



## **From Premium to Deductible Payments and Related Concepts**

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### **Summary:**

This article seeks to study the contours of deductible payments in the legal regime for insurance contracts. This particularly extends to their relationships with premiums, co-payments, maximum coverage, compulsory overdrafts and co-insurance as figures close to or bearing some affinity with deductibles. Furthermore, this necessarily incorporates analysis of the different types of deductibles as well as the most relevant functions performed by the deductible framework, such as revisiting the indemnity principle, combatting moral hazard, the idea of insurance as a consumer product and the avoidance of low-value administrative costs.

**Keywords:** Insurance Contract, Premium, Deductible, Unpredictable Risk, Risk, Moral Hazard, Claim, Fraud, Negligence, Indemnity, Co-payment, Maximum Cover, Mandatory Overdraft, Co-insurance, Salvage Expenses.

### **1. General considerations**

Today, we shall approach the deductible and its related figures after having addressed premiums and the termination of contract due to non-payment on an earlier occasion. In fact, we are unable to grasp the scope of deductibles without reference to premiums; hence, explaining such a sequence with consideration of the premium preceding the more circumstantial analysis of the deductible. Indeed, we are not only dealing with two costs incurred by the policyholder or insured party but we have also encountered other very relevant affinities that underpin this sequential study.

Logically, we agree study of the premium precedes, and as is clear from the Program, the deductible and its respectively related figures. Thus, after studying the premium in its various aspects, it makes every sense to now address the deductible given how that figure also helps in clarifying the emergence, *raison d'être* and variability in deductibles. In fact, just as both figures emerge from the insurance contract, it is at a moment subsequent to payment of the premium that we face the eventuality of any deductible payment. However, just as such a sequence makes sense, it is no less true that there are relevant differences between the deductible and the premium. However, in order to understand the meaning and scope of deductibles and their related items, it is important to first revisit the premium in order to clarify certain issues, particularly the attributions and types of deductible.

### **2. From Premium to Deductible Payments**

Under the Insurance Contract Act (Portuguese acronym LCS hereafter), the premium represents the consideration for the coverage agreed, including everything contractually owed by the policyholder, including the costs of covering the risk, the acquisition, management and collection costs as well as any charges related to issuing the policy<sup>1</sup>.

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<sup>1</sup> Cf. Article 51.1 LCS.

Accordingly, this is an amount payable by the policyholder to the insurer in return for a service provided<sup>2</sup>, a price as the counterpart or reverse side of the risk<sup>3</sup>, whose payment occurs at an earlier or preliminary moment<sup>4</sup> in relation to the occurrence of any eventual loss. However, this only reflects one aspect of the premium, the so-called gross premium, alongside the pure, actuarial or even risk premium<sup>5</sup>. Nevertheless, it is generally accepted that the notion incorporated into the LCS still integrates the price of risk<sup>6</sup>.

In any event, the premium, the consideration designed to cover the costs of covering the risk and naturally the negative consequences of an actual or potential event, appears as the monetary expression of the eventual occurrence of a loss<sup>7</sup>. However, as this provides the consideration for the service provided by the insurer, we are not faced with a contract based on any equivalence of services or a strictly bilateral contract<sup>8</sup>. Rather, we are faced with an aleatory, and not commutative<sup>9</sup>, contract even when controversy persists as to whether the hazard concerns one or both parties. Moreover, while there is consensus as to the uncertainty of the allocation of the counterparty<sup>10</sup>, it is nevertheless also true that we are in some cases faced with uncertainty regarding the policyholder's provisions<sup>11</sup>.

However, while the unpredictable risk and the risk are present<sup>12</sup>, they do not always coincide. Moreover, there is sometimes even divergence between them. In fact, while the unpredictable risk embodies an economic and speculative uncertainty that results from a certain agreement of wills, the risk, pure risk or risk in the strict sense, represents an uncertainty directed to the eventuality of any claim<sup>13</sup>. Therefore, while this randomness does not appear as an essential characteristic of such contracts<sup>14</sup>, the insurance also does not extend to every situation of uncertainty to which the risk corresponds. Accordingly, should the risk not extend to every situation, the insurance certainly does not cover all eventualities representing risk.

<sup>2</sup> Cf. José Pereira Morgado, "Prémio. Anotação" in *Lei do Contrato de Seguro*, 2nd ed., Coimbra, 2011, p. 264.

<sup>3</sup> See our "Pagamento do Prémio na Lei do Contrato de Seguro" in *Cadernos de Direito Privado*, no. 39, 2012, p. 3.

<sup>4</sup> In this regard, Menezes Cordeiro mentions that, according to the etymology of the term premium, payment must be made at a time prior to any assumption of risk. *Direito dos Seguros*, 2nd ed., Coimbra, 2016, p. 740.

<sup>5</sup> Cf. Margarida Lima Rego, "O Prémio" in *Temas de Direito dos Seguros*, Coimbra, 2012, p. 198.

<sup>6</sup> Cf. José Pereira Morgado, "Prémio-Anotação" in op. cit., p. 264. Accordingly, Margarida Lima Rego emphasises, with regard to the scope, the legal concept of premium includes everything contractually payable by the policyholder. Cf. "O Prémio" in op. cit., p. 199.

<sup>7</sup> Cf. Luís Poças, *O Dever de Declaração Inicial do Risco no Contrato de Seguro*, Coimbra, 2013, p. 112.

<sup>8</sup> Margarida Lima Rego maintains the lack of equivalence in the benefits arises from the analytical breakdown of the premium contents. First of all, the pure or actuarial premium, whose value corresponds to the prevailing mathematical expectations. However, there is also the risk premium, susceptible of distinguishing between the net premium and the gross premium. Cf. *Contrato de Seguro e Terceiros*, Coimbra, 2010, pp. 377 et seq. In a different sense, pointing out the special bilaterality of the insurance contract, Paoloefisio Corrias, *Il Contratto di Assicurazione: Profili Funzionali e Strutturali*, Naples, 2016, pp. 76 et seq. José Vásquez Cueto also warns of the existence of a functional bilaterality in insurance contracts. Cf. *La Obligación de Pago de la Prima en la Ley de Contrato de Seguro*, Valencia, 2007, pp. 25 et seq.

<sup>9</sup> Menezes Leitão, after considering that classification is limited to onerous contracts, considers a commutative contract to be that in which both property assignments are certain whereas in aleatory contracts, one of the property assignments is uncertain as to its existence or content. Cf. *Direito das Obrigações*, Vol. I, 12nd ed., Coimbra, 2015, pp. 184-5.

<sup>10</sup> Menezes Leitão accordingly identifies the insurance contract where, unlike gambling and betting, uncertainty arises as an attribution of the counterparty. Cf. *Direito das Obrigações*, op. cit., pp. 184-5. In a similar vein, Carlos Mota Pinto, *Teoria Geral do Direito Civil*, 4th ed., 2005, pp. 402-3.

<sup>11</sup> Therefore, Margarida Lima Rego alludes to whole life insurance, where the insurer's benefit is certain and the final amount of the premiums paid by the policyholder is uncertain. Cf. *Contrato de Seguro...op. cit.*, p. 396.

<sup>12</sup> On the presence of unpredictable risk and risk in various insurance contracts, as risk businesses, see Januário da Costa Gomes, *Assunção Fidejussória de Dívida*, Coimbra, 2000, pp. 119 et seq.

<sup>13</sup> Cf. Margarida Lima Rego, *Contrato de Seguro...op. cit.*, pp. 148-9.

<sup>14</sup> Luís Poças, despite refuting the essential nature of randomness admits this is a tendency in insurance contracts. Cf. *O Dever...op. cit.*, p. 131.

Moreover, when faced with situations of uncertainty, attention should be paid to the transformation of risk into liability<sup>15</sup> and accordingly determine the insured or insurable risk<sup>16</sup>. This naturally also reflects on the susceptibility of risk transfer<sup>17</sup> and the economic appropriateness of a particular insurance contract<sup>18</sup>.

Therefore, as risk, as the susceptibility of the occurrence of a future and uncertain event, establishes the structural framework for any insurance contract, it is naturally included in calculating the premium. In addition to exogenous reasons arising from the value<sup>19</sup>, calculation models<sup>20</sup>, the functions to be performed<sup>21</sup> and the consequences of non-payment, assessed on another occasion, there is an inevitable recognition of the highly relevant connection between risk and premium. Regarding this connection, Inês Oliveira Martins points out how not only do insurers seek to anticipate situations of risk exposure but also that the insured party faces a loss corresponding to the total value of the premium<sup>22</sup>.

However, just as a relationship exists between the risk and the premium, the dependency between the premium and the deductible is also no less true. Indeed, as the deductible represents the monetary value that, in the event of any claim, is payable by the insured party<sup>23</sup>, we may very easily understand the existence of points of contact between these two figures. This arises not only because in subjective terms the two monetary payments, the premium and the deductible, are due to the insurer but, above all, because, in objective terms, the premium amount may interlink with the exact amount or even the susceptibility to demanding the deductible. In other words, the higher the premium, the lower the deductible. And vice versa. In fact, in Anglo-Saxon terminology, this relationship reflects in the very designation. Accordingly, the term is "deductible". This is something that, as the name indicates and deserving of due acceptance, in general, the amount delivered by way of deductibles will be taken from or deducted from the amount of the premium chargeable to the policyholder.

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<sup>15</sup> Cf. José António Veloso, "Risco, Transferência de Risco, Transferência de Responsabilidade na Linguagem dos Contratos e da Supervisão dos Seguros" in *Estudos em Memória do Professor Doutor José Dias Marques*, Coimbra, 2007, pp. 280 et seq.

<sup>16</sup> On this subject, in particular on the various types of uncertainty, risk and forecast justifying insurance contracts, see Frank Knight, *Risk, Uncertainty and Profit*, New York, 1964, pp. 238 et seq.

<sup>17</sup> The topic is not always consensual. Thus, on accepting that risk is the object or cause of the insurance contract, see Giovanni di Giandomenico, *Il Contratto e l' Alea*, Pádua, 1987, pp. 150 et seq. On the contrary, clarifying the lesser accuracy of the term risk transfer, see Aldo Boselli, "Le Obbligazioni Fondamentali nel Contratto Aleatorio" in *Rivista Trimestrale di Diritto e Procedura Civile*, no. 3, 1949, pp. 598 et seq.

<sup>18</sup> For further details on these important issues, Francesco Santoro-Passarelli, "Funzioni delle Assicurazione Private e delle Assicurazioni Sociali" in *Atti del Primo Congresso Internazionale di Diritto delle Assicurazioni*, Milão, 1963, pp. 525 et seq.

<sup>19</sup> Regarding the economic reasons for increasing the value of premiums, see Rob Bourke, "Economic Justifications for Higher Prices and Premiums" in *Australian Strategic Policy Institute*, 2019, pp. 1 et seq.

<sup>20</sup> As regards the models for calculating premiums, Barry Dennis, Chionglong Kuo and Tyler T. Yang, "Rationales of Mortgage Insurance Premium Structures" in *The Journal of Real Estate Research*, Vol. 14, no. 3, 1997, pp. 359 et seq.; Roger Gay, "Risk When Distributions Are Fat Tailed" in *Journal of Applied Probability*, Vol. 41, 2004, pp. 157 et seq.

<sup>21</sup> In terms of health insurance, the question arises whether this really represents a redistributive instrument. Cf. Dominique Henriët, Jean Charles Rochet, "Is Public Health Insurance an Appropriate Instrument for Redistribution? In *Annales d'Economie et de Statistique*, nos. 83-84, 2006, pp. 61 et seq..

<sup>22</sup> Cf. Inês Oliveira Martins, *Contrato de Seguro e Conduta dos Sujeitos Ligados ao Risco*, Coimbra, 2018, pp. 100-1.

<sup>23</sup> Cf. Artur Pinto Lucas, *Princípios Gerais do Contrato de Seguro*, Lisbon, 2012, p. 95.

Based precisely on this idea, a broad debate has arisen not only about special reductions in the amounts of premiums, depending on whether deductibles were set higher or lower<sup>24</sup> but also about the construction of models demonstrating an automatic and concomitant variation in the value of the premium and in the corresponding value of the deductible<sup>25</sup>.

Hence, this almost umbilical relationship between premiums and deductibles has become so commonplace that even the advertising of insurance products alludes to it. Therefore, as the deductible is an optional clause, along with others that may be contractually established, Article 49(3) LCS recognises the amount thereof conditions the value of the service provided by the insurer in a facet also occurring in case law. Indeed, there are judgements, some of which were handed down before the LCS came into effect, admitting that deductibles are one factor taken into account when calculating premiums<sup>26</sup>. This also holds under French case law and doctrine, as highlighted by Groutel and Leduc when accepting that the underlying reasons for enshrining deductibles in insurance contracts are strictly material or financial in nature in view of the correlative decreases in the premium<sup>27</sup> in a dimension that has also gained equivalent recognition by Ferrari<sup>28</sup>, Prölss and Martin<sup>29</sup> in Italian and German law respectively.

### 3. The Deductible Performance

Prefiguring the deductible as the amount deliverable to the insurer following the occurrence of the loss, one may grasp the perspective viewing deductibles as a deduction against the amount of compensation<sup>30</sup>. Therefore, in view of the insured capital, there would be an uncovered margin<sup>31</sup>, an amount to be handed over to the insurer designed to reduce or write off<sup>32</sup> the value of the indemnity. Therefore, while the deductible is undeniably related to calculating the premium, it does not fail to impact on the amount receivable by way of indemnity. As the deductible is a payment handed over to the insurer following the occurrence of any loss, the amount corresponding to the indemnity naturally becomes lower in absolute terms than it would otherwise have been were there no applicable deductible.

Even though the LCS states the payment owed by the insurer is limited to the damage arising from the loss up to the amount of the insured sum<sup>33</sup>, other parameters need taking into account. First of all, we face the principle of compensation<sup>34</sup> or principle of prohibition of enrichment<sup>35</sup> under which the insured parties are prevented from profiting at the insurer's expense.

<sup>24</sup> Cf. Paul Feldstein and Thomas Wickizer, “Analysis of Private Insurance Premium Rates: 1985-1992, in *Medical Care*, Vol. 33, 1995, pp. 1035 et seq.; Jack Francis, Arie Harel and Giora Harpaz, “Actuarially Fair Premia for Deductible Insurance Policies” in *The American Economist*, Vol. 55, no. 2, 2010, pp. 83 et seq.

<sup>25</sup> Cf. K.P. M. van Winssen, R.C. van Kleef and W.P. Wen, “A Voluntary Deductible in Health Insurance: The More Years you Opt for It, the Lower your Premium?” in *The European Journal of Health Economics*, Vol. 18, no. 2, 2017, pp. 209 et seq; Jack Meyer, Michael Ormiston, “Analyzing the Demand for Deductible Insurance” in *Journal of Risk and Uncertainty*, no. 18, 1999, pp. 223 et seq.

<sup>26</sup> Cf. Ruling by the Portuguese Supreme Court of Justice of 2 February 2001.

<sup>27</sup> Cf. Hubert Groutel, Fabrice Leduc, *Traité du Contrat d' Assurance Terrestre*, Paris, 2008, p. 1008.

<sup>28</sup> Cf. Vincenzo Ferrari, *I Contratti di Assicurazione Contro i Danni e Sulla Vita*, Naples, 2011, pp. 35 et seq.

<sup>29</sup> Cf. Jürgen Prölss and Anton Martin, “§ 75” in *Versicherungsvertragsgesetz Kommentar*, 31st ed., 2021, <http://beck-online.beck.de>.

<sup>30</sup> In this sense, see José Vasques, *Contrato de Seguro: Notas para uma Teoria Geral*, Coimbra, 1999, p. 308.

<sup>31</sup> Expression applied by Menezes Cordeiro especially addressed to deductibles in damage insurance. Cf. Insurance Law... op. cit., p. 756.

<sup>32</sup> Romano Martinez deploys the expressions discount or rebate, addressed to the amount payable by the insurer. Cf. *Direito dos Seguros*, Cascais, 2006, p. 111.

<sup>33</sup> Cf. Article 128 LCS .

<sup>34</sup> As regards the case of damage insurance, Gianguido Scalfi, *I Contratti di Assicurazione: L' Assicurazione Danni*, Turin, 1991, pp. 28 et seq.

<sup>35</sup> Em sentido equivalente, quanto ao direito alemão, Rudolf Gärtner, *Das Bereicherungsverbot*, Berlim, 1970, pp. 11 et seq.

Therefore, even though there are exceptions to this principle, based on the autonomous wishes of the parties<sup>36</sup>, the fact remains this principle appears to be structural and correspondingly sets out very relevant guidelines and postulates. These include the lack of equivalence between the damage and the indemnity and the appearance of the deductible. Accordingly, payment by way of a deductible consolidates the idea that the compensation received by the insured party will be lower than the damage<sup>37</sup>. In short, we may accept that the amounts paid as deductibles consolidate the prohibition on enrichment, strengthening the indemnity function of the insurance contract and even impressively illustrating that known as partial insurance. In other words, as Ferrari notes, in contracts designed to conserve property and prevent damage, the inclusion of a deductible represents a pre-set limit under which the insured personally assumes a share of the risk<sup>38</sup>.

However, the functions of deductibles reach beyond contributing to valuing the premium and revisiting the principle of indemnity. In fact, deductibles contribute to meeting other objectives, including situations that generate losses which cannot be provoked, triggered or influenced on the wishes of the insured party. Therefore, in order to reinforce this important vector, we encounter mechanisms aimed at limiting or restricting those nonconformities. Among these, deductibles, quite understandably emerge prominently as a mechanism directed at avoiding or restricting claims to receive the contractually established indemnity given the losses must not be intentional on pain of jeopardising the randomness of risk. Indeed, according to Inês Oliveira Martins, the acceptance of intentional loss would transform the insurer's provision into a discretionary condition unworthy of being insured<sup>39</sup>.

Also as regards intentionality, it is worth pointing out the different types of misconduct, especially wilful or fraudulent behaviours in accordance with their most damaging consequences. In fact, whenever fraud is equivalent to qualified wilful misconduct that associates general wilful misconduct to a specific wilful misconduct, based on an awareness of the harm caused or advantage obtained<sup>40</sup>, formulations have been put forward for injurious and fraudulent behaviour that deserve important reflection. For example, there is the dichotomy between hard or serious fraud, relating to the simulation or provocation of the loss, and light or opportunity fraud, involving exaggerating the reported amount calculated for the damage<sup>41</sup>. However, despite the plurality and gradeability of wilful or fraudulent behaviours, the regime-rule determines the insurer is not obliged to provide the agreed benefit in the case of a loss caused intentionally by the policyholder or insured party<sup>42</sup>. In addition, this results in the correlative loss of the overdue premium in accordance with systemic consistency<sup>43</sup>.

Accordingly, even when insurability occurs, in some cases of deliberate provocation of the loss, as in the case of suicide<sup>44</sup> for example, it is also true insurance contracts do not intend to cover fraud<sup>45</sup> but rather to repress fraudulent acts<sup>46</sup>.

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<sup>36</sup> Cf. Article 131 LCS.

<sup>37</sup> In this sense, see Margarida Lima Rego, *Contrato de Seguro...op. cit.*, p. 255.

<sup>38</sup> Cf. Vincenzo Ferrari, *I Contratti di Assicurazione Contro i Danni e Sulla Vita*, Naples, 2011, p. 37.

<sup>39</sup> Accordingly, Inês de Oliveira Martins adds the contrast between LCS Article 46 and Article 437(3) of the Commercial Code which determines insurance policies are void when the insurance event was caused by the insured or a civilly liable person. Cf. *Seguro de Vida Enquanto Tipo Contratual Legal*, Coimbra, 2010, p. 275.

<sup>40</sup> Cf. Luís Poças, "A Cominação Civil da Fraude na Execução do Contrato de Seguro: Ocorrência e Participação do Sinistro" in *Problemas e Soluções de Direito dos Seguros*, Coimbra, 2019, pp. 86-7.

<sup>41</sup> Cf. Luís Poças, "A Cominação..." in *op. cit.*, pp. 87-88.

<sup>42</sup> Article 46(1) LCS.

<sup>43</sup> Notwithstanding how Article 94 LCS seek specifically to deal with the aggravation of risk, Luís Poças defends the applicability of that regime by virtue of an enunciative interpretation resulting from the corresponding inclusion of a shortfall. Cf. "A Cominação..." in *op. cit.*, p. 122.

<sup>44</sup> Under the terms of Article 191 LCS, besides the rule being supplementary, there is the stipulation of a deadline, a limit and also the distinction between voluntary and involuntary suicides.

<sup>45</sup> Cf. Malcolm Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century*, Oxford, 2005, pp. 255 et seq.

Nevertheless, negligent behaviour or behaviour caused in any way by a lack of diligence should be covered by the insurance policy<sup>47</sup>. However, the variability of negligent intensity, particularly gross negligence, has sometimes justified the defence of a correlative reduction in the coverage<sup>48</sup>. Furthermore, in order to cope with the increase in claims caused by less diligent or negligent acts, measures have been taken to limit or minimise them. Thus, although there are claims, especially following storms, when it is not possible to trigger the claim<sup>49</sup>, as well as the susceptibility of subjective risk without the danger of enrichment<sup>50</sup>, deductibles appear as an important mechanism for avoiding subjective risk<sup>51</sup> and minimising the non-fraudulent, even if less diligent or unethical claims<sup>52</sup> by insured parties.

In fact, negligence, lack of care, irrational<sup>53</sup> or less diligent behaviours of insured parties may not even have repercussions for the insurer whenever stipulating deductibles. This falls within the scope of the so-called contributory consumer negligence model that deserves consistent reflection by the doctrine<sup>54</sup>. Accordingly, once the claim has been triggered, in addition to policyholders being able to reflect on their own susceptibility to participating in the insurance costs, with a foreseeable future increase in premiums, deductibles represent their contributions to claims caused by negligent behaviour. Accordingly, after careful consideration, precisely so as not to have to pay the deductible as well as facing natural increases in the insurance premium, insured parties may choose to repair the damage caused at their own expense.

<sup>46</sup> Accordingly, Luís Poças refers to the principle of repression of fraudulent acts, directed at preventing and punishing fraud. He states that the loss of the insurer's right to payment and of the premiums earned are commensurate with the seriousness of the act and the reprehensibility of the conduct, regardless of its economic relevance. Cf. "A Cominação..." in op. cit., pp. 123-4.

<sup>47</sup> Inês Oliveira Martins upholds that even gross negligence is covered by insurance contracts. Cf. "Regime Jurídico do Contrato de Seguro em Portugal" in *Actualidad Jurídica Iberoamericana*, no. 5, 2017, p. 217. Broadly speaking, on the issue of including negligent behaviour, see also Margarida Lima Rego, *Contrato de Seguro...* op. cit., pp. 159-60.

<sup>48</sup> Cf. Udo Hansen, *Beweislast und Beweiswürdigung im Versicherungsrecht*, Berlin, 1990, pp. 37 et seq. Oliver Brand, "Das Quotelungsprinzip- Versuch einer Versöhnung" in *Festschrift für Egon Lorenz zum 80. Geburtstag*, Karlsruhe, 2014, pp. 55 et seq.

<sup>49</sup> Within this scope, Francisco Rodrigues Rocha mentions real insurance against natural phenomena such as earthquakes, floods, bad weather on holiday, storm, hail, lightning or snow. Cf. *Do Princípio Indemnizatório no Seguro de Danos*, Coimbra, 2015, p. 78

<sup>50</sup> Francisco Rodrigues Rocha recalls circumstances in which the insured party prefers the value of the object in cash. Cf. *Do Princípio...* op. cit., p. 78.

<sup>51</sup> Francisco Rodrigues Rocha applies the term *expedient* in order to contribute to eliminating the subjective risk of placing the deductible alongside the coverage maximums, mandatory overdrafts and non-coverage of loss of profits. Cf. *Do Princípio...* op. cit., pp. 78-9. In a similar vein, viewing the deductible as a fraud-deterrent mechanism, René van Vliet, "Deductibles and Health Care Expenditures: Empirical Estimates of Price Sensitivity Based on Administrative Data" in *International Journal of Health Care Finance and Economics*, Vol. 4, no. 4, 2004, pp. 283 et seq.

<sup>52</sup> Regarding variations in deductibles, taking into account the variability of unethical, yet acceptable, behaviour on behalf of the insured, see Antony Miyazaki, "Perceived Ethical of Insurance Claim Fraud: Do Higher Deductibles Lead to Lower Ethical Standards?" in *Journal of Business Ethics*, Vol. 87, no. 4, 2009, pp. 595-6.

<sup>53</sup> Regarding the relationship between the deductible and the insured's non-rational behaviour in health insurance, see Richard van Kleef, Wynand van de Vem and René Vliet, "A Voluntary Deductible is Social Health Insurance with Equalization "Community- Rated or Risk-Rated Premium Rebate?" in *The Journal of Risk and Insurance*, Vol. 73, no. 3, 2006, p. 546.

<sup>54</sup> The contributory negligence model, apart from being part of a non-complete settlement of the claim, is, according to H.E. Frech, a very reasonable solution designed to improve the *status quo* of insurance law. Cf. "State- Dependent Utility and the Tort System as Insurance: Strict Liability Versus Negligence", in *International Review of Law and Economics*, Vol. 261, no. 14, 1994, pp. 264 et seq. In a similar vein, Giorgio Cingolani, *Le Assicurazioni Private in Italia*, Bologna, 2019, pp. 309 et seq.

The deductible is also designed to prevent and/or restrict an emerging trend towards viewing insurance as a consumer product as something to be used comfortably and carelessly at any given moment<sup>55</sup>. However, this somewhat dilettante posture compromises the uncertainty of the result, something structural to the insurance contract<sup>56</sup>. Therefore, deductibles appear as an affirmation of the preponderance of risk and as a very credible and very effective measure in the sense of minimising carelessness and, to some extent, abuse and moral hazard<sup>57</sup>. Thus, should moral hazard diminish the incentives for the insured to act diligently in order to avoid losses or to mitigate the effects of such occurrences<sup>58</sup>, the deductible emerges as a brake, an effective remedy against these serious dysfunctions. As has been demonstrated, persons who take out insurance policies tend to be less diligent in avoiding losses than someone who does not take out insurance; who is not insured<sup>59</sup>. In other words, while the latter, knowing the risk would not be covered, remains more vigilant, the former, precisely because they would be beneficiaries of the insurance policy, act with less diligence and concern.

As such, deductibles would contribute to reducing moral hazard or, at least, one kind of moral hazard<sup>60</sup>. Indeed, whenever deductibles potential impact on the *ex ante* risk<sup>61</sup>, it would be more difficult to ascertain the prevention mechanisms directly linked to variability in the deductible<sup>62</sup>. On the contrary, in *ex post* moral hazard, the effectiveness of the deductible reveals itself very significantly and even susceptible to quantifying the true impact of the reduction in moral hazard<sup>63</sup>. In short, the obligation to pay a deductible encourages people to take more care, particularly of their health<sup>64</sup>, rather than acting carelessly by using something they take for granted and want to repeatedly use over again as a consumer good, at no extra cost or concern.

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<sup>55</sup> On the deductible as a remedy to prevent health insurance or motor insurance being turned into consumer products, see Beatrix Hoffman, "Restraining the Health Care Consumer" in *Social Science History*, Vol. 30, no. 4, 2006, p. 504. For a similar in-depth view on health insurance, Geir Asheim, Anne Wenche and Tore Nilssen, "Deductibles in Health Insurance: Pay or Pain?" in *International Journal of Health Care Finance and Economics*, Vol. 3, no. 4, 2003, pp. 254 et seq.

<sup>56</sup> On the different variables of uncertainty as structuring elements of risk, Margarida Lima Rego, *Contrato de Seguro...* op. cit., pp. 74-75.

<sup>57</sup> Moral hazard, including the scope for agents to change their behaviours and thus distort the context and objectives of a certain contract, would be countered by the increasing setting of deductibles of an appreciable amount. Cf. Beatrix Hoffman, "Restraining..." op. cit., pp. 504-5.

<sup>58</sup> Cf. Luís Poças, "Aproximação Económica à Declaração do Risco no Contrato de Seguro" in *Problemas e Soluções de Direito dos Seguros*, Coimbra, 2019, p. 59.

<sup>59</sup> Cf. Luís Poças, "Aproximação..." in op. cit., p. 59.

<sup>60</sup> Claudia Pütz and Christian Hagist, after alluding to *ex-ante* and *ex-post* moral hazards in order to differentiate between prevention and over-consumption of medicines, maintain that deductibles are very effective because they generate a significant and very appreciable reduction in the *ex-post* moral hazard. Cf. "Optional Deductibles in Social Health Insurance Systems: Findings from Germany" in *The European Journal of Health Economics*, Vol. 7, no. 4, 2006, p. 227.

<sup>61</sup> Cf. David Bardey e Romain Lesur, "Contrat d' Assurance Maladie Otimal et Risque Moral Ex Ante: Quand Peut-On S' Afranchir d' une Franchise?" in *Revue Économique*, Vol. 55, no. 5, 2004, pp. 857 et seq.

<sup>62</sup> For detail on this facet, Karl Borch, *Economics of Insurance*, Amsterdam, 1990, pp. 315 et seq.

<sup>63</sup> According to the study by R. C. van Kleef, K Beck, W. P. van de Ven and R. C. van Vliet, the impact of deductibles on the reduction of moral hazard, particularly in health insurance, is not significant. "Does Risk Equalization Reduce the Viability of Voluntary Deductibles?" in *International Journal of Health Care Finance and Economics*, Vol. 7, no. 1, 2007, pp. 43 et seq.

<sup>64</sup> Cf. Charles Hall, "Deductibles in Health Insurance: An Evaluation" in *Journal of Risk and Insurance*, no. 33, 1966, p. 255.

Deductibles also reduce the need of insurers to incur administrative costs, for example when dealing with what are low-value claim<sup>65</sup>, the so-called petty claims<sup>66</sup> or, in the case of health insurance, so-called the sniffle claims<sup>67</sup>. Thus, besides consisting in amounts of reduced value, the costs may sometimes represent values just lower or slightly higher than the deductible itself<sup>68</sup>. This naturally discourages subsequent claims due to the receipt of a small amount following the application of the respective deductible.

#### 4. Types of Deductibles

Even while deductibles perform various functions in the sense of strengthening the structural traits of the insurance contract; we should nevertheless note that their contents are anything but uniform. Rather, deductibles take plural and diversified forms. Therefore, without aiming to draw up a definitive list of the various existing types of deductibles, it is important to highlight the most prominent, above all, those evident in some way in the general regime and those emerging from special insurance contract regimes. Accordingly, taking into account their binding nature, we have compulsory and optional deductibles. The latter are freely negotiated between the policyholder and the insurance company, within the scope of the framework handed down by the applicable legal regime as in the case of the LCS.

Furthermore, deductibles may be simple, of a fixed amount, absolute, of a variable amount or accounting for a proportion of the damage suffered. Thus, as regards the simple deductible, when the amount is fixed, there are certain advantages, especially the avoidance of petty claims, in contrast to insurance policies exempt from deductibles. However, insurers prefer absolute deductibles, which are based on a percentage of the damage suffered, as, in such cases, insurers are able to provide more attractive and affordable values in the premiums negotiated with future policyholders. Indeed, as Groutel and Leduc note, not only are insurers able to offer lower premiums, while suggesting coverage of higher amounts, but they may even offset risk through co-insurance<sup>69</sup>.

On the one hand, deductibles are applicable to any claim within the terms of the respective contract without setting any limit on the occurrences causing damage. On the other hand, in another type of deductible, by setting a limit per claim and per annuity, we encounter the so-called aggregate of claims<sup>70</sup> deductible, as exceeding the stipulated amount causes the payment of the deductible to cease without any loss to the insured party. In other words, as Pinto Lucas adds, once the fixed amount is reached, subsequent claims are paid in full, without any other charge to the insured party<sup>71</sup>. Of course, this may be beneficial to the policyholder although a succession of claims over a one-year period will obviously not be a frequent case in the case of contracts where the policyholder is a private individual.

In certain insurance contracts, in particular for motor insurance, there is commonly a distinction between deductibles according to value. This breaks down especially into basic, extended and reduced deductibles. These come in addition to the contractually admissible exemption from deductibles, which renders the insurance premium more expensive. Whereas the increased deductible will reach a higher value in the event of a claim, this logically provides a lower premium value. In turn, particularly in the credit sector, the deductible may be simple or absolute.

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<sup>65</sup> Cf. José Vasques, *Contrato de Seguro*, Coimbra, 1999, p. 309. In a similar vein, Menezes Cordeiro, *Direito dos Seguros...* op. cit., p. 756.

<sup>66</sup> In this sense, see Romano Martinez, *Direito dos Seguros...* op. cit., pp. 111-2.

<sup>67</sup> These low-value claims would be reduced should the corresponding deductibles be paid. The insured party would thus think twice, as Beatrix Hoffman points out, before resorting to health insurance. Cf. “Restraining...” in op. cit. pp. 505-6.

<sup>68</sup> Romano Martinez alludes to this hypothesis when highlighting the relevance of the deductible, regarding small or petty. Cf. *Direito dos Seguros: Relatório*, Lisbon, 2005, p. 71.

<sup>69</sup> Cf. Hubert Groutel and Fabrice Leduc, *Traité...* op. cit., pp. 1008-9.

<sup>70</sup> In this sense, Artur Pinto Lucas, *Princípios...* op. cit., p. 96.

<sup>71</sup> Cf. Artur Pinto Lucas, *Princípios...* op. cit., p. 96.



It is simple whenever seeking to exclude compensation for losses in excess of a certain agreed amount. Conversely, it becomes absolute whenever the insurer pays as from a certain minimum amount.

## 5. Related figures

The proximity between deductibles and other figures that, in some way, present an affinity or similarity may be identified through means of summoning and applying various and different criteria. In this approach, when attributing particular emphasis on the service delivered by the insurer, we may even state that premiums hold a very significant affinity with deductibles as, in fact, we referenced above. However, on examining more closely and, accordingly, drawing on other variables, we then encounter several other figures that also appear to share affinities with the deductible.

Correspondingly, when we consider the occurrence of a claim, we would accept that the co-payment displays an interrelationship with the deductible. Hence, although the co-payment represents incomplete coverage and the deductible a mechanism aimed at reinforcing the care taken by insured parties, both figures may be perceived as minimising the moral hazard. This, therefore, brings these figures in very close proximity, especially in times of crisis that are prone to demanding more detailed reflection<sup>72</sup>. Indeed, the struggle against moral hazard arises through co-payments in the form of a fee or consideration for a service. For example, in health insurance, the co-payment is incurred by the insured party when he/she has a medical consultation, examination or treatment. The insurer pays part of the cost of the consultation or medical act and the remainder is borne by the insured party. This is similar in nature to a deductible, where the insured party incurs part of the indemnity and the insurer another part of the same coverage.

In co-payments, we also find types or subtypes that naturally help in understanding both the affinity and also the autonomy as regards deductibles. This accordingly encapsulates the following three types of co-payment: reimbursement, assistance and mixed co-payment. Hence, while the deductible and the co-payment may be close, there are also important differences. Thus, while the deductible corresponds to the amount of the insured capital for which the insurer is not liable for the loss, the co-payment relates to a benefit, assumed by the insured party, for each service. On the other hand, despite these significant differences, the affinity between deductibles and co-payments lies in the circumstantiality of both instalments serving to reduce claims or, for instance, the level of recourse to healthcare<sup>73</sup>. We even find common political and ideological assumptions. In particular, this advances ideas of a markedly liberal nature, as opposed to a more socialist or collectivist ideology, when it maintains that such payments are essential for the continued provision of health insurance<sup>74</sup>, the promotion of redistributive justice<sup>75</sup>, the solidarity of the system<sup>76</sup> and even in terms of safeguarding the imperative to rebalance the tax burden in order to cope with increased expenses brought about by deductibles or co-payments<sup>77</sup>.

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<sup>72</sup> Regarding moral hazard, in situations of financial crisis, Rutger Claasen, "Financial Crisis and the Ethics of Moral Hazard" in *Social Theory and Practice*, vol. 41, no. 3, pp. 527 et seq.

<sup>73</sup> Cf. Rainer Winkelmann, "Co-payments for Prescription Drugs and the Demand for Doctor Visits-Evidence From a Natural Experiment, in *Health Economy*, no. 13, 2004, pp. 1081 et seq.; Jonas Schreyögg e Markus Grabka, "Copayments for ambulatory care in Germany: A Natural Experiment Using a Difference-in-Difference Approach, in *The European Journal of Health Economics*, 2010, Vol. 11, no. 3, pp. 331 et seq.

<sup>74</sup> Cf. Theodor Marmor, *The Politics of Medicare*, 2nd ed., New York, 2000, pp. 50 et seq.; Arnold Relman, "Restructuring the US Health Care System" in *Issues in Science and Technology*, vol. 19, no. 4, 2003, pp. 34 et seq.

<sup>75</sup> Cf. Ivonne Honekamp and Daniel Posseriede, "Redistributive Effects in Public Health Care Financing" in *The European Journal of Health Economics*, Vol. 9, no. 4, 2008, pp. 405 et seq.

<sup>76</sup> Cf. Claudia Pütz and Christian Hagist, "Optional..." in op. cit., pp. 226-7; Rachel Huang and Larry Tzeng, "Disappointment and the Optimal Insurance Contract" in *The Geneva Risk and Insurance Review*, 2012, Vol. 37, no. 2, pp. 258 et seq.

<sup>77</sup> Janet Vroomen and Peter Zweifel discuss these issues in relation to the confrontation between the Dutch and German systems. Cf. "Preferences for Health Insurance and Health Status: Does it Matter Whether you are Dutch or German? In *The European Journal of Health Economics*, Vol. 12, no. 1, 2011, pp. 93 and following.

However, when we turn to the elimination of subjective risk, we may indicate maximum coverage, partial coverage, compulsory overdrafts or even co-insurance in accordance with the provisions of Article 62 LCS. Indeed, when facing percentages of the damage to be incurred by the insured party in the event of a claim<sup>78</sup>, in none of these cases is there total similarity with deductibles. There is, however, an affinity in view of the identifying features, albeit autonomous, of partial coverage, compulsory overdrafts or co-insurance. Indeed, as far as maximum coverage limits are concerned, also known as guaranteed maximums or ceilings, they represent limits on the insurer's indemnity liability. In fact, in credit insurance, the guaranteed maximum or ceiling may mean an indicative limit of proportionality in relation to the premium received. However, they can also be calculated annually and targeting certain amounts<sup>79</sup>. For example, in credit insurance, the annual guaranteed ceiling applies to the sums insured, underpinned by a total of credits attributed to a given class, type of customer or financial operation<sup>80</sup>. Accordingly, when the maximum coverage or guaranteed ceiling limits the amount to be indemnified, this still remains subject to risk as the insurer does not know the exact amount to be paid out<sup>81</sup>.

We also come across the compulsory overdraft as a scheme of proportional risk sharing in which insurers cap their liabilities to a certain proportion of the risk covered and with the other part, the overdraft, not insurable. In these terms, the compulsory overdraft appears as a characteristic figure in credit insurance under the auspices of Article 5(1) of Decree-Law no. 183/88<sup>82</sup>. Therefore, in credit insurance, instead of surety insurance<sup>83</sup>, an opposing figure<sup>84</sup>, the coverage becomes limited to a certain percentage of the insured credit, representing a real implementation of the principle of indemnity blocking<sup>85</sup> in keeping with how the remaining percentage share will be borne by the policyholder-insured party. Accordingly, while the overdraft concerns losses occurring in operations, described as normal losses, the insurance policy covers risks arising from events of a random or exceptional nature<sup>86</sup>.

Therefore, it is interesting to note the prevailing affinity between deductibles and compulsory overdrafts. In fact, the combination of these figures is not only accepted but there is even acceptance of the preponderance of recourse to compulsory overdrafts in preference to deductibles<sup>87</sup>. This in itself removes the scope either for confusion or for minor overdrafts in relation to deductible sums. We should also add that, in addition to mandatory overdrafts, resulting from legal stipulations, there are also other limits; the indemnifiable limits setting out the contractually agreed amounts in accordance with the provisions of Article 5(3) above.

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<sup>78</sup> In this sense, Luís Poças, *Problemas...* op. cit., p. 59.

<sup>79</sup> Cf. Paolo De Angelis and Luigi di Falco, "Le Assicurazioni sulla Salute: Definizioni e Caratteristiche Principali" in *Assicurazioni sulla Salute*, Bologna, 2016, p. 31.

<sup>80</sup> Cf. Margarida Silva Santos, *Seguro de Crédito*, op. cit., pp. 103-4.

<sup>81</sup> Cf. Margarida Silva Santos, *Seguro de Crédito*, op. cit., p. 105.

<sup>82</sup> Cf. Decree Law no. no. 183/88 of 24 May.

<sup>83</sup> Cf. Article 7 of Decree Law no. 183/88.

<sup>84</sup> Although bond insurance is sometimes classified as a form of credit insurance, both are at best included in the broader area of financial insurance. Accordingly, Klaus Kossen, "Die Kautions-versicherung" im Versicherungsrechtliche Studien, Vol. 43, Berlin, 1996, pp. 18 et seq.

<sup>85</sup> As regards the principle of indemnity blocking, Margarida Silva Santos alludes to the respective structural framework. Thus, she highlights the incentives for the preventive influencing of insured parties to ensure they maintain prudent and considered sales policies, maintaining their interest in the good recovery of the covered claim and the preservation of that interest even after the occurrence of the loss and the payment of the respective indemnity. Cf. *Seguro de Crédito*, Lisbon, 2004, pp. 99-100.

<sup>86</sup> Cf. Margarida Silva Santos, *Seguro de Crédito*, op. cit., p. 103.

<sup>87</sup> Hubert Groutel and Fabrice Leduc note the annulment of contracts by the Cour de Cassation precisely in situations where the value of the indemnity seems reduced or lesser when compared with the value of the deductible. Cf. *Traité...* op. cit., p. 1010.

This is justified by the susceptibility of moral hazard, the probability of less diligent conduct by insured parties<sup>88</sup> and, naturally, due to the extent of the insurable risks, within the scope of credit insurance<sup>89</sup>, in contrast to that found in the regime applicable to surety insurance.

Rescue costs also display an affinity with deductibles. Indeed, the also reflects an amount due to be deducted from the indemnity receivable. Thus, if under the terms of Article 126 LCS, the policyholder or insured party must apply the means within their power to prevent or limit damage, it is no less certain that, according to the precept of Article 127 LCS, the insurer shall pay the expenses incurred, provided they are reasonable and proportionate to the damage. Therefore, although the addressees of those provisions are those requiring rescue and not the third parties contributing to any such salvage process, we may grasp how that the expenses incurred by the former, due to the contributions of the latter, must be reimbursed by the insurer<sup>90</sup>. Furthermore, as mentioned above, should the expenses be subject to limits of reasonableness and proportionality, they also cannot, in terms of their total amounts when added to the benefit payable per claim, exceed the value of the capital insured<sup>91</sup>.

## 6. Conclusions

In brief, the premium is the consideration for the agreed coverage, including everything that is contractually due by the policyholder, in particular the cost of covering the risk, the acquisition, management and collection costs as well as any charges related to issuing the policy. This constitutes the remuneration due from the policyholder, to be delivered to the insurer, in return for the service rendered at a determined price as a counterpart or reverse of the risk. The deductible experiences points of contact with the payment of premiums. Indeed, not only does it constitute a payment of a monetary sum in the event of a claim but the payment may be made by the policyholder or even the insured party. In other words, the two monetary payments, premiums and deductibles, are due to the insurer and, on another level, the amount of the premium may interlink with the calculation of the amount of the deductible or even with waiving this payment.

Deductibles serve several purposes. Thus, they may impact on moral hazard, *ex ante* and even *ex post* hazard. Correspondingly, the obligation to pay a deductible encourages people to be more careful, instead of resorting to something otherwise taken for granted just like any other consumer product. Thus, the deductible seeks to restrict claims caused by negligent acts as well as countering the emergence of an alleged model of contributory consumer negligence. In addition, deductibles also diminish the scope for insurers having to incur administrative costs as they effectively choke off low-value claims, the petty claims and so-called snuffle claims.

Understandably, within the scope of deductibles, there are dissimilarities likely to lead to mutually different types. Accordingly, we have simple deductibles, with fixed amounts, or absolute deductibles, with variable amounts. These deductibles may also incorporate a limit per claim or an annuity or, conversely, no limit at all relative to the circumstances causing the damage. Furthermore, as regards certain special regimes, distinguishing between deductibles according to their value represents common practice and thereby covering basic, extended, reduced and exempted deductibles.

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<sup>88</sup> Cf. Luís Poças, “Seguro Financeiro: Os Ramos “Crédito e Caução” in *Problemas e Soluções de Direito dos Seguros*, Coimbra, 2019, p. 178.

<sup>89</sup> Luís Poças reminds us that the range of insurable risks by credit insurance is extensive and heterogeneous and may cover lack or delay in payment of pecuniary obligations, political risks, non-amortisation of expenses, exchange rate variations, unforeseeable and abnormal changes in production costs, and the suspension, revocation or arbitrary termination of the contract. In contrast, the risk inherent in bond insurance is very simple as this focuses on the lack or delay in performance of the obligation. Cf. “A Natureza Jurídica do Seguro-Caução” in *Revista de Direito e Estudos Sociais*, Ano LVI, no. 1, 2015, pp. 109-110.

<sup>90</sup> Cf. Arnaldo Costa Oliveira, “Anotação-Artigo 127º” in *Lei do contrato de Seguro Anotada*, 2nd ed., 2011, p. 435.

<sup>91</sup> Cf. Inês Oliveira Martins, “Regime...” in *op. cit.*, p. 218.

In terms of the related figures, we encounter co-payments, maximum coverage, mandatory overdrafts and salvage expenses. Thus, both deductibles and co-payments, as partial amounts in terms of the overall damage, seek to minimise moral hazard. In turn, in the case of compulsory overdrafts, we have coverage limited to a certain percentage of the insured credit, representing a real block on indemnities paid out. Finally, salvage expenses also display an affinity with deductibles as they represent a sum to be extracted from the indemnity even while themselves subject to limits of reasonableness and proportionality.

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