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An overview of ECJ Ruling C-633/20, concerning group insurance contracts

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Abstract

The paper is about ECJ decision C-633/20 on the qualification of the policyholder which represents a group of customers when undertaking a group insurance policy, in particular whether such policyholder should be considered an insurance distributor. This paper analyzes the text of the Court's decision, of the Opinion of the Advocate General and of the Directives on insurance distribution. A section takes stock of the current situation in three selected jurisdictions (namely Italy, Spain and the Netherlands) and the possible future application of the ECJ's decision within the national framework. The conclusions highlight the fact that there is no European uniformity in the approach to affinity arrangements. The IDD is a minimum harmonization directive and already includes the concept of policyholder representing other insureds. If a profit is made, then customers must be informed so that they can make an informed choice when buying insurance protection, also to avoid unregulated distortions in the market. For instance, there should be a clear disclosure in favor of the clients being part of a voluntary group insurance when the risk insured is their own, to allow customers to make an aware purchasing decision, thus clarifying when the policyholder must not be considered an intermediary. In the context of the coming review of the IDD, further developments should be analyzed thoroughly.

Keywords: ECJ, Affinity , Group Insurance, IDD, Consumer Protection

1. INTRODUCTION

The use of group insurance constitutes an important part of the business of insurance market players, given the large volume of business it represents. On the one hand, the advantages of group insurance are obvious, since it allows for economies of scale, reducing premiums compared to individual policies for group members, while on the other hand, a standardization of terms and conditions can be observed, due to

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the centralization of policies that are not tailor-made for a single individual, but must effectively meet the needs of many.

Against this background, legal tools for analyzing group policies, which are still being developed as we can see in the ECJ decision being discussed in the current paper, must be treated with great care and attention.

The subject of the treatment and qualification of collective insurance policies is, at first glance, complex and not uniform even across the customs among the operators of the EU Member States. Even more so, the definition of policyholder of a voluntary collective insurance greatly differs in the legal frameworks of various EU Member States.

In the recitals of the primary source of European legislation on insurance, Directive 2016/97 (better known as IDD), one can find a tentative explanation of the nature of the representatives of group insurance: "*In the case of group insurance, 'customer' should mean the representative of a group of members who concludes an insurance contract on behalf of the group of members where the individual member cannot take an individual decision to join, such as a mandatory occupational pension arrangement*".[1]

Starting from such literal indication and a handful of other references to "customer" in the same legislative text, the interpretation that can be inferred is that the sponsors / representatives of a group of members are themselves customers, whereas the represented do not adhere to the collective insurance on their own, but rather through the sponsors. That is further clarified in the second part of recital 49: "*The representative of the group should, promptly after enrolment of the member in the group insurance, provide, where relevant, the insurance product information document and the distributor's conduct of business information*."

At first glance, the text is clearly addressing the issue of information asymmetry of the customer compared to the insurance product manufacturer and distributor, imposing transparency so that buyers are aware of the characteristics of the policy they subscribed. In this case, then the conditions are met when the representative of the group is also making the required disclosures to the rest of the members of the policy. Instead if, unlike in the case described above, there was no perfect overlap between the parties taking part in the group insurance, the latter would be referred to as an improper group policy.

The decision of the Court being analyzed in this paper is of a central importance, as it synthesizes the contents of the regulatory texts, filling a gap and setting the criteria to understand when a "representative of a group of members" who is not a "customer" could potentially be considered an "insurance distributor".[2]

It should be noted that the doctrine has tried to solve the same issue for a while: the draft of the Principles of European Insurance Contract Law (PEICL)[3], which can be seen as an attempt to provide a taxonomy in the European insurance law landscape, found an elegant solution, addressing the representative of the group as the "group

[1] Directive (EU) 2016/97, *Official Journal of the European Union*, L 26, 2.2.2016, p. 19, Recital 49.

[2] Opinion of Advocate General Szpunar delivered on 24 March 2022, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CC0633, 27.12.2022, para. 70.

[3] Principles of European Insurance Contract Law (PEICL), Basedow, J., Birds, J., Clarke, M., Cousy, H., Heiss, H. and Loacker, L. (eds), Verlag Dr. Otto Schmidt, 2016, p. 57 ff.

organizer". As the Advocate General put it in his Opinion, such term is used "*to avoid terminological difficulties and to avoid prejudging a priori whether the 'group organizer' thus understood is a 'policyholder' under insurance law or rather a 'customer' under Directives 2002/92 and 2016/97.*"[4]

The Advocate General also highlights the distinction: a group organizer is considered a policyholder when membership to the group insurance is essentially mandatory, while in the case of voluntary enrolment, the members of the group are the policyholders themselves who at the same time benefit from insurance cover as insured persons.[5]

As we will see in this paper, national legislations have also tried to solve the riddle of group insurance. In the case of Italy, for instance, the difference between "accessory" and "elective" group insurance, which PEICL also recognizes, is already present in the national insurance norms. While in the former group members are automatically insured by belonging to the group because of certain characteristics or circumstances and without being able to opt out of the insurance, in the latter they are insured as a result of applying in person or because they have not opted out of the insurance.

In other countries such difference may not be so evident and the recognition of the different roles could be demanded to practice or is even being remodeled based on the outcome of the decision of the ECJ in the case at hand: Case C-633/20, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V.* v TC Medical Air Ambulance Agency GmbH.

1.1. The request for a preliminary ruling

On 29 September 2022, the European Court of Justice (ECJ) gave a judgement[6] on a case between the *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV* (BVV, the Federal Union of Consumer Organisations and Associations from Germany) and TC Medical Air Ambulance Agency GmbH (TC Medical).

The *Bundesgerichtshof* (German Federal Court of Justice) made a request for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU):

"*Is an undertaking which maintains, as the policyholder, foreign travel medical insurance and insurance [covering] foreign and domestic repatriation costs as a group insurance policy for its customers with an insurance undertaking, distributes to customers memberships entitling them to claim insurance benefits in the event of illness or accident abroad and receives a fee from recruited members for the insurance cover purchased an*

[4] Opinion of Advocate General Szpunar delivered on 24 March 2022, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CC0633, 27.12.2022, para. 70.

[5] *Ibidem*, para. 72.

[6] Case C-633/20, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0633, 15.1.2023.

insurance intermediary within the meaning of Article 2(3) and (5) of Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97?"[7]

The events that preceded the request for a preliminary ruling can be summarized as follows:[8] TC Medical (the defendant in the main proceedings) is a company that in case of sickness or accidents abroad offers, among its services, the repatriation of its customers. Such services are offered using the staff and the aircraft of a third company with which TC Medical has a contractual agreement. The coverage in case of occurrence of said events is provided via group insurance policy, concluded with *W. Versicherungs-AG*, of which TC Medical is the policyholder and therefore pays the relevant premium.

Consumers are offered the membership of such collective insurance scheme via advertising companies that have been delegated by TC Medical. Other than the membership, the fee gives customers of TC Medical other benefits (i.e. reimbursement of costs relating to medical care and ambulance transport, the organization and provision of the relevant transport and the management of a call center).

German law requires a license to carry out insurance intermediation activities and neither TC Medical nor the insurance companies have it.

According to the defendant, the activity carried out by TC Medical is not of insurance nature, but rather its customer can join a collective insurance policy that the company has subscribed and receive the related coverage and benefits.

On the other hand, BVV started the main proceeding before the *Landgericht Koblenz* (Regional Court of Koblenz), on the grounds that such activity is that of an insurance intermediary and therefore TC Medical must have a license or cease it.

While the first court initially upheld the decision, TC Medical appealed before the *Oberlandesgericht Koblenz* (Higher Regional Court of Koblenz) which annulled it. The Higher Regional Court found that such activity did not fall under the definition of insurance intermediation as per the relevant applicable German law, which was Paragraph 34d(1) of the *Gewerbeordnung* (German Trade Regulation Act, GewO). The case was then brought before the Federal Court of Justice, which referred the decision to the ECJ based on the interpretation of "insurance intermediation" under the provisions of Directives 2002/92 and 2016/97 (IDD).

1.2. The judgement of the ECJ

In its decision, the Court ruled that the definitions of "insurance intermediary" and therefore "insurance distributor" (as provided by the Directives 2002/92 and 2016/97) also include the legal persons that as part of their activities, offer their customers to join a group insurance scheme that they previously concluded with an insurance company on a voluntary basis, in return for a fee. By enrolling in such schemes and paying a

[7] Case C-633/20, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0633, 15.1.2023, para. 28.

[8] *Ibidem*, paras. 16–27.

compensation to the legal persons, the customers have a right to claim insurance benefits, such as sickness or accidents abroad.[9]

The reasoning of the ECJ is based on a thorough analysis of the text of the Directives. The Court examined the definitions of "insurance intermediary", "insurance distributor" and "remuneration" not only *per se*, but in their context, as well as the goal that the provisions pursue.

The Court defines distributor as "*a person who, 'for remuneration', takes up or pursues the activity of insurance mediation or insurance distribution*"[10], while the concept of "fee" is broad and comprises any economic benefit given in respect for the activity of distribution.

According to the Court, TC Medical falls within the requisites of distributor because every new membership of a customer gives rise to a payment to them. The prospect of this payment constitutes for TC Medical a separate economic interest which is such as to encourage membership as much as possible, distinct from the interest of the members in obtaining an insurance coverage under the main contract.

Keeping that in mind, the ECJ clarified that it is irrelevant whether the payment to TC Medical (which is the legal person that concluded a group insurance contract with the company) is made directly by the insurer in the form of a commission or indirectly by the customers, by way of new memberships (i.e. by paying fees in return for rights to insurance benefits). As the membership is voluntary, members are not necessarily aware of the fact that they are indirectly induced to get the policy.

TC Medical would in fact have an interest in extending its customers' membership in the insurance scheme as much as possible, so that the amounts received through fees would equalize or exceed those owed as premiums by it to the insurance company.[11]

It is also irrelevant that the goal of the activity of TC Medical is not that of placing an insurance contract, but rather seeking voluntary membership of its customers to the scheme in exchange for a fee. Such activity is seen as comparable to that of a paid insurance agent or distributor.[12]

The inclusion of policyholders who offer voluntary membership to a group insurance policy in exchange for a fee in the definition of insurance intermediaries has a two-fold consequence. First, it extends to such category the requirements of registration and license provided by the law, ensuring a level playing field with the other intermediaries, who are already regulated. Second, it imposes the same obligations in terms of disclosures (e.g. about possible links between intermediaries and certain insurers, which may give rise to conflicts of interests), professional, financial and organizational requirements and rules of conduct, therefore enhancing consumer protection.

[9] Case C-633/20, available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62020CJ0633, 15.1.2023.

[10] *Ibidem,* para. 40.

[11] *Ibidem,* para. 42.

[12] *Ibidem,* para. 45.

2. THE POSSIBLE APPLICATION OF THE JUDGEMENT IN SELECTED JURISDICTIONS

2.1. Group Insurance / Collective contracts in Italy: scope of application and distribution rules – The current legislative framework in Italy

The ECJ decision will likely have little impact on insurance distributors and intermediaries in Italy, as the existing rules already provide for precise disclosure obligations and related responsibilities for the protection of the customers.

When the IDD has been transposed into Italian law via modifications to the Italian Private Insurance Code, the Italian Institute for the Supervision of Insurance (IVASS) issued two new applicable Regulations, No. 40 and 41 of 2018, providing for a gradual approach to disclosure obligations on the basis of assumptions such as the conscious and express adherence to the policy, the payment of the premium or the gratuity of the guarantees, and the combination with the offer of goods or services with a premium higher or lower than a certain threshold.

One aspect is of particular importance: the introduction in art. 2 lett. a) of IVASS Reg. 40/2018 of the definition of "adherent" meaning "*the person who evaluates and freely decides to take the coverage of a group insurance contract, manifesting an express will and bearing in whole or in part, directly or indirectly, the economic burden of the premium*."

This definition distinguishes situations in which the insured wholly or partly bears the payment of the premium (e.g.: within an association, the adhesion of a member to an open convention or more simply the case of the dealer who proposes the CVT policy to the purchaser of the vehicle) from those in which the insured becomes the insured by the pure will of the Contracting Party (e.g.: accident policy stipulated by the company as a benefit for all employees, without their voluntary adhesion).

2.1.1. Scope of application

The new Italian rules apply to all forms of collective contracts, namely to:

– Group policies by adhesion;

– Policies by contract;

– Collective policies taken out on behalf of the policyholder pursuant to Art. 1891 of the Italian Civil Code (mandatory by contract or *ex lege*).

2.1.2. Collective policies by adhesion

In contracts in the form of a group policy by adhesion in which the adherents bear all or part of the economic burden of the premium, directly or indirectly, the broker shall deliver, send or make available to the group policyholder and the adherent members the following information and documents:

– Disclosure on potential conflicts of interest;

– Disclosure of remuneration concerning the nature of the remuneration received, as well as the amount of the remuneration in the case of fees paid directly by the client;

– Demand & Needs test;

– Pre-contractual and contractual documentation.

The obligations are fulfilled by the distributor, also through the cooperation of the group policyholder, without prejudice to the latter's duty of supervision for which it is responsible.

IVASS Reg. 40/2018 provides for an obligation on the broker to deliver different documentation depending on whether the insured person is a member who pays the premium (with a further distinction of amounts even different from the IDD exemption) or is gratuitously offered the guarantee.

Adherent with premium over € 100	**Adherent with premium up to 100 €**	**Adherent without burden**
Demand & Needs	Demand & Needs	
Broker precontractual documents (mandatory package)	Broker precontractual documents (mandatory package)	
Insurer IPID	Insurer IPID	
Application form containing: – information on the right to receive home insurance credentials from the company	Application form containing: – information on the right to receive home insurance credentials from the company – information on the right to receive the terms and conditions of contract from the company	Application form containing: – information on the right to receive home insurance credentials from the company – information on the right to receive the terms and conditions of contract from the company

2.1.3. When the collective policyholder receives remuneration

Article 3 of IVASS Reg. 40/2018 re-proposes what had already been introduced by IVASS (formerly ISVAP) Reg. 5/2006, namely the qualification of insurance distribution activities with reference to the conclusion of insurance contracts or agreements in collective form on behalf of individuals, where the latter bear the economic burden related to the payment of premiums, and the party concluding the contract receives remuneration.

Such remuneration can be received directly from the broker who brokered the group contract in the form of commissions, or from the policyholder with whom the broker has agreed a remuneration in addition to the insurance premium.

If the policyholder received a remuneration, whose definition includes "*any commission, fee, expense or other payment including other economic benefits of any kind or any other financial or non-financial advantage or incentive, offered or provided*

in connection with insurance distribution activities", the collective policyholder will necessarily have to be registered with the Italian Register of Insurance Intermediaries (RUI) in its section E), and in particular as Section E) accessory to the broker if the insurance guarantee is ancillary to the good or service offered.

3.1. The current legislative framework in Spain[13]

3.1.1. The Spanish insurance authority's current position

The Spanish insurance authority, *Dirección General de Seguros y Fondos de Pensiones* (DGSFP) has historically been very strict about the possibility for an insurance intermediary to assume a dual role also as policyholder of a group policy.

This is because, according to the DGSFP, the coexistence of the two roles in the same subject would lead to distortions, in case the mediatory is to give advice to its customers.

The only possibility for a dual role also as policyholder of group insurance policy, has been to use an external collaborator of the intermediary (but not of a broker so of an agent) to act as policyholder, while the "real" policyholders are the insured subjects. In order for this devised stopgap to work, there are two conditions to meet:

a) the insured persons joining the group policy (which are considered the *dominus negotiorum*) would keep power of disposal of the insurance contract throughout its duration;

b) the activities of the external collaborator would be in a way discernible, i.e. they would not include advice in any case, but the collaborator would be involved in administrative processing of the policy and the intermediary would take an actual active role and properly advise the members of the group policy.

The DGSFP has adamantly maintained its position throughout the years. It is opposite to the stance taken by the ECJ in the ruling under our consideration, which instead admits that the roles of intermediaries and policyholders of a group insurance policy are compatible.

The Spanish authority has repeatedly confirmed its prohibition a few times over the years. For instance, the conclusion of its Consultation 3873/2008 of 19 December 2008[14] clarified that acting both as policyholder (whether of an individual or group policy) and as intermediary would distort the advisory activity that the intermediary would carry out for himself, and would convert the policy into one of direct contracting with the insurance company.

In another later case on a similar matter[15], the Spanish authority illustrated its position in a response to the Royal Spanish Hunting Federation (RSHF)'s questions.

[13] Based on "*Comments on the Judgment of the Court of Justice of the European Union of 29 September 2022 (case C-633/20): will the DGSFP's historical criterion on the impossibility of acting simultaneously as policyholder and intermediary in the same policy be modified?*", Bird&Bird newsletter of 6 October 2022.

[14] Consultation 3873/2008 of 19 December 2008, available at: http://apps.dgsfp.mineco.es/CriteriosMedidadores/documentos/auex/QVAD.pdf, 18.11.2022.

[15] Consultation 88/2009 of 17 February 2009, available at: http://apps.dgsfp.mineco.es/CriteriosMedidadores/documentos/otro/SCANFECAZA.PDF, 18.11.2022.

Among others, a specific one was whether there was incompatibility between the RSHF's role of representative of the insurable and insured group, as policyholder of a group insurance contract and its intermediation activity. The Authority made clear that in case policyholders/intermediaries gave an advice for themselves, it would be equivalent to the insurance company directly selling the policies to the policyholder.

The basis of the DGSPF's stance was that a dual role of policyholder and insurance intermediary was not in line with the obligations imposed by the Spanish Act 26/2006[16] with regard to advice and assistance imposed on insurance intermediaries towards the consumers.

While such law has been now repealed, the Spanish Authority's attitude remained the same.

3.1.2. The aftermath of the ECJ decision in Spain

Decision C-633/20 of the ECJ is surely binding for the German Federal Court of Justice, but the practice suggests that it will be interpreted as precedent also in other similar decisions in the EU, cascading to national courts when called to interpret the provisions of European legislation.

This means that the position of the DGSPF may be challenged in the future, leading to changes in the Spanish approach to dual positions as policyholder and insurance intermediary. One possible approach could be the same taken by the Italian regulator, to differentiate disclosure needs in order to overcome the distortion of the advisory activity that the intermediary would carry out essentially for himself.

3.2. The situation in the Netherlands

The consequences that the ruling will have on the Dutch market are still unclear. Under the so-called "Fenex ruling", until now it was possible for a policyholder to have a dual role also as insurance intermediary, as the *Autoriteit Financiële Markten*, the Dutch Authority for the Financial Markets (AFM) was of the opinion that the activities of a policyholder of a group insurance could be interpreted as intermediation activities, although a license was required.

Fenex is a Dutch organization for forwarding and logistics. As a result of the *Wet financiële dienstverlening*, or Financial Services Act (Wfd) entering into force, companies offering insurance in the Netherlands would have been imposed certain financial requirements, as well as training standards for their staffs to meet and also mandatory registration with the AFM. In order to be compliant and be able to provide insurance, Fenex engaged in discussions with the AFM and the Dutch Ministry of Finance, to clarify whether the freight forwarding sector was included in the scope of application of the law and therefore Fenex could continue taking out goods transport insurance on behalf of clients.

[16] *Ley 26/2006, de 17 de julio, de mediación de seguros y reaseguros privados*, available at: https://www.boe.es/buscar/act.php?id=BOE-A-2006-12916, 18.11.2022.

As a result, the company was allowed to continue to offer such services to their customers, but the take out of freight forwarding insurance on behalf of clients was subject to specific conditions.[17]

The Dutch Authority is expected to work on a review of its policy in the aftermath of the ECJ case and therefore consulted the market. It would be of primarily importance for the AFM to clarify in what cases a consultation on conditions and premiums for a group of prospective policyholders would be considered mediation.

That is even if in the intentions of the ECJ, as presented in the case at hand, a consultation on conditions and premiums is just one part of the considerations that would lead to the conclusion that the sponsor of a group policy is acting as mediator.

The other essential part, on which the Court also focuses its attention, lies in fact in the profit that the sponsor would be making: as highlighted in the decision[18], the prospect of remuneration represents for the sponsor an economic interest of its own, such to encourage membership of the voluntary group insurance contract, in order to grow the number of members, which with their payments finance or even exceed the amount of premiums the sponsor pays to the insurer for the same policy.

4. CONCLUSIONS

If the starting point of our research was the recognition of the criteria according to which a group organizer becomes a distributor, the ECJ provides a response based on the achievement of an economic benefit – not only on the type of activity carried out by the representative of the group members.

What is then the economic benefit that the group organizer achieves? The definition can already be found in the IDD, in art. 2(1)(9): a remuneration that puts on the same level the activities of a policyholder to those of a distributor or a paid agent of an insurance company.

A systematic interpretation of the Directives in insurance distribution draws the reader to the same conclusion: "*the activity consisting in enabling third parties to obtain insurance cover as a result of enrolment in group insurance, which enrolment takes place on an individual and voluntary basis and the enrolees indirectly finance the insurance premium, falls within the concepts of 'insurance mediation' and 'insurance distribution*'"[19].

The decision of the ECJ at the basis of this paper highlighted once more that there is no uniformity in the European approach to affinity schemes. At the extremes of the current landscape are the Italian view, which appears decidedly more defined and schematic in its application, and the German rules, which can be considered "lighter," in the sense of greater freedom of interpretation and implementation left to intermediaries.

Until now, there was an assumption based on an interpretation of the rules that a subject could play the role of the intermediary and policyholder at the same time. The ECJ's decision makes clear that this concept already exists in the Directives in force

[17] Fenex 2005 annual report, *Jaarverslag Fenex 2005,* p. 10, available at: https://adoc.pub/jaarverslag-fenex-2005.html, 19.12.2022.

[18] See note 6, *supra*.

[19] Opinion of Advocate General Szpunar delivered on 24 March 2022, par. 100.

and should be better cascaded into the Member States' legislation on the basis of the "level playing field" principle. That difference is clear since, as we analyzed *supra*, some countries (eg. Italy) already went ahead, goldplating the existing rules.

The consumers, to be protected, must know or be made aware that they are buying an insurance protection. The profit made on an otherwise unconscious choice would rightly be considered an economic interest generating a distortion in the market that should therefore be regulated.

On a practical level, the decision now calls for an examination of the affinity constellations which could already be compliant with the ECJ ruling. Further developments since the ruling should be analyzed thoroughly, with care and interest, especially in the context of the review of the IDD.

It would be advisable for the next iteration of the Directive to clarify that the policyholder should never be considered an intermediary in case the policy covers its own risks, especially in relation to incurring in a possible financial risk for a service offered to its clients. On the other hand, there should be a clear disclosure in favor of the clients being part of a voluntary group insurance when the risk insured is their own, to allow customers to make an aware purchasing decision.

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