which an individual may choose to live his personal life as he chooses and to exclude entirely the outside world not encompassed within that circle”, but comprises also, among other aspects, the right to personal autonomy and to self development and the rights to physical and moral integrity, touching multiple aspects of the subject’s physical and social or even professional identity; the right can inclusively be held by moral persons. In narrower terms, the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (Oviedo Convention) protects the feature of the right that matters most in our analysis: the right to private life in specific connection with information regarding the health of the person.

The protection of personal data is the subject of the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Personal Data Convention), of 1981. It is furthermore addressed in as far as health information is concerned by two soft law instruments: Recommendation of the Committee of Ministers of the Council of Europe on the protection of medical data, no. 5, of 13 February 1997 (Recommendation 97(5)) and Recommendation of the Committee of Ministers of the Council of Europe on the protection of personal data collected and processed for insurance purposes, no. 9, of 18 September 2002 (Recommendation 2002(9)). Under EU law, the protection of personal data is recognised as an autonomous fundamental right, assured by Articles 8 of the CFREU and 16 of the TFEU. It has been concretised by the “Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data” (Directive on Personal Data, transposed to Portuguese law by LPPD).


6) See for instance ibid. pp. 1096-1097 and case law quoted there. Despite the wording differences between ICCPR and ECHR — for instance, the first refers to “privacy” whereas the second refers to “private life” —, the Human Rights Committee does not stray very much from the ECtHR understanding, as quoted above — see case law quoted on W. Kälin and J. Künzli, The Law of International Human Rights Protection (Oxford: Oxford University Press, 2009), pp. 382-392. Art. 7 of the Charter of Fundamental Rights of the European Union (CFRUE) also refers to “private life”; in Art. 52, the Charter explicitly states that its precepts corresponding to those in ECHR should be given the same meaning as these later ones.

Both national and international instances agree that health-related information pertains to the nucleus of privacy protection, which not only generates abstention duties for the States, but also positive duties vis-à-vis the creation of conditions for the protection of this right, even in the relationships between private entities. 8

The regulation of health data as part of personal data protection can be seen as a consequence of this approach. In fact, under both the Personal Data Convention, EU law and Portuguese constitutional and infra-constitutional (LPPD) law, health information benefits of the status of data from a special category, or of sensitive data, the processing of which is in principle forbidden.9

The special protection that private life deserves in regard to health information is determined by three sets of reasons. It lies first of all in the dignity of the person, who should be treated as a subject, and not as a “simple object of information”.10 Secondly, it serves a collective interest, namely, the reliance on secrecy by the health professionals, which is essential for the proper functioning of the health system.11 Thirdly, breaches of professional secrecy may deter people from seeking medical assistance, thereby posing a threat to their own health as pointed out by the ECtHR in Z. v. Finland.12

The insurer’s interest in a correct risk assessment finds protection, at fundamental rights level, in those norms that protect the freedom of economic initiative — mainly, Article 16 of the CFRUE and Article 61 of the Portuguese Republic Constitution; it is specifically laid down in the Insurance law.

The balancing of the rights of the insurer and the rights of the insurance candidate must be kept in mind while analysing both the insurance practices and the norms applicable in this field.

---


9) See Article 6 of the Personal Data Convention, Article 8 of the Directive on personal data, Recommendation 2002(9) of the Council of Europe, point 4.6, Article 35, no. 3, of the Portuguese Republic Constitution and Article 7 of LPDP.

10) Gomes Canotilho and Vital Moreira, supra note 4, p. 551.


12) ECtHR has considered, in Z. v. Finland, 25 February 1997, no. 22009/93 (available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58177) that “[r]especting the confidentiality of health data […] is crucial not only to respect the sense of privacy of a patient but also to preserve his or her confidence in the medical profession and in the health services in general. Without such protection, those in need of medical assistance may be deterred from revealing such information of a personal intimate nature as may be necessary in order to receive appropriate treatment and, even, from seeking such assistance, thereby endangering their own health and, in the case of transmissible diseases, that of the community”; this jurisprudence has been followed in MS. v. Sweden, 27 August 1997, no. 20837/92 (available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58177).
2.2. Collection of Health Information through Questionnaires

The underwriting of insurance is, as mentioned above, based on the collection of information regarding the risk to be covered. Since the candidate has more information than the insurer regarding the circumstances that may influence the risk, much of this information is provided by the candidate himself, upon request of the insurer. Here, the concept of “good faith” plays a very important role, placing upon the candidate a pre-contractual duty of disclosure of the circumstances that are relevant to the assessment of the risk.13 Depending on the legal system, this duty can be fulfilled in one of two ways: either by answering the relevant questions posed by the insurer — “duty to answer system”, or “system of closed questionnaire” — or by spontaneously providing all the relevant information, besides the one asked for in the questionnaires eventually presented — “spontaneous declaration system”, or “system of open questionnaire”.14 As we shall see below in more detail, the Portuguese system belongs to the latter.

The non-fulfilment of this duty, even when due to mere negligence on the part of the candidate, has consequences upon the coverage provided. Under Portuguese law, when the insurer proves that he never takes out contracts related with the risk whose circumstances were omitted or incorrectly disclosed, he can terminate the contract and refuse to cover an insured event meanwhile occurred. Otherwise, the insurer can condition the continuation of the contract to a modification of its terms (giving rise to a higher premium or to the exclusion of risks); if the insured event meanwhile occurs, the sum paid is then reduced in proportion to the difference between the premiums paid and the premiums which would be due in case of a correct and complete disclosure.

The practical effects of this regulation are foreseeable. As the candidate does not know — and many times does not understand — the actuarial15 criteria

---

13) Thus, for instance, Steering Committee on Bioethics, Council of Europe, supra note 8, p. 6.
15) “Underwriting is based on the knowledge and experience of underwriters and medical doctors who give their evaluation on the basis of ratings suggested in the underwriting manuals. Underwriting manuals are up-to-date, evidence-based rating guidelines suggested for the assessment of different risk factors. These guidelines are usually produced by reinsurers using data from clinical and insurance literature, as well as the findings of experience studies analysis” — Steering Committee on Bioethics, Council of Europe, supra note 8, p. 10.
which determine the amount of the premium and fears that, if he/she does not disclose enough information, the insurer will not pay the insured sum or will pay it only in a reduced amount, the candidate can be prone to over-disclosing information. That means, when applied to health information, the tendency to provide more health information than necessary for a correct assessment of the risk.

The consequences of the breach of this pre-contractual duty are different in other European countries. Some apply a particularly severe sanction, corresponding to the “all-or-nothing principle”, which determines that “the insured loses all insurance cover for the insured event even if the non-disclosure was innocent or the non-disclosure had no relation to the insured event”.16 That is still the case, for instance, in the law of England, Wales (18(1) UK Marine Insurance Act 1906), Ireland and Scotland. However, with the entry into force of the Consumer Insurance (Disclosure and Representations) Act 2012, expected to take place on March 2013, the remedy applicable will be, in case of contracts with consumers, a proportional reduction of insurance money.

However, legal systems most usually adopt a mixed approach on this matter. The “all-or-nothing principle” is for instance followed by German law, but only to a certain extent, since it “[limit[s] its scope by requiring gross negligence (…) of the breach and a causal link between the non-disclosure and the insured event (…)”. The all-or-nothing principle is furthermore precluded if the insurer would, nevertheless, have concluded the contract, albeit under different conditions, if he had known the non-disclosed circumstances” (19, paras. 2, 3 and 4 of the Insurance Contract Act). The Dutch Civil Code also applies the all-or-nothing approach, but only (with exception of the cases of fraud) if the insurer, had it been aware of the true state of affairs, would not have concluded the insurance contract at all (Articles 7:929 and 7:930). This does not part much from the system of the Portuguese law, as described above. Other European countries have adopted a proportional reduction of insurance money, though denying this protection to the fraudulent applicant. That is partially the case of Portuguese law, as well as, for instance, the case of French (L. 113-9 Code of Insurance) and Belgium (Article 7 of Insurance Contract Act) laws.17

In the following sections we will illustrate how the method of collection of information can collide with the right to privacy of the candidate. That will be done by firstly examining the legitimacy of certain questioning practices (2.2.1.),


17) See ibid., pp. 83-85. The system of the Principles of European Insurance Contract Law, as proposed by the Project Group “Restatement of European Insurance Contract Law” (PEICL) also adopts a mixed approach, allowing the insurers to terminate the contract only when they would not have concluded the contract if they had been fully and accurately informed or when the parties to the insurance contract are unable to agree a reasonable variation of the contract (Article 2:102). The PEICL provide a model regulation of the insurance contract, functioning as an instrument that is optional to national law. See ibid., ‘Introduction,’ and pp. 81-83.
and then the validity of a “spontaneous declaration system”, or “system of open questionnaire” like the one set out in Portuguese law (2.2.2).

2.2.1. Right to Privacy v. Open-Ended Questions

Please indicate any disorders or illnesses, deformities or problems that are not explicitly stated above.

Consultation Document on Predictivity, Genetic Testing and Insurance, Steering Committee on Bioethics of the Council of Europe

As stated above, normally the insurer makes use of an insurance questionnaire presented to the candidate, who must then provide information in accordance with the questions posed. In order to extract from the candidate as much information as possible, many questionnaires contain open-ended questions, such as: “are there any other hazards we should know about?”; “please indicate any disorders or illnesses, deformities or problems that are not explicitly stated above”; or “have you in the last five years suffered from any illness, health disturbance or accident besides the ones identified above”.

The second example is taken from the consultation document issued by the Steering Committee on Bioethics, which alerts to the obvious dangers of open-ended questions: the danger of disclosure of non-relevant information. Faced with questions such as above transcribed, the candidate who has no specific medical knowledge, who does not have access to the actuarial criteria followed by the insurer in the risk evaluation and who wants to make sure that the insured sum is paid in case the insured event occurs will tend to disclose every fact concerning his health that he is aware of. He is hence likely to disclose information that the insurer would not need to know of in order to assess the risk in cause.

One could however argue that the providing of this extra information is based upon the free consent of the candidate. The candidate himself provides information while answering the question: he thus consents on the disclosure of private information, voluntarily restricting his right to privacy. It must therefore be discussed whether the mere consent of the candidate is enough to make the disclosure legitimate.

---


19) “Considering in particular the sensitive nature of health-related data, this legal duty should however not put the applicants in a position where, for example through open-ended questions, they end up disclosing information that are not relevant to the insurance contract”, Steering Committee on Bioethics, Council of Europe, supra note 8, p. 11.
Many of the legal instruments quoted above specifically refer to the consent of the person as a legitimate ground for the limitation of the right to privacy, even regarding the special field of sensitive data.\textsuperscript{20} As a limitation of the right to privacy, such consent must be set forth by law;\textsuperscript{21} it must in addition be freely given, specific, informed and, in the case of sensitive data, explicit.\textsuperscript{22}

In order to be specific, the consent shall refer to a concrete factual contextualization, to a specific and framed chronological actuality and to a determined operation, being as individualized as possible.\textsuperscript{23} It shall be informed: the insurer shall provide the candidate with all information necessary to guarantee fair processing, according to transparency and good faith. That includes, for instance, information about the purposes of the processing for which the data are intended, as well as on the consequences of a refusal of consent and the possible consequences of such collection/processing on the candidate’s insurability.\textsuperscript{24} The consent shall furthermore be express and directed to the treatment of personal health data, which means that it should preferentially be given by reference to contractual clauses that are separated from the rest of the contract.\textsuperscript{25}

Regarding the question of whether, for the purposes of the applicable laws, this consent should be deemed free, we should remember what we stated before on the actual condition of the disclosing candidate. The candidate is not factually free in his voluntary limitation of the right to privacy: the subsistence or usefulness of the insurance rests upon his disclosure of health data. He is under an onus to disclose the relevant health information: an onus which conditions his access to goods that do not qualify as luxury goods, but as a requisite to the satisfying of basic social needs — v.g., buying a house or benefiting from healthcare.

The acknowledgement of the factual coercion involved should not mean the rejection of the consent of the subject as a ground for the processing of data; but it does place special demands on compliance with the requirements of consent. Due to the unbalances of the relation candidate-insurer, there must be special

\begin{itemize}
\item \textsuperscript{20} That is the case of Article 35, no. 2, of the Portuguese Republic Constitution, of Article 81 of the Portuguese Civil Code, Article 7, no. 2, of LPPD, Article 8, no. 2, of the CFRUE and of Article 8, no. 2, a), of the Directive on personal data, of 4.3., c) of Recommendation 1997(5) of the Council of Europe and of 4.6. of Recommendation 2002(9) of the Council of Europe.
\item \textsuperscript{21} Articles 17, no. 1 of ICCPR, 8, no. 2, of the ECHR, 8, no. 2, of the CFREU.
\item \textsuperscript{22} See Articles 3, h) and 7, no. 2, of LPPD, 2, h) and 8, no. 2, a), of the Directive and 6.1 of Recommendation 2002(9). Article 7, no. 2, of LPPD, sets out that consent must be preceded by the permission, given by law or by authorization of the (Portuguese) National Commission of Data Protection (NCDP), for the processing of sensitive data. NCDP has however consistently considered the express consent of the data subject given during the conclusion of the insurance contract as a sufficient basis to the processing of the data, since no formal law has yet been issued on this matter — see Comissão Nacional de Protecção de Dados, supra note 11, pp. 21-22 and Comissão Nacional de Protecção de Dados. 2006. Deliberação 72/2006. www.cnpd.pt, retrieved 30 May 2012, p. 4.
\item \textsuperscript{23} Ibid., p. 4.
\item \textsuperscript{24} Thus, Arts. 10 of the Directive on personal data and 10 of LPPD. See also ibid., pp. 4-5 and Steering Committee on Bioethics, Council of Europe, supra note 8, p. 17.
\item \textsuperscript{25} Comissão Nacional de Protecção de Dados, supra note 22, p. 5.
\end{itemize}
surveillance to ensure that the disclosure of information is lawful, as freely given as possible, specific, informed and explicit and that it does not go beyond what is necessary to allow it to fulfil its purpose: to allow the insurer a correct risk assessment. In fact, it is not a case analogous to those where the person determines the boundaries of his/her sphere of privacy, freely choosing the aspects of his/her life he/she wishes to make public. Here, the consent’s role is to justify an interference in the sphere of privacy of the candidate — which remains his/her sphere of privacy — which otherwise is illegal. The intrusion is therefore only justified as long as it is proportionate to the purpose of evaluating the risk. Which goes to say that in these situations the principle of proportionality should have a special importance as a safeguard of the right to privacy. Since the principle of informed consent demands, as referred to above, that the data subject is informed as to the purposes of the data processing, it can be instrumental in guaranteeing compliance with the principle of proportionality.

A similar view is shared by several instances that, while acknowledging the context of factual coercion, assert the pivotal role of informed consent as a legitimising ground for a proportionate restriction of the right to privacy. The Portuguese National Commission of Data Protection (NCDP), Article 29 Data Protection Working Party and the Steering Committee on Bioethics of the

---

26) Stressing the difference between the shaping of one’s protected sphere of privacy and the limitation of the right to protection of the sphere of privacy, P.M. Pinto, “O direito à reserva sobre a intimidade da vida privada”, Boletim da Faculdade de Direito da Universidade de Coimbra 69 (1993) 479-586, pp. 560-561.
27) We refer to the principle of proportionality as it is construed by the Portuguese doctrine. After the German doctrine, Portuguese authors ascribe three dimensions to the principle of proportionality, thus going beyond the dimension of “necessity” of the measure. The first dimension acknowledged concerns adequacy or suitability, meaning that the measure adopted must be suited to achieve the purpose intended; the second concerns necessity and means that the subject should be affected by the measure in the lesser extent possible, that is, the disadvantage that he suffers should be as limited as possible; the third concerns proportionality stricto sensu and implies that the measure adopted must not impose burdens or cause harm to other legitimate interests which are disproportionate to the importance of the objective achieved (see J.J. Gomes Canotilho, Direito constitucional e teoria da Constituição, (Coimbra: Almedina, 2003), pp. 267 and ff.). The ECJ also usually integrates the three referred stages in a proportionality inquiry, though the third stage is sometimes consumed by a negative conclusion in the first or in the second stage and other times appears blended with the second stage — see P. Craig and G. de Búrca, EU Law, Text, Cases and Materials (Oxford: Oxford University Press, 2008), pp. 544 and ff.
28) Comissão Nacional de Protecção de Dados, supra note 22, p. 5.
Council of Europe\textsuperscript{30} have unambiguously sustained the principle that even while relying on the consent of the candidate, the data collected by the insurer have to be proportionate to the purpose of risk assessment. Closer to what we defended above, NCDP has considered that economic and informational inequality between the insurance contracting parties, as well as the actual situation of need faced by the insured regarding the celebration of the contract, demand a special surveillance of the issuing of the consent and also of the insurer’s duty to inform.\textsuperscript{31} Both the approach followed by the Dutch legislator in the Law on Medical Examinations of 5 July 1997, and the 1999 Report regarding medical examinations preceding insurance, pursue a similar line of reasoning.\textsuperscript{32}

Following the European standard in this respect,\textsuperscript{33} the principle of proportionality that parameterises the limitations of fundamental rights — Article 18, no. 2, of the Portuguese Republic Constitution — finds expression in Article 5, no. 1, c) of LPPD, which sets out that personal data processed should be adequate, relevant and not excessive regarding the ends for which they are collected.\textsuperscript{34}

We can now close the circle we started above. We have sustained that open-ended questions pose a danger of over-disclosure of health information. That

\textsuperscript{30} Steering Committee on Bioethics, Council of Europe, supra note 8, p. 17. According to the Committee, “the information asked by insurance companies must be necessary for insurance purposes. The principle of necessity requires that health-related data only be sought if the risk presented by the applicant cannot be evaluated without the data in question. b) The data to be collected and processed must be relevant. The principle of relevance requires that there be a clear, well-established link between the health data gathered by the insurer and the risk to be covered. 84. The principle of proportionality, complements these requirements by ensuring the adequacy of the means (collecting and processing health-related data) to the aim pursued (risk assessment), with due regard for the legal rights involved (in particular the right to privacy and the closely related “right not to know” but also other fundamental rights such the right not to be discriminated against). The principle of proportionality would also be relevant for determining the tool to collect data (e.g. questionnaire or medical examination).”

\textsuperscript{31} Comissão Nacional de Protecção de Dados, supra note 22, p. 4

\textsuperscript{32} Gevers, supra note 2, pp. 148 and 159 and ff.

\textsuperscript{33} See Article 6, no. 1, c) of the Directive on personal data, Article 52, no. 1, of CFRUE, Article 8, no. 2, of ECHR, 21, no. 1, of the Oviedo Convention and point 4.1. (first dash) of Recommendation 2002(9).

\textsuperscript{34} Even if it was not for LPPD, the constitutional principle of proportionality should be deemed directly binding upon private entities — like insurers — that interfere with private rights of other entities — like the insurance candidates. Though the question of the direct effect (that is, the effect in the relations between private entities) of the norms protecting fundamental rights (Drittwirkung) is theoretically intricate, it is nonetheless generally accepted by the Portuguese doctrine that private entities that are in a relation of power towards other private entities should be limited by constitutional norms regarding fundamental rights, or that private entities should at least respect the essential nucleus of the rights of other private entities. In the quality of providers of basic goods, endowed with market power, insurers are clearly in a relation of power towards the candidates; additionally, as said above, health information should be considered to enter the nucleus of the right to privacy. Insurers should therefore be bonded by the principle of proportionality while interfering with the right to informational privacy of the candidates. See Gomes Canotilho and Vital Moreira, supra note 4, pp. 384 ff; and J.C. Vieira de Andrade, Os direitos fundamentais na Constituição Portuguesa de 1976, (Coimbra: Almedina, 2001), pp. 237 and ff.
means that open-ended questions can very easily lead to a non-proportionate disclosure of health information. Therefore, they can lead to a non-proportionate limitation of the right to privacy, which infringes the applicable legislation.

This conclusion has several corollaries. First of all, open-ended questions such as the ones quoted above should be deemed illegal under Portuguese law. By way of comparison, one should point out that for instance the Law Commission and the Scottish Law Commission have considered admissible that the insurer resorts to open-ended questions.\textsuperscript{35} Two points should however be stressed here: first, that these entities have not put the question of the admissibility regarding the problem of the right to privacy. Second, that for many years both English law and Scottish law have lived under a system of open questionnaire, at least in terms of formal law. They may therefore be less ready for such a complete change of paradigm.

Questions should, moreover, be as specific as possible. They should furthermore be clear, and not vague or complex. Otherwise, consumers unfamiliar with the terminology used will tend to provide information in excess. Questions should also be coherently ordered, to be more understandable.\textsuperscript{36} Questions should not also be placed in a way that directs the candidate to disclose information on health risks that the insurance does not cover. Take the case of health insurance that does not cover expenses concerning psychiatric disorders: if the questionnaire simply asks if the person has been seeing any doctors recently, the candidate under treatment due to depression will disclose that (non-relevant) information to the insurer. This is even more so for questions that ask about previous disorders or illnesses: if they encompass a greater time period, they should ask for more specific information.

2.2.2. Right to Privacy v. the “Spontaneous Declaration System” or the “System of Open Questionnaire”

As stated above, the Portuguese system is a “spontaneous declaration system” or “system of open questionnaire”, where the candidate has the duty to disclose all circumstances which may be relevant to the risk assessment (Article 24, no. 1, of

\textsuperscript{35} See Law Commission and Scottish Law Commission, supra note, 18, p. 54. That is also the position of the majority of the German doctrine — see U. Knappmann, “Verletzung der vorvertraglichen Anzeigepflicht”, in: R.M. Beckmann and A. Matusche-Beckmann (eds.), Versicherungsrechts handbuch (Munich: C.H. Beck, 2009), retrieved 2 September 2012 www.beck-online.beck.de, 1, § 14, Rn. 22a — but not, for instance, of T. Langheid, “VVG § 19 Anzeigepflicht”, in: T. Langheid and M. Wandt (eds.), Münchener Kommentar zum Versicherungsvertragsgesetz, I (Munich: C.H. Beck, 2010), retrieved 2 September 2012 www.beck-online.beck.de, Rn. 55, who considers that those questions, not being concrete enough, contradict the purpose of the legal regime after 2008, aiming at placing upon the insurer the risk of identifying the questions relevant to the risk assessment; similarly, Knappmann, ibid., Rn. 22a and 27. Furthermore, both points referred to in the text can, mutatis mutandis, be applied here: on the one hand, the majoritarian doctrine has not taken into account the problem of privacy and, on the other, German law foresaw, until recently, an open questionnaire system.

\textsuperscript{36} Steering Committee on Bioethics, Council of Europe, supra note 8, p. 11.
That is also for instance the case of the Belgian (Article 5 of the Insurance Act) and the Italian (Articles 1892 to 1894 of the Civil Code) systems. Differently, France (L. 113-2, 2° of the Insurance Contract Act) and Spain (Article 10 of the Insurance Contract Act) have “duty to respond” or “closed questionnaire” systems. That is also the case with German law, since 2008 (§ 19 of the Insurance Contract Act). The case of English law is more intricate. Presently, the applicable statutory law — section 18 Marine Insurance Act 1906 — imposes the “spontaneous declaration” system; however, in terms of “law-in-action”, this system is overlaid by the rules set out by the Financial Ombudsman Service, by the Financial Services Authority Rules and by the industry codes of conduct, which tend to converge in applying the closed questionnaire rule. Furthermore, following the Recommendations of the Law Commission and Scottish Law Commission, the present statutory law shall be replaced, in what concerns contracts with consumers, by the Consumer Insurance (Disclosure and Representations) Act 2012, expected to enter into force on March 2013, which abolishes the consumer’s duty to volunteer information. Finally, the closed questionnaire system is also adopted in the Principles of European Insurance Contract Law, Article 2:101.

Systems like that of the Portuguese Insurance Act, with an open questionnaire, have often been considered excessively protective of the insurer — that is the opinion, v.g., of the Law Commission and Scottish Law Commission, as well as of the German Commission appointed to the Reform of the Insurance Contract, — since they place upon the candidate the risk of the identification of the object of the duty to disclose. In case that duty is not correctly fulfilled and the insured event occurs, the insurer may be exempted from the duty to pay the insured sum, or be entitled to reduce that sum proportionally. In case the insured event occurs, the insurer will thus frequently try to prove that there was not a complete and correct disclosure of the risk.

The system of the Portuguese Insurance Act therefore overly restricts the right to privacy, since it factually compels the layman candidate to “over-disclose”. We can illustrate this statement by quoting a part of the guide elaborated by the British Financial Services Authority on the taking out of insurance contracts. It reminds people that if they don’t “disclose material facts, [their] policy may be

---

37) This Article states that “[t]he candidate shall, prior to the celebration of the contract, declare with exactitude all the circumstances which he is aware of and which he should reasonably deem relevant for the risk assessment by the insurer.”


39) See Law Commission and Scottish Law Commission, supra note 18, pp. 11 and ff.

40) Ibid., pp. 12 and ff.

41) See Kommission zur Reform des Versicherungsvertragsrechts, supra note 38, p. 307.
invalidated and [they] won’t be able to make a claim.” It then recommends: “So make sure you disclose everything, however irrelevant it may seem at the time.”

In fact, relying on a duty of the candidate to identify the relevant circumstances is in principle a greater threat to the right to privacy of the candidates than the systems that allow closed questionnaires to place open-ended questions. Moreover, the restriction of the right to privacy becomes more disproportionate when we consider that in case of group insurance, very common in life and health insurance, risk selection is of more limited relevance.

We thus find a normative contradiction between Article 24, no. 1, of the Portuguese Insurance Act and Article 5, no. 1, c), of LPPD, quoted above, that submits data collection to the principle of proportionality. In order to overcome this contradiction, we must summon norms of a higher rank — the Portuguese Republic Constitution, as well as the international norms in force in Portugal.

Article 35, no. 3 of the Portuguese Republic Constitution allows the restriction of the right to protection of personal data regarding private life when that restriction is based upon express consent. One could therefore argue that, since the candidate has given his/her consent, no further caution would be necessary to safeguard his private sphere.

But, as stated before, here the consent does not express a position of freedom of determination of the boundaries of the private sphere: it expresses an onus and functions as a justification for an interference by the insurer that would otherwise be illegal. We find a parallel in the pre-contractual relation between the employer and the person applying for a job — a relation that is regulated by Labour law. Both the later relation and the relation between the insurer and the insurance candidate are moreover often handled together in the analysis of the threats posed to the right to privacy — as, for instance, in the 1999 Report.

In what concerns the Portuguese Labour Code, the legislator has clearly not considered the consent to be enough for protection of the candidate. Under Article 17 of the Labour Code, the employer cannot demand from the candidate information regarding his private life, except when this is strictly necessary and relevant to assess the employee’s suitability to the functions, as specifically substantiated by the employer in written form. The same applies to information regarding the health or pregnancy of the candidate, which can besides only be asked for when justified by particular demands inherent to the nature of the activity. Moreover, the Labour Code has been approved by formal law of the

---

42) Cit. ap. Law Commission and Scottish Law Commission, supra note 18, cit., p. 27.
43) Thus, for instance, Gevers, supra note 2, p. 166.
44) Although the Portuguese Republic Constitution does not expressly determine the place of international conventions within the hierarchy of norms, the principle of the supremacy of international conventional law over infra-constitutional national law is commonly accepted and seems to be implied by the law on the organization and functioning of the Constitutional Court — see Gomes Canotilho and Vital Moreira, supra note 4, pp. 259-261.
Parliament, which complies with the constitutional requirements of form and competence that are mandatory to legislate in matters of fundamental rights (Article 165, no. 1, b). The Portuguese Constitutional Court, while preventively analysing the compatibility of the version of the quoted norms in the draft Labour Code, has stressed that the disclosure represents *an onus* to the candidate and that the restriction of the right to private life implied by requiring the applicant to provide information on his/her health condition is only constitutionally admissible when it complies with the principle of proportionality set out in Article 18, no. 2, of the Constitution. The Opinion of NCDP on the same case has likewise stressed the application of this principle.

The line of reasoning developed above concerning the illegitimacy of open-ended questions applies here, *a fortiori*: under the system of “open questionnaire”, it is as if all insurance questionnaires incorporated a final open-ended question, which could be phrased as “please disclose any other relevant facts non specifically questioned above”.

We thus argue that Article 24., no. 1, of the Portuguese Insurance Act, interpreted in the sense that it places upon the candidate the risk of identifying all the relevant circumstances and the duty to disclose his personal health information accordingly, infringes the constitutional regime applicable to the restriction of fundamental rights. It does so in terms of substance, since it implies a non-proportionate restriction of the fundamental right to privacy; and it does so in terms of form and competence, since it consubstantiates a restriction of fundamental rights performed by a law-decree. Furthermore, the mentioned Article infringes Articles 8 and 52 of CFRUE, 8, no. 2, of ECHR, and 10 and 26.1 of the Oviedo Convention.

3. Conclusions

The economic sustainability of the insurer’s activity often depends on a correct assessment of the risk to be covered. In accordance, the law places pre-contractual duties of disclosure upon the candidates. When the risks are influenced by health factors, it implies the volunteering of health information by the candidates, who thus voluntarily limit their right to privacy. The understanding of the context in which this limitation operates allows us to reach conclusions on the legitimacy of

---

45 We refer here to decision 306/2003 of the Constitutional Court. This decision draws extensively on decision 368/02 of the Constitutional Court, which on its turn analysed the constitutionality of Labour Law norms that submitted the workers to periodical health exams. On this case, the Court had concluded that health exams performed on the worker should undoubtedly be confined to what is strictly necessary, adequate and proportionate to verifying alterations on the health caused by the exercise of the professional activity and to determining the worker’s physical or psychological suitability to his functions. Both decisions are available in http://www.tribunalconstitucional.pt/tc/home.html.
certain insurance questionnaires techniques as well as on the extent of the duty of disclosure that the Portuguese law places upon the candidates.

First, we should consider that, as the candidate does not know — and many times does not understand — the actual medical and/or actuarial criteria which determine the amount of the premium and he/she faces a risk of loss or reduction of sum paid by the insurer in case of incomplete disclosure, in case of doubt, the candidate will tend to over-disclose information. That means, when applied to health information, the tendency to provide more health information than necessary for a correct assessment of the risk.

Secondly, it should be borne in mind that the consent of the candidate does not express his/her freedom of determination of the boundaries of his/her private sphere: the consent is often issued in a context of factual coercion of the candidate, expressing an onus and functioning as a justification for an interference by the insurer that would otherwise be illegal. There must therefore be a special surveillance to assure that the disclosure is as freely given as possible, specific, informed and explicit and that it does not go beyond what is necessary to allow it to fulfil its purpose: to allow the insurer a correct risk assessment. The principle of proportionality, foreseen in Articles 18, no. 2, of the Portuguese Constitution, 5, no. 1, c), of LPPD, 6, no. 1, c), of the Directive on personal data, 52, no. 1, of CFRUE, 8, no. 2, of ECHR and 21, no. 1, of the Oviedo Convention, has special significance as a safeguard of the right to privacy.

This brings us to the conclusion that since the insurer’s technique of resorting to open-ended questions in insurance questionnaires that can lead to a non-proportionate disclosure of health information, it amounts to a non-proportionate limitation of the right to privacy. Such a restriction of one’s informational privacy is against the law.

A fortiori, we conclude that Article 24, no. 1, of the Portuguese Insurance Act should be ruled both unconstitutional (18.°, 26.°, 35.°, 165.°, n.° 1, b)) and against international Human Rights law, when interpreted in the sense of placing upon the candidate a pre-contractual onus of identifying, him- or herself, all the circumstances relevant for the insurer and a duty to disclose his personal health information accordingly.