GLOSY

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ECJ – Group organizer as a distributor by the terms of IDD Commentary Judgement of the Court (First Chamber) of 29 September 2022 in case C-633/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH, ECLI:EU:C:2022:733.

Article 2(3) and (5) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, as amended by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, and of Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016, on the distribution of insurance, as amended by Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018, must be interpreted as meaning that the concept of 'insurance intermediary' and, therefore, that of 'insurance distributor', within the meaning of those provisions, covers a legal person whose activity consists in offering its customers membership on a voluntary basis, in return for payment which

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it receives from them, of a group insurance policy to which it has subscribed previously with an insurance company, where that membership entitles those customers to insurance benefits in the event, in particular, of sickness or accident abroad.

Keywords: group insurance, IDD, insurance intermediary, disclosure obligations.

I. Factual and the legal background.

The aim of this paper is to present the impact of the commented judgment on Member States' regulations concerning the legal position of the policyholder (group organiser) in group insurance contracts. The judgment of the Court of Justice (hereinafter "ECJ") may generate the need for new regulations regarding group organiser as a insurance distributor from the perspective of the substantive law of Member States.

The Judgment of the ECJ has decided on the preliminary ruling requested by the Bundesgerichtshof (Federal Court of Justice of Germany, hereinafter "BGH")[2], which concerned the interpretation of Article 2 (3 and 5) of the repealed Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 (hereinafter "Directive 2002/92") and Article 2.1 (paragraphs 1, 3 and 8) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (hereinafter the "Directive 2016/97"). The preliminary ruling was requested within the dispute between the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV (Federal Union of Consumer Organisations and Associations of Germany) and the entity TC Medical Air Ambulance Agency GmbH (hereinafter, "defendant") which discussed the alleged activity of insurance mediation carried on by the latter without the required authorization.

The defendant, defendant, hired advertising companies with the task of offering consumers, by way of door-to-door sales, the adhesion to a group insurance policy of which it was the policyholder and in which, in that capacity, defendant paid the premiums to the insurer. This group policy covered consumers who agreed to adhere to it against the risks of sickness or accident when travelling abroad, as well as repatriation costs from abroad and within the national territory. defendant's customers who adhered to the group policy paid a remuneration to defendant in exchange for the right to the referred benefits in the event of sickness or accident abroad. However, according to the judgement of ECJ, the benefits to the insured persons were paid by means of claims (credits) which defendant assigned to its customers. Neither defendant nor the advertising companies had the necessary authorisation required under German law to carry out the activity of insurance mediation. In that context, the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV (Federal Union of Consumer Organisations and Associations of Germany) brought an action before the Landgericht Koblenz (Regional Court in Koblenz, hereinafter "LG Koblenz) seeking an order requiring defendant to cease that activity, on the grounds that such activity corresponds to that of an insurance intermediary, an activity for which it was not duly authorised. That Court upheld the lawsuit, a decision which was subsequently reversed

2. Decision of BGH of 15.10.2020, I ZR 8/19, GRUR 2021, 80, beck-online.

by the Oberlandesgericht Koblenz (Higher Regional Court in Koblenz, hereinafter "OLG Koblenz"), who found that defendant should not be deemed as an insurance intermediary.

The case reached the highest German Court, the Bundesgerichtshof (Supreme Court of Germany), before which a cassation appeal was filed. The Bundesgerichtshof referred the case to the ECJ for a preliminary ruling, as it considered that the debate should focus on whether defendant is an insurance intermediary within the meaning of the repealed Directive 2002/92 and Directive 2016/97 or not. The question referred to the ECJ for a preliminary ruling was the following: "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 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?"

II. Short characteristics of the judgement.

In the ECJ's view, the defendant in the main proceedings would fall within the concept of insurance intermediary, in view of the definitions of "insurance intermediary", "distribution activity" and the concept of "remuneration" of Directives 2002/92 and 2016/97, as well as the context and the objectives pursued by those regulations. "Remuneration" is defined in Directive 2016/97 as "any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities". The ECJ understood that defendant received remuneration within the meaning of the Directive, since each adhesion by a customer to the group insurance policy entailed the payment of an amount to defendant. Thus, in doing so defendant contributed, in return for that remuneration, to the acquisition by third parties (its customers) of the insurance cover provided for in the contract which it had concluded with an insurance company. According to the ECJ, the prospect of such remuneration represents, for a legal person such as the defendant in the main proceedings, an economic interest of its own, distinct from the interest of the customers in obtaining insurance cover under the contract in question, an interest which is likely to encourage it, in view of the optional nature of membership of that contract, to seek to obtain a large number of adhesions. This is demonstrated in this case by the fact that defendant used advertising companies with the task of offering such membership by means of door-to-door sales. What is relevant here is that the ECJ states that it is irrelevant that the payment in favour of the legal person who has concluded such group insurance policy with the insurance company (defendant) is made by the adherents and not by the insurer, in the form, for example, of a commission. Besides, that circumstance does not exclude that person's own economic interest in having as many of its customers as possible adhere to such a contract so that their payments finance, or even exceed, the amount of the premiums which it itself pays to the insurer under the same contract. Distribution activities are defined in Directive 2016/97 as "activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, 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". The ECJ has already determined on other occasions that the activities listed in that provision are presented as alternatives, i.e. that each of them constitutes in itself an activity of insurance mediation. It is therefore sufficient for an entity to carry out only one of the activities listed in the definition for that entity to be deemed an insurance intermediary. Not only that, but the ECJ has specified that the list of activities contained in that definition must be interpreted broadly, in particular with regard to work prior to the conclusion of insurance contracts "and the nature of the preparatory work referred to is not limited in any way whatsoever". Against this background, the ECJ has been categorical in concluding that, although Directives 2002/92 and 2016/97 do not expressly refer to the type of activity carried out by defendant (i.e. offering its clients the adhesion to a group insurance policy of which it is the policyholder) as insurance mediation, "the definitions contained in those provisions must be read as encompassing such an activity". For the ECJ, that activity "is comparable to the paid activity of an insurance agent or a distributor of insurance products which seeks the conclusion, by policyholders, of insurance contracts with an insurer whose object is to cover certain risks in return for the payment of an insurance premium". It is in the context of this reasoning that the ECJ refers to the possibility of a legal person acting simultaneously as a group policyholder and as an insurance intermediary in the following words: "(...) the fact that the legal person engaging in an activity such as that at issue in the main proceedings is itself a party, as policyholder to the group insurance policy which it intends to encourage its customers to join, is not decisive. Just as the status of insurance distributor, under Article 2(1)(8) of Directive 2016/97, [is not] incompatible with that of an insurer, the status of insurance intermediary and, therefore, of insurance distributor is not incompatible with that of a policyholder".

III. Dualistic conception of group insurance.

In case of insurance with voluntary accession, insurance protection follows from the contract between the insurer and a group member.[3] It is concluded as a result of the declaration of accession and its acceptance by the insurer. The terms of insurance are specified in the framework agreement, between the insurer and the group organizer. Under that agreement, the insurer undertakes at the same time to enter into insurance contracts with members of the group using the abovementioned construction of stipulation of benefit for a third party (*stipulation de contrat pour autrui*). The person applying for insurance protection makes a declaration of accession to the insurer. Such person consents to being afforded protection on the terms specified by the policyholder and the insurer in the framework agreement. This act may be evaluated as declaration of intent. Therefore, it may serve as ground for the establishment of an obligational relationship which subsists due

3. J. Bigot (in:) J. Bigot (ed.), *Traité de Droit des assurances. Tome 3. Le contrat d'assurance,* Paris 2002, p. 132.

to the framework agreement but also independent of such agreement. The assumptions of the conception of dispersed obligational relationship apply here in the full extent.[4]

It should be explained that an insurance contract with compulsory accession (*assurance à l'adhésion obligatoire*) may not be identified with compulsory insurance (*assurance obligatoire*).[5] The obligatory character of accession to the insurance contract implies that establishment of the insurance protection is a consequence of adherence to a specific group. Upon fulfilment of the preconditions to adherence to the group, the specific person becomes covered by insurance protection and obtains the status of an insured party. Such person does not have to make any declaration of accession to the insurance.[6] On the other hand, imposition by the legislator of an insurance obligation does not lead to automatic emergence of insurance protection.

As mentioned above, also in German literature the heterogenous character of the concept of group insurance is emphasized. Authors point to two contractual constructions which account for the system of affording protection to a group of insured parties. These constructions, in fact, display clear affinity with the group insurance models described above in the context of French law. So called improper group insurance (*unechte Gruppenversicherung*) is based on a framework agreement. The contract from which insurance protection is directly derived is concluded between a group member and the insurer. The group member takes the role of both the policyholder and the insured party.[7] On the other hand, proper group insurance (*echte Gruppenversicherung*)[8] is a construction in which the group organizer is at the same time the policyholder, and the insured parties within the group are not parties to the agreement concluded with the insurer. However, proper group insurance contracts do not form a uniform category. One can differentiate between their two forms.[9]

Such division of group insurance was also proposed in the judicature of the Polish Supreme Court. In the Supreme Court's case-law, two very important views were presented on the legal status of the group insurance contract. In the judgment of 16 September 2016, the Supreme Court pointed out that, in the examined case, the bank acted as policyholder concluding an insurance contract with the insurer for the benefit of a third party. The insured person, by making a respective declaration, joined the personal group insurance, which was a kind of collective insurance, and, as a result, became a party (within the insurance relationship), rather than a third party. This means that the Court did not use the construction of insurance for the account of a third party, as provided for in Art. 808 of the Civil Code.[10] The insured person concluded a contract by accession

4. L. Mayaux, note sous Cass. 2ème Ch. civ., 8 juillet 2010, no 09–16417, Revue générale du droit des assurances 2010, n° 4, p. 1090.
5. L. Mayaux, *La nature juridique de l'assurance collective (in:) L. Mayaux, Les grandes questions du droit des assurances, Paris 2011,* p. 64.
6. Otherwise in P.G. Marly, *Droit des assurances*, Paris 2013, p. 285.
7. F. Herdter, *Der Gruppenversicherungsvertrag: Grundlagen und ausgewählte Problemfelder,* Karlsruhe 2010*,* p. 14.
8. This terminology was coined by H. Millauer, *Rechtsgrundsätze der Gruppenvericherung, Karlsruhe 1966*, p. 107 et seq.
9. See more: M. Fras, The European Context of the Group Insurance Contract, Problemy Prawa Prywatnego Międzynarodowego 27/2020, p. 179 et seq.
10. § 1. The policyholder may conclude an insurance contract for the account of a third party. The insured party might not be referred to by name in the agreement, unless this is necessary for the specification of the sub-

(adhesion), and the contract's terms were specified by other parties, which means that the scope of contractual freedom of the insured person was much reduced and exhausted by acceptance of the presented general terms and conditions of contract, without any possibility to modify those terms and conditions.[11]

In another judgment of 12 January 2018, the Supreme Court adopted the view on two types of the group insurance contract, concluding that, in the factual context of the case, the insured person in fact insured himself using the possibilities left at his disposal, by taking advantage of a simplified procedure of entering into the contract as agreed between the Bank and the defendant. Such content of the contract corresponds to a greater extent with the so called dispersed group insurance relationship, as distinguished in literature of the subject, which implies that – beside the framework agreement between the insurer and organizer of the insured group – individual contracts can be identified, concluded by accession to the insurance, whose provisions are specified *ex ante* in the framework agreement.[12]

IV. Legal position of the policyholder and organizer of the group.

A view is relatively popular in French literature that, in at least certain group insurance schemes, the policyholder does not by itself conclude the insurance contract but only a framework agreement which does not have the characteristics of a typical insurance relationship. On the other hand, the insurance contract *sensu stricto* stands between the insured persons and the insurer. Under this assumption, the party concluding the framework agreement should be referred to as "organiser of the group" or the group's "operator," whereas the insured person as policyholder. Merely signalling at this point the essence of the problem, it must be noted that such an insurance formula is referred to as insurance contract with voluntary accession. The other forms of the group insurance contract (group insurance schemes with compulsory accession) are closer to the construction of the insurance contract for the account of a third party. The organiser of the group acts in such situations as policyholder concluding the agreement for the account of the group's members (insured persons). Consequently, under the first model, a member of the group is the insured person and the policyholder, while the entity concluding the framework agreement with the insurer acts as the group's organiser. On the other hand, in insurance schemes with compulsory accession, one can distinguish the organizer of the group (policyholder) and members of the group (insured persons).

The French legislator, at least in the terminological dimension, seems to abstract from the specific position of the party organising the group insurance contract and from the above-mentioned dichotomous division into insurance schemes with compulsory and voluntary accession.[13]

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11. Judgment of the Supreme Court of 16 September 2016, file reference IV CSK 711/15, LEX No. 2151436.
12. Judgment of the Supreme Court of 12 January 2018, file reference II CSK 222/17, LEX No. 2446838.
13. However, French law accentuates the peculiar nature of group insurance in the context of naming a member of the group applying for insurance protection. Such person is not only the "insured party" (*assuré*) but the "acceding party" (*adhérent*), which points to specific activities undertaken by such person for the insurance cover to arise under the group insurance scheme.

In the legal idiom, the party concluding the insurance contract with the insurer is consequently referred to as policyholder (Art. L. 141–1 CA). In the context of the proposed conceptual apparatus, the legislator does not distinguish between situations in which the agreement between the group's organizer and the insurer is and insurance contract and situations in which it makes a framework agreement.

Also in German literature, attention is drawn to the fact that only in a so called proper group insurance contract the organizer of the group is, at the same time, the policyholder. On the other hand, in a so called improper group insurance contract, based on the above-mentioned construction of framework agreement and corresponding to the French model of insurance with voluntary accession, the group's organizer should be distinguished from the policyholder. The agreement under which insurance protection is offered directly is concluded between a member of the group and the insurer. The group's member acts at the same time as both the insured person and policyholder.[14]

Under the French model, the catalogue of persons that may enter in a group insurance contract is limited. In this context, the provision of Art. L. 141–1 CA mentions only a legal person (*personne morale*) and a natural person conducting business activity (*chef d'entreprise*). In the former case, when the contract is concluded by a legal person, the entities most frequently acting as policyholders are an employer, bank, sports association or entity managing specific assets, entering into an agreement with the insurer.[15] It is emphasized in literature of the subject that it is extremely rare for natural person entrepreneurs to conclude group insurance contracts. Bearing in mind the scale of the conducted activities, the interested parties are more prone to take advantage of an offer of entrepreneur organizations, which conclude, in their interest, group insurance agreements.[16]

Similar restrictions were not envisaged in German and Austrian law. However, literature of the subject describes a different mechanism of narrowing down the range of persons that may acquire the status of policyholder. A given party may conclude a group insurance contract with a view to ensuring insurance coverage to a given group if there is an extra-insurance relationship between that specific party and each member of the group.[17] Therefore, the limits of the capacity to be a policyholder, just as the limits of the capacity to be an insured person, are delimited by the existing relationship between the policyholder and members of the group to which insurance cover is to be afforded.[18]

14. F. Herdter, *Der Gruppenversicherungsvertrag...*, p. 14.
15. L. Grynbaum (ed.), *Assurances 2013–2014. Acteurs, contrat, risques des consommateurs, risques des entreprises*, Paris 2012, p. 333.
16. L. Mayaux (in:) J. Bigot (ed.), *Traité de Droit des assurances. Les assurances de personnes, t. 4,* Paris 2007, p. 626.
17. F. Herdter, *Der Gruppenversicherungsvertrag...*, p. 77.
18. See more: M. Fras, The European Context of the Group Insurance Contract, Problemy Prawa Prywatnego Międzynarodowego 27/2020, p. 179 et seq.

V. PEICL and group insurance.

Advocate General M. Szpunar in his opinion delivered on 24 March 2022[19] points out that as in the case of model rules of European private law (Draft Common Frame of Reference (DCFR))[20], model rules of European insurance law (Principles of European Insurance Contract Law (PEICL)) were drawn up using the comparative law method.[21] In those rules, the person who concludes a contract with an insurer so that others can then benefit from insurance cover is referred to as a "group organiser". The use of that concept makes it possible to avoid terminological difficulties and to avoid prejudging a priori whether the "group organiser" thus understood is a "policyholder" under insurance law or rather a "customer" under IDD[22].

Also under the PEICL, a distinction is made between "accessory group insurance" (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) and "elective group insurance" (group members are insured as a result of applying in person or because they have not opted out of the insurance).[23]

In 2016, the full text of the PEICL was published together with commentary.[24] The original version of the PEICL did not contain the provisions on group insurance.[25] As the works progressed, the authors of the PEICL eventually decided to introduce a definition of the group insurance contract which – beside the definition of "insurance contract," "damage insurance" and "fixed-sum insurance" – was covered by the provision of Art. 1:201, in paragraph (7) of that provision. It was concluded that group insurance contracts are based on the agreement between the insurer and the group organizer concluded for the benefit of the insured parties who have a common connection with the organizer and meet the requirements set forth in such agreement. So determined circle of the insured parties is referred to as "group". At the same time, the definition expressly mentions the possibility of obtaining protection by members of the insured party's family under the group insurance contract.

Researchers from the Restatement Group opted as well for sanctioning the distinction between insurance with compulsory accession (*accessory group insurance*) and insurance with voluntary accession (*elective group insurance*). The first of these concepts is defined as group insurance in which the existence of insurance protection is a consequence of belonging to a given group. The insured party may not withdraw from the insurance coverage. The second category,

19. Opinion of Advocate General Szpunar delivered on 24 March 2022 in Case C-633/20.
20. See C. von Bar, E. Clive, H. Schulte-Nölke, *et al*. (eds), Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition, Sellier European Law Publishers, Munich, 2009, p. 7.
21. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss and L. Loacker (eds), Principles of European Insurance Contract Law (PEICL), Verlag Dr. Otto Schmidt, 2016, p. 57
22. § 70 of opinion of Advocate General Szpunar delivered on 24 March 2022 in Case C-633/20.
23. § 71 of opinion of Advocate General Szpunar delivered on 24 March 2022 in Case C-633/20.
24. J. Basedow, J. Birds, M. Clarke, H. Cousy, H. Heiss, L. Loacker, Principles of European Insurance Contract Law (PEICL), 2nd Expanded ed Edition, Köln 2016.
25. Ch. Armbruster, *PEICL – The Project of a European Insurance Contract Law*, Connecticut Insurance Law Journal 2013, vol. 20, p. 150.

on the other hand, refers to situations in which accession to a group insurance is a consequence of submitting to the insurer a notice of intention to join the circle of insured parties or absence of refusal to accede to the insurance.[26]

In the provision of Art. 1:201 PEICL, containing a dictionary of terms used in the PEICL, the authors additionally introduced definitions of the group insurance contract (Art. 1:201 item 7), group insurance with compulsory accession (*accessory group insurance*) (Art. 1:201 item 8) and group insurance with voluntary accession (*elective group insurance*) (Art. 1:201 item 9).

VI. Impact of the commented judgment on German law.

Thus far, in German literature, the dominant view was that the policyholder in a group insurance contract, as a party to the legal relationship, may not be, at the same time, considered an insurance intermediary, even if the policyholder offers, as a part of the policyholder's activities, voluntary accession for consideration to the group insurance scheme.[27] The above was confirmed, among others, by interpretation of the provision of § 34d of the Act on conducting business activity,[28] in which the legislator listed among insurance intermediaries only insurance agents (Versicherungsvertreter) and insurance brokers (Versicherungsmakler).[29] For the above reason, it was assumed that activities of a so called group organiser (Gruppenspitze), who intermediates in the offering of insurance coverage within the framework of the proper group insurance contract (echte Gruppenversicherung), did not require any authorisation. On the other hand, a minority view presented in academic literature related to a group insurance contract based on the formula of so called framework agreement (Rahmenversicherung), and assumed that one can speak of the policyholder as intermediary when the policyholder does not conclude group insurance in the interest of the insured persons but acts in the policyholder's own economic interest.[30] Set aside the inconsistent terminology regarding the types of group insurance contracts in Germany, it should be pointed out that in the general part of the German Act on the insurance contract (hereinafter: "VVG")[31] there are no provisions on the group insurance contract. One exception is the legal regime of the group insurance contract covering repayment of debt (Restschuldversicherung). Under § 7d VVG, within the framework

26. More on the considered conceptions of the group insurance contract in M. Fras*, Umowa ubezpieczenia grupowego. Aspekty prawne,* Warszawa 2015, p. 400–402.

27. A. R. Stöbener, Beratungspflichten des Versicherers. Von der Anlassrechtsprechung zur IDD, H, Karlsruhe 2018, p. 399–402.

28. Gewerbeordnung of 22 February 1999, (BGBl. I S. 202).

29. 1. Whoever wishes to professionally intermediate in the conclusion of insurance or reinsurance contracts (insurance intermediary), must, according to the following provisions, obtain authorization from the competent chamber of commerce and industry.
    2. Insurance intermediary shall be any party, who:
        1) as insurance agent of one or several insurance companies or of an insurance agent, was entrusted with intermediation or conclusion of insurance contracts, or
        2) as insurance broker, deals with intermediation or conclusion of insurance contracts on behalf of a mandator, without acting in that respect on behalf of an insurance company or of an insurance agent.

30. H.-P. Schwintowski, Verbraucher und Recht (VuR) – Zeitschrift für Wirtschafts – und Verbraucherrecht 8/2008, p. 286.

31. Gesetz über den Versicherungsvertrag of 23 November 2007, (BGBl. I S. 2631)

of such group insurance contract covering repayment of debt, the policyholder has the same disclosure and advisory obligations to the insured person as the insurer.[32]

In the main proceedings, the I instance court (Regional Court in Koblenz) assessed the economic model used by the defendant as requiring authorization prescribed by the law.[33] On one hand, LG Koblenz drew attention to the fact that the defendant, as such, was a party to the agreement and, consequently, in the light of the provisions of national law, could not be considered an insurance intermediary. On the other hand however, LG Koblenz concluded that the *modus operandi* adopted by the defendant made a conscious attempt both to circumvent provisions on the need to obtain authorization and to evade civil law disclosure obligations, advisory obligations and record keeping obligations under VVG. In the opinion of the I instance court, expressed in main proceedings, the activities of the defendant in fact boiled down to distribution of group insurance to its customers.

However, in appellate proceedings, the Higher Regional Court in Koblenz adopted the view expressed in academic literature that the group organizer, as a party to the group insurance contract, cannot at the same time be an insurance intermediary.[34] In the opinion of OLG Koblenz, the activities of the defendant cannot be qualified as insurance intermediation in the understanding of § 34d GewO. The examined group insurance contract was qualified by OLG Koblenz as insurance contract for the account of a third party, in which insurance premium was paid to the insurer by the defendant – the policyholder. Moreover, OLG Koblenz draws attention to the fact that consumers contacted by the defendant did not deserve the same degree of protection as consumers contacted by insurance intermediaries. As opposed to insurance intermediaries, the defendant did not create the appearance that, as a part of its activities, the defendant would objectively provide advice to consumers. Rather than that, from the very beginning, the defendant appeared as a potential contractual partner having its own economic interests in the conclusion of the agreement.

In the justification of the commented judgment, the ECJ draws attention to the fact that the positive answer to the referred preliminary question is a consequence of interpretation of Directive 2002/92 and Directive 2016/97, taking into account not only the text of the provisions but also their context and purposes of the legislative instruments. In this regard, the ECJ shared the view that consumers should enjoy insurance coverage at the same level regardless of differences between the channels of insurance distribution. However, the qualification of the policyholder in the group insurance contract as insurance intermediary raises legitimate doubts of academic authors and may have major significance in the insurance practice.

Analysis of the commented judgment leads to the conclusion that the ECJ offered broad interpretation of the terms "insurance distribution" and "insurance intermediary," including the prerequisite "for consideration." In effect, the ECJ explained in very general terms in what situations and under what conditions a policyholder in a group insurance contract can qualify as insurance

32. The policyholder in the group insurance contract covering repayment of the remaining debt has, in relation to the insured person, the advisory and disclosure obligations imposed on the insurer. The insured party has the rights of a policyholder, in particular, the right to withdraw from the contract. The insured party should be instructed once again in writing about the right of withdrawal within one week from the declaration of acceding to the contract. Along with the instruction, the insured person should once again be provided with the insurance product information sheet. The deadline for the right of withdrawal does not start running before the receipt of the above documents.

33. Judgment of LG Koblenz of 26.6.2018, 2 HK O 67/17, BeckRS 2018, 37627, beck-online.

34. Judgment of OLG Koblenz of 19.12.2018, 9 U 805/18, GRUR-RR 2019, 161, beck-online.

intermediary. In the first place, by giving expression to a broad understanding of the term "consideration," used by the EU legislator in Recital 11 of Directive 2002/92 and in Art. 2(1) item 9 of Directive 2016/97, ECJ admits that "the condition relating to the existence of remuneration must be regarded as satisfied where every membership of a customer of the legal person which subscribed to the group insurance policy with the insurance company and which pays, on that basis, the insurance premiums to that company, gives rise to a payment to that legal person". One can only agree with the opinion of the ECJ that the defendant in the main proceedings actually acted in the defendant's own economic interest and, as a consequence, the benefits obtained by the defendant fell within the scope of the term "consideration." However, it is still dubious to put an equation mark between the activities of a group's organiser, who is a party to the insurance contract, and remunerated activities of an insurance intermediary or insurance distributor.[35] A further part of the justification of the commented judgment reveals that, in the opinion of the ECJ, it is irrelevant that a legal person conducting such activities as examined in the main proceedings is in itself a party to the group insurance contract in respect of which the legal person intends to encourage its customers to make a declaration of accession (46). One should approach with criticism the lack of in-depth considerations in this respect.

In the same way, the ECJ points to two prerequisites permitting qualification of a policyholder in a group insurance contract as insurance intermediary. First of all, this is voluntary accession to the group insurance scheme, that is the possibility to make an individual decision, and the economic interest of the policyholder as organizer of the group. However, in the commented judgment, the Court did not address the difference between acquisition of membership in a particular group and the accession to the group insurance contract as such.

It seems that the decisive factor in the assessment of the prerequisite of voluntariness, as invoked by the ECJ, should be intention and purpose for which potential members of the group join the scheme. Therefore, it should be sufficient to resolve if, when joining a particular group, its members have a real possibility to withdraw from the insurance coverage offered within the framework of the group insurance contract.[36]

One should accept the opinion that the judgment of the ECJ should not be interpreted so that the policyholder in the group insurance contract must always be treated as insurance intermediary if the policyholder encourages to become members of the group organized by the policyholder, which involves the need to pay a membership fee, as a part of which members of the group obtain at the same time insurance cover under the group insurance contract concluded by the organizer of the group.[37] As an example, M. Wandt points so a sports club whose members pay a fixed membership fee, in consideration of which they obtain insurance coverage under the group insurance contract concluded by the sports club.

35. C. Armbrüster, EuGH, 29.09.2022 – C-633/20: Niederlassungsfreiheit: Erlaubnis zur Versicherungsvermittlung für Versicherungsnehmer einer Gruppenversicherung, Europäische Zeitschrift für Wirtschaftsrecht 20/2022, p. 954.

36. A. Fischer, T. Lübcke, Ende oder Neuanfang im Gruppenversicherungsmarkt? Zugleich Anmerkung zum Urteil des EuGH v. 29.9.2022 – C-633/20, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs – und Schadensrecht 23/2022, p. 1480.

37. M. Wandt, Versicherungsnehmer einer Gruppenversicherung als Versicherungsvermittler. Grund und Grenzen der Entscheidung des EuGH v. 29.9.2022 – C-633/20, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs – und Schadensrecht 23/2022, p. 1481 et seq.

In the case-law of the ECJ, a tendency can be noticed to treat a policyholder in a group insurance contract as insurance intermediary. In the commented judgment, the ECJ refers to an earlier judgment of 24 February 2022[38], in which the Court held that an entrepreneur being a policyholder in a group insurance contract has a disclosure obligation to the insured party. It was explained in the cited judgment that the status of insurance distributor is not incompatible in that context with the status of a policyholder. This view was consequently upheld also in the latest judgment of the ECJ of 2 February 2023[39].

VII. *De lege lata* approach of the French and Polish law and the commented judgment.

A question must be asked if the optimal approach is not the one adopted by the Polish legislator to the legal position of the organizer of a group in the spirit of pro-EU interpretation, that is in the spirit of IDD. Under Art. 18 Polish Act on Insurance and Reinsurance activity[40] in an insurance for third-party account, especially in group insurance, the policyholder shall not receive remuneration or other benefits in relation to the offering of the possibility to take advantage of insurance cover or activities relating to performance of the insurance contract. This shall not preclude the insured party's possibility to undertake to the policyholder to reimburse the cost of the insurance premium (1). The prohibition of receiving remuneration or other benefits, as referred to in paragraph (1) shall also cover persons acting on behalf or in the name of the policyholder (2). The provisions of paragraph (1), first sentence, and paragraph (2) shall not refer to group insurance contracts concluded for the account of employees or persons performing work under civil law contracts or their family members, and to contracts concluded for the account of members of associations, professional societies or trade unions (3). Prior to accession to the group insurance contract referred to in paragraph (3), the policyholder shall provide to a person interested in the accession to such contract information on: the business name of the insurance company and the address of its registered office, the nature of consideration, in the understanding of the Act on insurance distribution, received in relation to the proposed accession to the group insurance contract, the possibility to submit a notice of defect, to submit a complaint or of out-of-court dispute resolution (4). As regards group insurance contracts referred to in paragraph (3), the provision of Art. 7 of the Act on insurance distribution shall apply appropriately to the policyholder (5).

From the perspective of the legislative technique principles, the application of referring provisions should be considered expedient. We have to do with a situation of appropriate application of a legal provision when a legal norm itself requires to apply a legal provision or legal provisions belonging to another legal institution. A reference to appropriate application of a legal provision or legal provisions is based on similarity between the provisions that should be given effect in a particular situation. Appropriate application of a provision requires an interpreter to take into account any possible differences between the institutions to which the referring provision and

38. Judgement of the ECJ of 24.02.2022 r., C-143/20, LEX nr 3307852.
39. Judgement of the ECJ of 2.02.2023 r., C-208/21, LEX nr 3480544.
40. Ustawa z dnia 11 września 2015 r. o działalności ubezpieczeniowej i reasekuracyjnej (t.j. Dz. U. z 2022 r. poz. 2283 z późn. zm.).

the provision referred to belong.[41] As pointed out in judicial practice, "it is generally accepted that, cutting a long story short, "appropriate" application of a legal provision may consist in its direct application or application subject to certain modifications justified by the otherness of the condition to which the reference relates, or in inadmissibility of its application in the analysed factual situation. Such inadmissibility may follow either directly from the contents of the legislative regimes at play or from the fact that application of a given norm could not be reconciled with the specificity and otherness of the examined factual situation."

Without the need for intervention of the Polish legislator regarding the qualification of a policyholder as the group's organiser, such policyholder is imposed with a part of the obligations of a distributor, without treating, at the same time, the policyholder as insurance intermediary. One should approach with criticism the specification of categories of group insurance contracts because the cited provision should cover all group insurance contracts. Considering appropriate application of Art. 7 Polish Act on Insurance Distribution[42] this means that in case of the listed group of insurance contracts, the policyholder, when performing the policyholder's obligations, will be legally obliged to act fairly, reliably and professionally, in accordance with the best interests of the insured persons. Therefore, the obligation of the policyholder's loyalty to the insured persons has a normative basis. Upon delivery of the commented judgment, it remains an unresolved question if the policyholder, as organizer of the group, is also imposed with disclosure and advisory obligations.

From comparative law perspective, attention should be drawn to the practice of French courts, which, in a manner characteristic to such courts, offer creative interpretation of the contents of the disclosure obligation imposed on the group's organiser. Under Art. L. 141–4 CA, organiser of the group must provide to the insured person a document prepared by the insurer, which, among others, contains information on the scope of insurance coverage under the insurance contract. In the latest decisions of lower instance courts, a tendency can be identified to impose on the group organiser an obligation to notify the insured persons about the limitation periods provided for claims under the insurance contract.[43] As a consequence, it is predictable that the scope of the disclosure obligation will be expanded. In fact, there is no reason why a member of the group should obtain information on the member's rights and obligations within a narrower range than the organizer in the group insurance scheme or policyholder as a part of an individual insurance contract.

In French law, where the burden of informing the insured parties about the terms of insurance is with the group's organiser, the tendency discussed above to expand the limits of the disclosure obligation is not, however, exhausted by merely pointing to subsequent pieces of information that must be disclosed to the insured persons.[44] Views expressed in in this context in French case-law are subject to constant evolution, which can be traced using as an example collective insurance contracts of borrowers.[45] Special care for ensuring borrowers with a desired protection level should be of no surprise.

41. Cf. Judgment of the Supreme Court of 23.1.2008, V CSK 377/07, Legalis.
42. Ustawa z dnia 15 grudnia 2017 r. o dystrybucji ubezpieczeń (t.j. Dz. U. z 2022 r. poz. 905 z późn. zm.).
43. A. Guégan, *La prescription en droit des assurances* (in:) *P. Jourdain, P. Wéry* (eds.), *La Prescription extinctive: études de droit comparé,* Bruxelles 2010, p. 610, and case-law cited therein.
44. D. Krajeski (in:) P. Le Tourneau (ed.), *Droit de la responsabilité et des contrats, Paris 2012,* p. 1429.
45. N. Lebond, *L'information en assurance-emprunteur*, Gazette du Palais 2011, n° 302, p. 14 et seq.

Borrowers acceding to a collective insurance contract are considered under the French case-law to be a group particularly exposed to dangers present in commercial transactions.[46]

It should be reminded that Art. L. 141–4 CA requires the group organiser to provide to the insured party information about the scope of insurance cover. Until recently, it was accepted that mere provision of the information referred to in Art. L. 141–4 CA to a member of the insured group was sufficient for proper compliance with the disclosure obligation by the loaner who offered to the interested parties a possibility to accede to the insurance agreement concluded by the loaner (*obligation d'information, devoir d'information*)[47]. The Cassation Court and, following its case-law, also lower instance courts gradually withdrew from this position.[48] As a summary of the current case-law statements, in the report of the Cassation Court of 2009, it was highlighted that the obligations of an organizer of the group are not exhausted by mere provision to the insured persons of the information referred to in Art. L. 141–4 CA. The organiser should provide the borrower with the terms of insurance considering the borrower's situation and personal characteristics,[49] and draw the borrower's attention to those insurance terms that might not correspond to the interested party's expectations.[50] As a consequence, the group's organiser is imposed with the obligation to clarify the terms of insurance coverage (*devoir d'éclairer*)[51] and with an advisory obligation (*devoir de conseil*)[52] vis-à-vis persons acceding to the insurance.

These assumptions found practical manifestation in the case in which the widely commented decision of the Cassation Court was delivered of 2 March 2007.[53] The judgment was passed in the following factual situation. A borrower acceded to an insurance contract at the age of 61. The borrower already took advantage of retirement benefits. The insurance was to guarantee repayment of the loan in case of the borrowers incapacity to work or invalidity. In the written information provided to the insured person, it was stipulated that the insurance protection would cease upon the acceding party's retirement or upon attainment by the acceding party of the age of 60. Upon the borrower's death, his heirs sued the loaner (the group's organiser), claiming that the loaner did not duly comply with the disclosure obligations. Lower instance courts dismissed the claim and pointed to the fact that the prerequisites of cessation of insurance coverage had been known to the insured party and that the organizer of the group complied with the obligation under Art. L. 141–4 CA. However, the Cassation Court, in the judgment of 2 March 2007, called into question the reasoning adopted by the courts of I and II instance. In the Cassation Court's opinion, the organiser of the group should have drawn the borrower's attention to the exemptions stipulated in the insurance contract since, already at the time of his declaration of accession to the insurance scheme, the borrower could not hope for the insurer's performance. Consequently, the bank did not comply with its disclosure obligations, which resulted in the accession by the borrower

46. J.F. Riffard, *Éclairages sur les obligations du banquier en matière d'assurance couvrant la défaillance de l'emprunteur*, Revue de Droit bancaire et financier 2007, no 6, p. 97.
47. Cass. Civ, 2ème, 25 janvier 2007, n°06–10649; Cass. Civ, 2ème, 13 janvier 2005, n°03–17199.
48. J. Djoudi, *L'obligation d'éclairer l'assuré sur l'inadaptation de la garantie à sa situation personnelle*, Gazette du Palais 2010, no 190–191, p. 17 et seq.
49. *Rapport Annuel 2009. Les personnes vulnérables dans la jurisprudence de la Cour de cassation, Paris 2009,* p. 67.
50. Civ. 1ère, 28 janv. 1992, RGAT 1992, p. 340; Civ. 1ère 21 mai 1990, Bull. Civ. I, no 113, D. 1990, IR 151.
51. D. Krajeski (in:) P. Le Tourneau (ed.), *Droit...*, p. 1428–1429, and case-law cited therein.
52. P. Guiomard, *Code des assurances, code de la mutualité*, Paris 2013, p. 187–189, and case-law cited therein.
53. Cass. ass. plén., 2 mars 2007, n° 06–15.267, RGDA 2007, p. 397.

to an insurance contract unsuited to the borrower's life situation and legitimate expectations. It cannot be excluded that the group organiser's negligence could give rise to compensatory liability.

As a consequence of redefining the concept of disclosure obligation, group organisers were imposed with obligations which were not provided by the legislator in the norms of the French Insurance Code. At the time being, one cannot speak merely about the obligation to notify the acceding parties about the terms of insurance because, under the recent case-law, a specific advisory obligation has been introduced,[54] which should be strictly complied with by insurance operators.[55] So understood advisory obligation (*obligation de conseiller*) is more far-reaching than the obligation to clarify (*obligation d'éclairer*) the terms of the contract. The latter is exhausted by creating a situation in which contractual terms are understandable to the other contracting party, whereas the advisory duty should have a direct impact on the behaviour of the other party.[56]

VIII. Conclusions

It would be impossible to give a clear assessment of the commented judgment of the ECJ. On one hand, one should approve of the broad interpretation of the term insurance distributor for the purposes of protecting customers of insurance services through information and advice. One should also assess positively the equal approach to all parties carrying out activities in the area of insurance intermediation, regardless of the economic model used by such parties. This allows to avoid any possible attempts to circumvent the law with regard to disclosure obligations owed to the customer. It cannot be clearly predicted if the commented judgment will lead to a silent revolution in the law of insurance distribution. Much depends on judicial practice in the Member States, on whether the courts will apply the existing national provisions in line with the pro-EU interpretation adopted in the commented judgment or call for an active intervention of the legislator.

Among the consequences of the commented judgment in Germany, one should point to the fact that, as a rule, group organisers will have to take into account the need to obtain an appropriate authorization for conducting the activities of an insurance intermediary. Another unresolved question, from the point of view of German legislation, is the issue of the content and scope of precontractual disclosure and advisory obligations of the policyholder under a group insurance contract owed to particular members of the group. As pointed out above, the provision of § 7d VVG applies only to group insurance covering the repayment of debt. On the other hand, § 7 VVG[57] relates to the disclosure obligations of an insurer, and not of an insurance intermediary.[58] In the light of the above,

54. A. Gurio, *Renforcement de l'obligation d'information du banquier prêteur auprès de son client adhérant au contrat d'assurance de groupe*, JCP 2007, II, p. 10098

55. See: H. Croze, *Argumentaire pour la responsabilité d'une banque en cas d'inadéquation de l'assurance crédit souscrite par l'emprunteur, Procédure 2007, no 4*, p. 22.

56. J. Djoudi, F. Boucard, *La protection de l'emprunteur profane*, RD 2008, no 4, p. 503.

57. "The insurer shall notify the policyholder in the written form, prior to declaration of the intention to conclude the agreement, about the contractual provisions, including the General Terms and Conditions of Insurance, and shall provide information as specified in the regulation referred to in paragraph (2)."

58. See more: O. Zgonina, Disclosure obligations as instrument of protecting customers of insurance services in German Law [in:] J. Suchoža, J. Husár, R. Hučková (eds.) PRÁVO – OBCHOD – EKONOMIKA XI, Košice 2022, p. 288 et seq.

it seems that, to disperse the legal doubts arising in Germany upon delivery of the commented decision, it will be necessary for the national legislator to intervene. Until regularising the legal position of the group's organiser as insurance intermediary, only one tool is available, that is broad pro-EU interpretation of the applicable VVG provisions.

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Glosa do wyroku Trybunału Sprawiedliwości z dnia 29 września 2022 w sprawie C-633/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH, ECLI:EU:C:2022:733.

Niniejsza glosa stanowi próbę analizy pozycji prawnej ubezpieczającego (organizatora grupy) w umowie ubezpieczenia grupowego na tle wyroku Trybunału Sprawiedliwości Unii Europejskiej z dnia 29 września 2022 r. (C-633/20). Opracowanie zawiera rozważania na temat zakwalifikowania ubezpieczającego jako pośrednika ubezpieczeniowego i związanymi z tym konsekwencjami prawnymi. Na tym tle w sposób szczególny zarysowuje się problem zakresu przedumownych obowiązków informacyjnych i doradczych ubezpieczającego w umowie ubezpieczenia grupowego oraz nałożenia na niego ewentualnie innych wymogów formalnych przewidzianych prawem krajowym tak jak dla dystrybutorów ubezpieczeń. Glosowany wyrok omówiony został na tle trzech porządków prawnych. W pierwszym rzędzie omówiono go na tle prawa niemieckiego, którego dotyczyło pytanie prejudycjalne. Następnie odniesiono go do istniejących regulacji w Polsce i we Francji tak, aby na tle komparatystycznym wyciągnąć odpowiednie wnioski.

Słowa kluczowe: ubezpieczenia grupowe, IDD, pośrednictwo ubezpieczeniowe, obowiązki informacyjne.

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