Legal Aspects of Group Policies and Occupational Pension Schemes in view of the Protection of the Insured.

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Summary Outline

Social security systems have been the main means of health care and pension protection in the developed countries during the 20th century, as compared to private insurance. However, during the past decades social security systems show signs of decline and are progressively replaced by private and professional insurance. This is due to several economic, social, political and other factors; to indicate only some of them: sovereign States, having abandoned their sovereign privilege to determine the volume of money printed and monetary policy in general have placed themselves in a situation of scarcity of funds and are not any more able to guarantee the financial viability of social security systems; economic and demographic developments made financial viability of social security systems far more fragile; as a result, sovereign States seem to progressively favor the development of private insurance and professional insurance schemes as an additional and supplementary mechanism to social security, which will be deduced to the basics only.

In most countries social security has some type of constitutional foundation and is associated with basic constitutional and individual rights. In some countries the Constitution explicitly refers to social security, while in other countries were the constitution makes no such express reference, social security is considered to be associated with the very basic constitutional right of human dignity. As a result, it is generally accepted that even if sovereign States progressively retreat themselves from the provision of social security, such retreat cannot be utter and complete; States will always be responsible to provide some sort of basic social security. Moreover, it is a responsibility of the State to regulate and supervise private and professional insurance.

Greece, during 2005-2010 faced the situation of financial collapse of some professional insurance schemes, which were established in late ’80 and early ’90 through collective bargaining. Such schemes were funded partially by employers as well, mainly credit institutions, who had also guaranteed to cover any deficits. The deficits were so great that threatened to vanish any capital adequacy of the employers. In such a situation, the State intervened through legislation and absorbed the collapsed professional insurance schemes, effectively by incorporating them into its social security system. This intervention was legally challenged in court on several grounds, mainly because it was considered to violate the autonomy of professional insurance. Although legal literature provided ample support and argumentation towards this direction, Greek courts have reasoned that, so long as the State is responsible to protect social security according to its Constitution, it was also entitled to intervene to professional insurance in case of financial collapse, because professional insurance was supplementary to social security and served the same needs.

Moving to issues of private law:

An interesting issue is whether some of the provision of legislation on private life insurance should also apply, i.e. by way of analogy of law, to professional insurance schemes. This question can be raised in particular in connection to provision entitling the insured to redeem its life policy and collect any accumulated funds, or in connection to provisions regarding description of risk on the part of the insured, etc. Moreover, during the past decades courts have issued abundant judgments on disproportionate general terms in life insurance policies which violated consumer protection law; does this jurisprudence apply to professional insurance schemes and their internal organization charts allocating rights and liability among the participating members? I believe that the method to be followed to respond to this issue is to trace the very nature of professional insurance. Professional insurance is destined to be supplementary to social insurance; the main

difference among social security and professional insurance is that in the later it is the sovereign State that bears the financial and investment risks of insurance, while in the later this risk is transferred to the insureds themselves. From this point of view, professional insurance is closer to social security than private insurance; hence, any association or analogy among professional insurance and private insurance should be made with great caution.

Recently, private insurance practice in Greece is facing group health care policies where the insurer is entitled to recover any allowances made during each year, plus an administration fees. This is not true and genuine insurance, though, as the insurers bears no risk at all. The Regulator should have intervened, as such policies seem to represent a major violation of the existing insurance supervision and regulation. Insurance companies are obliged to be engaged in the field of risks coverage only and only exceptionally to handle investment policies on an administrative basis.

Group policies among insurers, employers and employees may also raise issues of labor law. Failure on the part of an employer to pay insurance premium or to meet other obligation under a group policy may qualify as a breach under an employment or a collective bargaining agreement as well. Greek courts have dealt with such situations by raising a distinction among cases where under the group policy (i.e. an investment – pension policy) the investment risk was born by the insurer and cases where the insurer was acting only as the administrator of funds. Usually, it is in the former case only that a breach of an employment or collective bargaining agreement will exist.

Finally, insurance policies, social security schemes and professional insurance schemes are arrangements destined to last for a very long period of time; hence, the need of adaption to changing circumstances. All these types of policies will have to be renegotiated and amended until their maturity. It is of major importance that the legal system provide some mechanism of renegotiation and adaptation based on fairness and transparency. Private law seems unable to provide this mechanism, at least the basic principles of private law alone. Ideally, there should be a regulatory body that should intervene and approve any proposed amendment.