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FOREIGN COURT PRACTICE

**JUDGMENT OF THE EUROPEAN COURT OF  
JUSTICE IN THE CASE “BUNDESVERBAND  
DER VERBRAUCHERZENTRALEN UND  
VERBRAUCHERVERBÄNDE eV”**

**v.**

**“TC MEDICAL AIR AMBULANCE AGENCY GmbH”**

## **1. Introduction**

The legal issue dealt with by the European Court of Justice in the case no. C-633/20 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH* (judgement made on 24 March 2022) was placed in the context of the application of European regulations concerning insurance mediation (Directive on Insurance Mediation and Directive on Insurance Distribution), e.g. interpretation of terms insurance intermediary and insurance mediation in concluding group insurance policies.

The issue refers to the separation between the professional activity of offering clients group insurance and the provision of insurance brokerage services (i.e. separation of the role of a policyholder of a group insurance policy from the role of an insurance intermediary).

## **2. Legal Framework**

Relevant European regulations governing the above-mentioned legal matter are the Directive 2002/92/EC on Insurance Mediation of 9 December 2002, and the Directive (EU) 2016/97 on Insurance Distribution of 20 January 2016.

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In terms of the Directive 2002/92/EC, relevant provisions are:

Paragraph 11 of the Preamble stipulates that “Directive should apply to persons whose activity consists in providing insurance mediation services to third parties for remuneration, which may be pecuniary or take some other form of agreed economic benefit tied to performance.”

Article 1 (1) stipulates that “Directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation by natural and legal persons which are established in a Member State or which wish to become established there.”

Article 2 (3) stipulated that “insurance mediation means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of insurance contracts, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.”

Article 2 (5) stipulated that “insurance intermediary means any natural or legal person who, for remuneration, takes up or pursues insurance mediation.”

Regarding the Directive 2016/97, relevant provisions are contained in several paragraphs of its introductory part, which primarily call for the establishment of the same legal regime for insurance distribution, regardless of the type of distributor. Those are:

Paragraph 5 of the Preamble stipulated that “various types of persons or institutions can distribute insurance products. Equality of treatment between operators and consumer protection requires that all those persons or institutions be covered by this Directive.”

Paragraph 6 stipulated that “consumers should benefit from the same level of protection despite the differences between distribution channels. In order to guarantee that the same level of protection applies ... a level playing field between distributors is essential.”

Paragraph 7 stipulated that “the application of Directive 2002/92/EC has shown that a number of provisions require further precision with a view to facilitating the exercise of insurance distribution and that the protection of consumers requires an extension of the scope of that Directive to all sale channels of insurance products.”

Paragraph 16 stipulated that “Directive should ensure that the same level of consumer protection applies and that all consumers can benefit from comparable standards. This Directive should promote a level playing field and competition on equal terms between intermediaries, whether or not they are tied to an insurance undertaking. There is a benefit to consumers if insurance products are distributed through different channels and through intermediaries with different forms of cooperation with insurance undertakings, provided that they are required to apply similar rules on consumer protection.”

Article 1 (1) stipulated that “Directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation in the European Union.”

Article 2 (1) stipulated that insurance distribution means “the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of insurance contracts, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media.”

Article 2 (3) stipulated that “insurance intermediary means any natural or legal person, other than an insurance or reinsurance undertaking or their employees and other than an ancillary insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution.”

Article 2 (8) stipulated that “insurance distributor means any insurance intermediary, ancillary insurance intermediary or insurance undertaking;

Article 2 (9) stipulated that “remuneration means any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial incentive offered or given in respect of insurance distribution activities.”

### **3. Subject Matter of the Proceedings and Legal Issues**

The defendant in the main proceedings, *TC Medical Air ambulance Agency GmbH* is a company whose business model is based, on one hand, on concluding group insurance contracts with an insurance company *W. Versicherungs-AG*, which provides group members with cover for risks of illness and accident during travel abroad as well as cover of repatriation costs (transportation to the country of residence in the event of the occurrence), and on the other hand, it commissions advertising companies to offer consumers, by way of door-to-door advertising, membership in a group insurance system for a fee.

The defendant *TC Medical Air ambulance Agency GmbH* is a policyholder, and the defendant’s clients who concluded group insurance pay a fee that entitled them to various services in case of illness or accident abroad, including reimbursement of healthcare costs, ambulance transportation, organization and repatriation, and access to emergency call centre (essentially, they became the insureds). The defendant *TC Medical Air ambulance Agency GmbH* provided the said services via company *F. r. AG*, which using its medical staff and its aircraft, organised and carried out repatriation in case of illness or accident and organised a round-the-clock emergency call centre.

The defendant’s business activity is not aimed at concluding an insurance contract, but to enable clients to join group insurance (which the defendant contracted, whereby the clients became insured persons), as well as to enable them to

use services covered by that insurance. Neither the defendant nor the advertising companies are licensed as insurance intermediaries.

The consumer protection association *Bundesverband der Verbraucherzentralen und Verbraucherverbände eV* believed it was insurance mediation and therefore brought an action before the national court seeking an order that the defendant cease from performing its business activity. The court of first instance upheld that action. The court of second instance dismissed the action and held that the defendant cannot be deemed as an insurance intermediary.

The referring court, the Federal Court of Justice, considered that the merits of the action depend on whether according to the Directive 2002/92 on Insurance Mediation, i.e. Directive 2016/97 on Insurance Distribution, the defendant can be deemed as “an insurance intermediary.” The Federal Court of Justice decided to stay the proceedings and to refer the following question to the European Court of Justice: “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 consumers 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 insurance intermediary within the meaning of Article 2(3) and (5) of the Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of the Directive (EU) 2016/97?”

### **3.1. Opinion of the European Court of Justice**

The court sought, in essence, to clarify whether a legal entity whose activity is offering clients to join group insurance (which a legal entity previously concluded with an insurance company) on a voluntary basis, in exchange for a fee, whereby the clients are entitled to use insurance services in case of illness or accident abroad, can be deemed an insurance intermediary.

The court pointed out that an insurance intermediary is the term related to fulfilment of two conditions - the first is provision of insurance mediation services, and the second is receiving a fee for such activity.

According to the court, the fee (for insurance mediation services) is set in directives to include situations like the one from the previous question, because a legal entity, by including clients in group insurance and receiving a fee in the form of membership fees for such inclusion, contributes to the fact that the third persons acquire insurance cover. The membership fee, which a legal entity as a policyholder of group insurance policy received from members, constituted a special economic interest of this legal entity separate from the members’ interests (insured persons), which is such that a legal entity encouraged a large number of memberships, which

confirmed commissioning of advertising companies to offer consumers, by way of door-to-door advertising, membership in a group insurance system for a fee.

The fact that the payment of fee in favour of a legal entity that concluded an insurance contract is done by members (in exchange for the right to insurance services granted to them by a legal entity) and not by an insurance company in the form of a commission is not important, since the definition of fee is broad enough to include such situations.

The court also considered the second condition concerning insurance mediation to be fulfilled because the list of activities that define mediation, i.e. insurance distribution, is alternatively set in the directives, and it is sufficient to perform one of the listed activities for a person to be considered to be performing insurance mediation (provided that he receives some kind of fee for it).

The court did not take into account the defendant's statements that the main goal of his business activity is not the conclusion of insurance contracts, but voluntary joining of clients to an existing group insurance contract, as well as his statements that an insurance policyholder, according to the directives, cannot be an insurance distributor (that is, a distributor by definition must be a person who is a third party in relation to an insurance contract concluded between an insured and an insurance company).

The court took a position that the disputed business activity is comparable to a paid activity of an insurance distributor, and as the goal of the Insurance Distribution Directive is to provide an equal level of protection to consumers regardless of the distribution channel, the court considered that the term of an insurance intermediary from the Directive on Insurance Mediation, that is, the term of an insurance distributor from the Insurance Distribution Directive should be interpreted as to include legal entities, which, in exchange for compensation in the form of a membership fee, enrol clients in group insurance, which they have previously concluded with an insurance company, whereby clients acquire the right to use insurance services, especially insurance against the consequences of illness or accident abroad.

#### **4. Brief Overview of Judgment**

In this case, the court resolved a doubt concerning certain innovative insurance distribution models where a legal entity offered clients a membership in a group insurance policy, which the legal entity itself concluded with an insurance company. Clients paid membership fees to a legal entity as members (insureds), and in return they acquired the right to use benefits (cover) provided by a group insurance policy contracted by a legal entity. Regardless of the fact that the EU directives in insurance mediation and distribution did not explicitly foresee this situation, the court broadly interpreted the term of remuneration (so as to include a membership

fee) and the term of insurance mediation (so as to include a policyholder of a group insurance policy). The court took into account the goal of the directives, which is to provide the same level of protection to insurance service users, regardless of a distribution channel, status, form (that is, as the defendant claimed in the main proceedings – a business model) of an insurance distributor. In this sense, in future, similar business models must be subject to the same regulatory requirements like other insurance distributors.

*Translated by: Jelena Rajković*