Reports of Cases

OPINION OF ADVOCATE GENERAL
SZPUNAR
delivered on 24 March 2022[1]

**Case C-633/20**

**Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV**
**v**
**TC Medical Air Ambulance Agency GmbH**

(Request for a preliminary ruling from the Bundesgerichtshof (Federal Court of Justice, Germany))

(Reference for a preliminary ruling – Free movement of persons and services – Freedom of establishment – Freedom to provide services – Concept of insurance mediation – Group insurance – Enabling consumers to join group insurance)

## I. Introduction

1. In the present case, the referring court asks the Court to interpret several concepts used in Directives 2002/92/EC[2] and (EU) 2016/97.[3] The Court's answer will enable the referring court to decide whether the defendant in the main proceedings is an 'insurance intermediary' within the meaning of those two directives.

2. In the present case, the Court is being asked to consider a specific legal construct which is a product of practice, namely, group insurance. This construct has a not-so-obvious (and, according to some sources, also an infamous) pedigree. It is pointed out that its roots, which date back to the 19th century, lie in the contracts concluded by slave traders to secure their financial interests. Under those contracts, the insurer would undertake to pay a certain sum of money in the event of a slave's death.[4]

3. In a judgment delivered almost a month ago, the Court ruled that an 'undertaking which is the policyholder' that concluded a unit-linked group life insurance contract is an 'insurance intermediary' within the meaning of Directive 2002/92 where it performs, for remuneration, the

[1] Original language: Polish.

[2] Directive of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3).

[3] Directive of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) (OJ 2016 L 26, p. 19).

[4] See Jerry, R.H., and Richmond, D.R., *Understanding Insurance Law*, LexisNexis, New Providence, 2018, p. 791, footnote 1.

activity of offering that insurance to consumers, who thereby conclude a life insurance contract with the insurance undertaking, and of providing financial advice on the investment of the capital resulting from the insurance premiums. [5]

4. However, that judgment was delivered in a different context to that which gives rise to the question referred for a preliminary ruling in the present case. In addition, it does not appear to remove any of the doubts surrounding the specific legal construct of group insurance and, in any event, does not answer the question as to where the boundary lies between the provision of insurance cover by means of group insurance, which is 'insurance mediation', and the provision of insurance cover which is not 'insurance mediation'. Nor does it directly address the legal issues underlying the referring court's doubts in the present case.

5. Underlying the referring court's doubts are two legal issues which are related precisely to the legal construct of group insurance as it functions in business transactions today. They concern, first, the possibility of equating 'joining group insurance' with 'concluding an insurance contract' in circumstances such as those of the present case and, secondly, the possibility of combining the roles of 'insurance intermediary' and 'policyholder' in such circumstances.

## II. Legal framework

### A. European Union law

#### *1. Directive on insurance mediation*

6. As set out in Article 2(3) and (5) of Directive 2002/92:

'For the purpose of this Directive:

…

3. "insurance mediation" means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.

   These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.

   The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as insurance mediation;

…

[5] See judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)* (C-143/20 and C-213/20, EU:C:2022:118, paragraphs 87 and 88).

5. "insurance intermediary" means any natural or legal person who, for remuneration, takes up or pursues insurance mediation'.

### *2. Directive on insurance distribution*

7. Article 2(1)(1), (3) and (8) of Directive 2016/97 provides:

'1. For the purposes of this Directive:

(1) "insurance distribution" means the 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;

…

(3) "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;

…

(8) "insurance distributor" means any insurance intermediary, ancillary insurance intermediary or insurance undertaking'.

## B. German law

8. The regulation on insurance mediation is included in Paragraph 34d of the Gewerbeordnung (Code governing the exercise of artisanal, commercial and industrial professions; 'the GewO'). That provision was amended during the period relevant to the circumstances of the main proceedings. The purpose of the amendments, which came into force as of 23 February 2018, was to bring German law into line with Directive 2016/97.

9. Notwithstanding those amendments, that provision in principle imposes on any person who wishes to act as a professional intermediary (an insurance broker or insurance agent) with respect to the conclusion of insurance contracts ('insurance intermediary') an obligation to obtain a licence from the competent chamber of commerce and industry. A person who obtains such a licence is entered in the relevant register.

## III. The facts of the case in the main proceedings, the procedure before the Court and the question referred for a preliminary ruling

10. The defendant in the main proceedings commissions advertising companies to offer consumers, by way of door-to-door advertising, membership of the 'TC Medical Air Ambulance Agency GmbH Mitgliedergemeinschaft' for a fee. Membership entitles the member to claim various benefits in the event of illness or accident abroad. These include reimbursement of costs for medically required treatment and patient transport, the organisation and implementation of appropriate transport, and the operation of an 'emergency call centre' that can be reached by telephone.

11. Membership benefits are generally provided, as the referring court explains, either directly using the assets of the defendant in the main proceedings or using receivables arising from group insurance, which receivables the defendant assigns to its customers.

12. The defendant has a contractual relationship with a company which, using its medical staff and its aircraft, provides some of the benefits (described by the referring court as 'insurance benefits') for the defendant and organises a round-the-clock emergency call centre. The defendant pays the company a fee for this.

13. Moreover, the defendant took out, as the policyholder, a group insurance policy with an insurance undertaking, by virtue of which the defendant's customers are provided with insurance cover in case of illness or accident abroad and insurance covering foreign and domestic repatriation costs. The defendant pays the premiums owed to the insurer, and group members remunerate the defendant in exchange for insurance cover.

14. Neither the defendant nor the advertising companies are licensed as insurance intermediaries.

15. The applicant consumer protection association submits that the defendant's activity is anticompetitive. It maintains, in essence, that the defendant practises insurance mediation, for which it requires a licence. The applicant adds that, in any event, the defendant's business is structured in such a manner as to create the impression that the defendant itself provides the insurance benefits to which its customers are entitled. Therefore, the association brought an action before the national court seeking primarily an order that the defendant refrain from offering or commissioning to offer to consumers, without the licence required to practise insurance mediation, contracts to join a group of insured persons.

16. The court of first instance upheld that action. The court of second instance hearing the defendant's appeal then dismissed the action. The court of second instance held that an insurance intermediary could only be a person who was neither a policyholder nor an insurer, whereas the defendant had entered into a group insurance contract as a policyholder, in its own name and on behalf of third parties.

17. The referring court, the Bundesgerichtshof (Federal Court of Justice, Germany) is now called upon to rule on the appeal on a point of law in this dispute. The referring court considers that the merits of the action depend on whether, under German law, the defendant requires a licence to act, for remuneration, as an intermediary which offers group insurance membership to consumers. In the view of the referring court, the answer to that question hinges on the

interpretation of Article 2(3) and (5) of Directive 2002/92 (the definitions of 'insurance mediation' and 'insurance intermediary') and of Article 2(1)(1), (3) and (8) of Directive 2016/97 (the definitions of 'insurance distribution', 'insurance intermediary' and 'insurance distributor').

18. In those circumstances, the Bundesgerichtshof (Federal Court of Justice), by order of 15 October 2020, received by the Court on 25 November 2020, decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'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 Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97?'

19. Written observations have been submitted by the parties to the main proceedings, the Czech, German and Italian Governments and by the European Commission. The parties to the main proceedings, the German Government and the Commission were represented at the hearing which took place on 12 January 2021.

## IV. Analysis

20. By its question referred for a preliminary ruling, the referring court seeks, in essence, to clarify whether Article 2(3) and (5) of Directive 2002/92 and Article 2(1)(1), (3) and (8) of Directive 2016/97 must be interpreted as meaning that a natural or legal person who 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 those persons [6] 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, is an 'insurance intermediary' within the meaning of those directives.

21. Before analysing the question referred for a preliminary ruling, I will address some terminological issues that may be relevant to its proper interpretation.

22. It is true that the question referred for a preliminary ruling, as formulated by the referring court, could also be read as seeking to clarify whether the defendant in the main proceedings is an 'insurance intermediary' under Directive 2002/92 and an 'insurance distributor' under Directive 2016/97.

23. Directive 2016/97 modified the definitions included in Article 2(3) and (5) of Directive 2002/92.

24. One of the changes brought about by the adoption of Directive 2016/97 is the broader group of persons who are subject (albeit sometimes to varying degrees) to obligations which, under Directive 2002/92, essentially only applied to persons engaged in the classic business of 'insurance mediation'.

[6] In fact, the referring court uses the terms 'customers' and 'consumers' in its question. However, in the light of the circumstances of the main proceedings, they are the same persons.

25. This is reflected in the recitals of Directive 2016/97 and in its operative part.

26. Recital 9 of Directive 2002/92 clarified that 'various types of persons or institutions, such as agents, brokers and "bancassurance" operators can distribute insurance products'. On the other hand, recital 5 of Directive 2016/97, in addition to agents, brokers and entities offering insurance products to bank customers ('bancassurance'), lists 'insurance undertakings, travel agents and car rental companies' among the entities that can distribute insurance products. In addition, the intention was also to bring within the scope of the directive those entities that distribute insurance products using new technologies, and the distribution channels created by those technologies. [7]

27. As regards the operative parts of the directives, in so far as they may be relevant to the answer to the question referred for a preliminary ruling, while Directive 2002/92 used the concepts of 'insurance mediation' (and 'insurance intermediary', defined as a person who engages in such mediation), Directive 2016/97 replaced them with the concept of 'insurance distribution'. That concept has a broader scope both with respect to its substance and the entities covered.

28. In addition to the activities of proposing or carrying out other work preparatory to the conclusion of insurance contracts and of concluding such contracts or assisting in the administration and performance of such contracts, which are already included in the definition of 'insurance mediation' in Directive 2002/92, the concept of 'insurance distribution' also explicitly includes 'advising'. [8]

29. The consistent legislative technique adopted was reflected in the introduction of a definition of the term 'insurance distributor'.

30. However, this new conceptual framework did not involve abandoning the term 'insurance intermediary'.

31. Indeed, the term 'insurance distributor' is broader and includes every 'insurance intermediary' and 'insurance undertaking' [9] as well as every 'ancillary insurance intermediary'. [10]

32. Directive 2016/97 defines each of those terms, with 'insurance intermediary' meaning in principle, as before, 'any natural or legal person … who, for remuneration, takes up or pursues the activity of insurance distribution [earlier: mediation]'. Obviously, the term 'insurance intermediary' does not include 'insurance undertakings' and 'ancillary insurance intermediaries' who are also 'insurance distributors'.

33. In the context of the present case, it is not even suggested that the defendant should be treated as an 'insurance undertaking'.

7 See recital 12 of Directive 2016/97.

8 However, it should be borne in mind that already in the context of Directive 2002/92 the 'activities' constituting insurance mediation were described in broad terms (see judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 53), and the directive itself also referred to the obligation to give advice in a simplified form (Article 12(3)).

9 That concept, too, was already used in Directive 2002/92. However, under that directive, the concept of 'insurance mediation' did not include activities undertaken 'by an insurance undertaking or an employee of an insurance undertaking who [was] acting under the responsibility of the insurance undertaking' (second subparagraph of Article 2(3) of the directive). As to the scope of that exclusion, see judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668).

10 In contrast, that concept was not present in Directive 2002/92, but there was an exemption referring to the 'complementary' nature of insurance contracts. See point 46 of this Opinion.

34. On the other hand, the question referred concerns, inter alia, the interpretation of the concepts of 'insurance distribution' and 'insurance distributor' within the meaning of Article 2(1)(1) and (8) of Directive 2016/97. The latter concept also includes the 'ancillary insurance intermediary'.

35. A doubt arises as to whether the provision of an answer helpful to the referring court requires clarifying whether the defendant is an 'ancillary insurance intermediary' and thus an 'insurance distributor'.

36. It is true that there is nothing to suggest that under German law that category of intermediaries is automatically exempted from the licensing requirement to which the main proceedings relate.[11] In addition, the referring court clarifies that a person who has obtained a licence issued by the competent chamber of commerce and industry is subject to registration. That clarification is accompanied by a discussion of the changes introduced by Directive 2016/97 compared to the previous legal position and a statement that 'ancillary insurance intermediaries' have also been made subject to the obligation to register under that directive.

37. By contrast, the defendant in the main proceedings itself argues, when presenting its 'business model', that it should be regarded precisely as an 'ancillary insurance intermediary'. That argument seeks to demonstrate that the additional conditions for not applying the directive to the defendant are also fulfilled. I shall revisit this issue later in this Opinion.[12]

38. An 'ancillary insurance intermediary' is defined as 'any natural or legal person … who, for remuneration, takes up or pursues the activity of insurance distribution on an ancillary basis, provided that all the [conditions listed in the definition] are met' (Article 2(1)(4) of Directive 2016/97).

39. As regards the present case, first, the referring court does not even entertain the possibility that the defendant in the main proceedings could be classified as an 'ancillary insurance intermediary', and its question referred for a preliminary ruling does not concern the interpretation of Article 2(1)(4) of Directive 2016/97. In fact, the request for a preliminary ruling does not even suggest that the defendant in the main proceedings is engaged in insurance mediation on an ancillary basis. Secondly, at the root of the referring court's doubts is not whether any part of the 'benefits' provided to the customers of the defendant in the main proceedings is ancillary to the other benefits, but whether the defendant is precluded from being considered an 'insurance intermediary' by the fact that it is in the business of offering group insurance membership to its customers (rather than 'concluding insurance contracts') and is itself acknowledged by the referring court as being a 'policyholder'.[13]

40. Before examining the substance of the question referred for a preliminary ruling, it is necessary to examine whether and which directives are applicable to the defendant, having regard to their scope *ratione temporis* and *ratione materiae*.

[11] On the contrary, although the referring court does not explicitly refer to that provision, it appears to follow from Paragraph 34d(8) of the GewO that only an 'ancillary insurance intermediary' which meets the conditions listed in Article 2(1)(3) of Directive 2016/97 is exempted from the licensing obligation. See points 46 to 48 of this Opinion.

[12] See point 42 of this Opinion.

[13] See point 53 of this Opinion.

## A. Application of the directives ratione temporis

41. The question submitted by the referring court relates to both Directive 2002/92 and Directive 2016/97.

42. In principle, the provisions of the former directive were repealed with effect from 23 February 2018 pursuant to Article 44 of Directive 2016/97. By that date, Member States were required to transpose the provisions of the latter directive in compliance with their obligation under Article 42 thereof. German legislation implementing the latter directive has also been in force since 23 February 2018. [14]

43. The applicant association's action before the national court relates to September 2017 when the German legislation transposing Directive 2002/92 was still in force. On the other hand, the referring court points out that the applicant association's action may be upheld if the defendant's conduct was unlawful on the date on which it occurred (that is to say, September 2017) and, in the light of domestic case-law, continues to be unlawful on the date on which the referring court rules on the case. This explains why the referring court is asking the Court to interpret the provisions of both directives. It also means that the Court should answer the question referred for a preliminary ruling both in so far as it concerns Directive 2002/92 and in so far as it concerns Directive 2016/97.

## B. Application of the directives ratione materiae

44. It remains to be considered whether the activities of the defendant in the main proceedings fall within the material scope of Directives 2002/92 and 2016/97.

45. The defendant in the main proceedings contends that it cannot be regarded as an 'insurance intermediary' within the meaning of the provisions to which the request for a preliminary ruling relates. It also argues that, given its 'business model', it could at most be considered an 'ancillary insurance intermediary' (Article 2(1)(4) of Directive 2016/97). The insurance cover enjoyed by the defendant's customers is allegedly just one of the benefits offered to them by the defendant, and pursuant to Article 1(3), the directive is supposedly not applicable to 'ancillary insurance intermediaries'. In support of its argument, the defendant also refers to recital 12 of Directive 2002/92 and recital 14 of Directive 2016/97.

46. The referring court's question does not concern Article 1(3) of Directive 2016/97 or Article 2(1)(4) of that directive. As I have already indicated in point 39 of this Opinion, there is nothing to suggest that the referring court contemplated that the defendant in the main proceedings could be considered an 'ancillary insurance intermediary' within the meaning of the latter provision.

47. However, I also suggest that the defendant's argument in the main proceedings should be examined more closely. In essence, the defendant's argument rests on two independent grounds for excluding the application of the directives. They refer to the 'complementary' nature of the insurance contracts and to the 'incidental' nature of the activities of the defendant in the main proceedings.

[14] See points 6 and 7 of this Opinion.

48. First, the concept of an 'ancillary insurance intermediary' is not present in Directive 2002/92. It is true, however, that in certain cases neither directive applies to persons engaging in mediation (distribution) activities in respect of insurance contracts which are 'complementary' in nature (Article 1(2)(e) of Directive 2002/92 and Article 1(3) of Directive 2016/97).

49. However, contrary to the defendant's assertions, additional conditions must be satisfied in order to exclude the application of the directives.

50. Quite apart from the other conditions laid down by both directives, we are dealing here with insurance which is complementary to the service supplied by the provider, and which includes, inter alia, the risk of non-use of another service or the risks associated with booked travel.[15] On the other hand, it is difficult to speak of the risk of non-use of another 'planned' service or trip in the case of insurance whose coverage extends to the reimbursement of the costs of medical treatment and transport of the person covered; by their very nature, those are unforeseeable events.

51. Secondly, within the meaning of the third subparagraph of Article 2(3) of Directive 2002/92, 'the provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity [was] not to assist the customer in concluding or performing an insurance contract [was] … not … considered as insurance mediation'. That exclusion was also referenced in recital 12 of the directive. It is also referred to in recital 14 of Directive 2016/97, and as regards its operative part, the exclusion can be found in Article 2(2)(a).

52. However, there is no indication that the defendant in the main proceedings provides information on insurance contracts only 'incidentally' in the course of other professional activities. Indeed, even when describing its 'business model', the defendant indicates that the disputed activities relating to group insurance contracts are a regular part of the services it provides to its customers; still, in its view, they are 'complementary'. Moreover, the defendant does not claim that those activities consist solely in providing 'information of a general nature' about insurance products.

53. In conclusion, there is nothing to suggest that, irrespective of the truth of the assertion about the 'complementary' nature of the cover to which the defendant's customers are eligible, Directives 2002/92 and 2016/97 should a priori be considered inapplicable *ratione materiae* to the circumstances of the main proceedings.

## C. Substance

54. Can the defendant be classified as an 'insurance intermediary' within the meaning of Directives 2002/92 and 2016/97?

55. At the root of the referring court's doubts as to whether this question can be answered in the affirmative appear to lie two questions of law, which essentially concern the peculiar legal construct of group insurance. The referring court's doubts in that regard appear to be essentially related to the following questions:

– first, whether 'joining a group insurance contract' can be equated with 'concluding an insurance contract' for the purposes of establishing that we are dealing with 'insurance mediation' within

[15] See Article 1(2)(e) of Directive 2002/92 and Article 1(3)(a) of Directive 2016/97.

the meaning of Article 2(5) of Directive 2002/92 and 'insurance distribution' within the meaning of Article 2(1)(3) of Directive 2016/97; and

– secondly, whether, in the context of both directives, an 'insurance intermediary' must be external to the relationship arising from the insurance contract (including the group insurance contract).

56. As regards its doubts as to the position of an 'insurance intermediary' outside the insurance relationship, the referring court states that in the course of the legislative work aimed at transposing the provisions of Directive 2002/92 into German law, insurance intermediaries were defined as persons who were not themselves policyholders or insurers. That approach stemmed from national case-law, which, in essence, appeared to be based on the assumption that an insurance intermediary is an entity external to the relationship arising from the insurance contract, even if it should traditionally be guided by the need to protect the insured as the weaker party in the insurance relationship.

57. Next, as regards group insurance specifically, the result of that legislative work appears to have been as follows: policyholders are not insurance intermediaries if they provide insurance cover to a narrow and predetermined circle ('group') of persons.

58. In addition, when the legislation transposing Directive 2016/97 into German law was drafted, it was supposedly considered whether the activity of procuring insurance cover for a fee should not be expressly recognised as a form of insurance mediation subject to licensing by the competent chamber of commerce and industry. Ultimately, however, the GewO provisions do not answer that question. In separate provisions, the German legislature imposed a duty on persons who conclude group insurance contracts to provide advice to persons who join group insurance contracts as well as certain duties regarding the insurance premium. However, as the referring court clarifies, it does not follow that the German legislature thus equated the status of those persons with that of persons who are insurance intermediaries.

59. Hence, as the referring court explains, it is generally accepted in case-law and in the literature that 'a group insurance policyholder who distributes memberships in the group insurance policy for a fee is not to be regarded as an insurance intermediary nor does he have a status resembling that of an intermediary'.

60. However, the referring court also notes the view taken by certain legal scholars that a person who concludes a group insurance contract ('a group insurance policyholder') can be regarded as an insurance intermediary if he or she takes out the group insurance policy not (only) in the interest of the insured persons [16] but (also) in his or her own commercial interests; there appears to be a suggestion that such a contract takes the form of a framework contract. [17]

[16] Admittedly, the referring court indicates that this concerns the conclusion of a contract 'not in the interest of the insured persons', but rather in the interest of the person who concludes the contract. In the examples provided, however, it explains that this includes, inter alia, situations where a group insurance contract is concluded 'not only in the interest [of the insured persons]'.

[17] The advocates of the view described by the referring court would argue that the 'policyholder' acts in its economic self-interest if it receives a fee for each person joining the group insurance policy ('framework contract'); indeed, the 'policyholder' is economically interested in encouraging new persons to join the insurance contract. This is the case with 'framework contracts' proposed by banks and covering the risk of being unable to repay the loan due to death or disability. On the other hand, in the case of sickness or pension insurance for members of an association or employees of a certain employer, the conclusion of a group insurance contract is not about the economic interest of the 'policyholder'. The purpose here is not to profit from getting those persons covered, but rather to negotiate the best possible terms of that cover for their benefit.

61. In addition, the referring court points to the view expressed in case-law and in the literature, according to which the obligation to obtain a licence from the competent chamber of commerce and industry should also cover cases where loopholes are exploited in order to circumvent the law and avoid the licensing obligation.

62. Since the referring court's doubts concern specific characteristics of group insurance contracts, it is necessary to look at both directives in order to examine whether the EU legislature attaches any legal significance to those characteristics (Section 1). Such an examination should make it possible to dispel the referring court's doubts about whether 'joining a group insurance contract' can be equated with 'concluding an insurance contract' (Section 2) and also about whether an 'insurance intermediary' can be positioned outside the insurance relationship (Section 3).

## *1. Group insurance in the light of Directives 2002/92 and 2016/97*

### *(a) General remarks*

63. It is true that in the operative parts of Directives 2002/92 and 2016/97 there is no explicit mention of a group insurance contract.

64. However, in the course of legislative work on Directive 2016/97, when a proposal was put forward to introduce the concept of 'insurance distribution' (and, consequently, the concept of 'insurance distributor'),[18] a proposal was also put forward to add recital 49, which was included unchanged in the adopted text of the directive. Although it was not accompanied by detailed explanations, that recital clarifies that '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'.[19]

65. Directive 2016/97 does not define the term 'customer' itself,[20] but the term is used in many of its provisions. In general, it follows from the directive that its objective is precisely to protect 'customers' and that the term denotes persons who use, and are interested in using, insurance products ('seeking insurance cover', see recital 51 of the directive) through distribution channels involving 'insurance distributors'.

66. From the second sentence of that recital, it can also be inferred that a group insurance contract where no individual decision is made to join the contract is (or, in practice, may be) concluded by the 'customer' with the involvement of a 'distributor',[21] whereas the EU legislature probably had in mind an insurance distributor. This appears to imply that in the case of group insurance, as referred to in recital 49 of Directive 2016/97, the 'customer' in principle is not an 'insurance distributor' himself or herself.

[18] See Annex to Information Note from the General Secretariat of the Council, 27 November 2015, 2021/0175 (COD).

[19] The second sentence of recital 49 of Directive 2016/97 adds that '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'.

[20] Similarly Weinberger, M.D., 'Scope of Protection: Is there a Ground for a Single Criterion?', *European Financial Regulation: Levelling the Cross-Sectoral Playing Field*, Colaert, V., Busch, D. and Incalza, T. (eds), Hart Publishing, Oxford – London – New York – New Delhi – Sydney, 2019, p. 299.

[21] See footnote 18 to the present Opinion.

67. Against the background of recital 49, one might also be tempted to make the even more far-reaching conclusion that there are other types of 'group insurance' in which enrolment is not automatic and depends on the decision of the members of the group. The question arises whether, in such situations, we are dealing with a 'representative of a group of members' who is not a 'customer' and thus could at least a priori potentially be considered an 'insurance distributor'.

68. Before such a conclusion can be formulated by way of an *a contrario* interpretation of the recital of the directive, an in-depth analysis is required. In the absence of any mention, in the recital of the directive, of group insurance that can be joined voluntarily, drawing such conclusions as to the legal classification of the parties to the insurance relationship may appear questionable. Indeed, it is even more questionable when we consider that the directive itself does not define the concept of 'group insurance', and certainly does not explain in its operative part the workings of such insurance, in which '[members of the group] cannot take an individual decision to join'.

### *(b) Group insurance construct in the law of the Member States*

69. The distinction between group insurance contracts where enrolment is mandatory (automatic enrolment by virtue of membership of a particular group or the presence of certain circumstances or the possession of certain characteristics, usually resulting from or indicating the existence of a particular link with the person who has taken steps to provide insurance cover to other persons) [22] and group insurance contracts where enrolment is voluntary – which appears to be drawn under recital 49 of Directive 2016/97 – is not alien to insurance law doctrine and national legislation, although it admittedly raises a number of questions. [23]

70. In addition, as in the case of model rules of European private law (Draft Common Frame of Reference (DCFR)), [24] model rules of European insurance law (Principles of European Insurance Contract Law (PEICL)) were drawn up using the comparative law method. [25] 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

[22] To address the doubts which may arise from the circumstances of the case in the main proceedings and which concern the artificial nature of the distinction between group insurance with mandatory enrolment and group insurance with voluntary enrolment: an argument referring to the 'business model' of the defendant in the main proceedings and based on the assertion that joining group insurance is mandatory, since it is 'mandatory' for all of its customers who have concluded a contract with it, which contract gives rise to non-insurance benefits (the availability of an emergency call centre, and so forth), would be unconvincing. That argument would have to be based on the belief that the circumstance or characteristic common to the persons eligible for the insurance cover is that they entered into a contract with the defendant, among others, for the very purpose of obtaining such insurance cover. In essence, this would mean that the 'mandatory' nature of enrolment results from a voluntary decision to conclude a contract precisely to obtain that cover. Hence, the view presented above, which refers to the defendant's 'business model', would be difficult to defend.

[23] It is true, as the Italian Government also states, that group insurance contracts are not a homogeneous category. In general, a group insurance contract is a product of practice and takes a variety of forms. On the other hand, the division described above, with greater or lesser differences, appears to be at least partially accepted in the legal systems of many Member States, for instance Germany (see Herdter, F., *Der Gruppenversicherungsvertrag: Grundlagen und ausgewählte Problemfelder*, VVW GmbH, Karlsruhe 2010, p. 14), France (Bigot, J., in Bigot, J. (ed.), *Traité de Droit des assurances. Le contrat d'assurance. Tome 3*, LGDJ, Issy-les-Moulineaux Cedex, p. 6 and the literature referenced therein) or Poland (see Fras, M., *Umowa ubezpieczenia grupowego. Aspekty prawne*, Wolters Kluwer, Warszawa 2015, p. 136 ff.; see also the judgment of the Sąd Najwyższy (Supreme Court, Poland) of 12 January 2018, Ref. No CSK 222/17, LEX No 2446838).

[24] See *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Outline Edition*, Von Bar, C., Clive, E., Schulte-Nölke, H. et al. (eds), Sellier European Law Publishers, Munich, 2009, p. 7.

[25] *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. As regards model rules and their relevance to national laws on insurance contracts, see, in particular, Fuchs, D., 'Consistency of the European project PEICL with the Polish Civil Code in view of art. 807', *Acta Iuris Stetinensis*, 2019, No 4, p. 90 ff.

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 Directives 2002/92 and 2016/97.[26] I shall therefore use the term 'group organiser' throughout the rest of this Opinion.

71. In addition, 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).

72. The distinction adopted in national legislation between mandatory and voluntary group insurance may also affect the manner in which the legal relationships underlying such insurance are perceived. If joining the insurance is mandatory, the insurance cover enjoyed by group members results from the insurance contract concluded by the group organiser with the insurer. That organiser may be treated as the policyholder. If, on the other hand, enrolment is voluntary, the insurance organiser concludes a framework contract with the insurer. That framework contract sets out the terms and conditions under which insurance cover is subsequently granted through the conclusion of insurance contracts by the enrolees themselves. In this case, they are the policyholders who at the same time benefit from insurance cover as insured persons.[27] This is obviously a classification made in the light of, and for the purposes of, national insurance law, because it is essentially that law which determines who the policyholder is.

73. It should be stressed that despite the numerous similarities, group insurance has a certain advantage over a bundle of individual insurance policies that could be taken out by each member of the group separately (or by another person for the benefit of each member of the group separately), as it makes it possible to 'centralise' the negotiation of coverage terms (as a rule, no such negotiation is conducted in the case of individual insurance, where standard-form contracts are typically used), and at the same time to obtain insurance cover for the interested parties in exchange for a lower premium.

### *(c) Mandatory and voluntary group insurance in the context of Directives 2002/92 and 2016/97*

74. In order to answer the question referred for a preliminary ruling, it is relevant whether, in the context of Directives 2002/92 and 2016/97, it is possible to draw on the distinction described above between mandatory and voluntary group insurance and, in the case of the former, to regard the group organisers as 'customers' and, in the case of the latter, to regard the beneficiaries of insurance cover (members of the group) as 'customers', which, in the case of the latter type of group insurance, would open the way for the group organiser to be regarded as an 'insurance intermediary'.

75. After all, that is actually what recital 49 of the Directive 2016/97 and its *a contrario* interpretation suggest.

[26] Starting from a similar assumption, that entity can be referred to as the 'operator' of the insurance (contract).

[27] See also the literature cited in footnote 22.

76. This approach is also reflected in the explanations of the referring court, which, in discussing the view presented by part of the doctrine as to the understanding of the concept of 'insurance intermediary', mentions, inter alia, legal constructs which involve the conclusion of a 'framework contract'. [28]

77. In considering that question, account must be taken of the referring court's doubts which, as will be recalled, concern, first, the possibility of joining group insurance being equated with concluding an insurance contract and, secondly, the possibility of positioning an 'insurance intermediary' outside the insurance relationship.

### *2. Joining group insurance*

78. The referring court explains that, in the light of the findings of the court of second instance, which are not being challenged in the appeal on a point of law, the defendant's business is not 'the conclusion of insurance contracts', but rather acting as an intermediary in enrolment to the group and enabling its members to take advantage of insurance cover.

79. Furthermore, the referring court points out that the wording of the provisions of German law which transpose Directives 2002/92 and 2016/97 into national law relates exclusively to the conclusion of insurance contracts. The refusal to recognise the defendant as an 'insurance intermediary' appears to result, at least in part, from the assumption that joining group insurance cannot be equated with (or considered tantamount in its effect to) 'the conclusion of an insurance contract'. That approach is also reflected in the written observations of the Czech Government, which adds that the enrolment concerns an insurance contract previously concluded by the group organiser with the insurer.

#### *(a) Literal interpretation*

80. At the root of the referring court's doubts appears to be the belief that the focal point of the definitions of the terms 'insurance mediation' in Directive 2002/92 and 'insurance distribution' in Directive 2016/97 is an activity directed precisely at 'the conclusion of insurance contracts'.

81. It is true that the 'activities' that constitute insurance mediation ('insurance distribution') generally involve, at least under a literal interpretation, mediation in 'the conclusion of insurance contracts'. Although this in itself does not prejudge that 'joining group insurance' falls within the scope of 'concluding insurance contracts', the Court has previously clarified that the 'activities' that constitute 'insurance mediation' – and consequently also 'insurance distribution' within the meaning of Directive 2016/97 – are described in broad terms. [29]

82. However, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part. [30]

[28] See point 58 of this Opinion.

[29] Judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others* (C-542/16, EU:C:2018:369, paragraph 53).

[30] Thus with respect to the concept of 'insurance mediation' in Article 2(3) of Directive 2002/92, see judgments of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 21), and of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others* (C-542/16, EU:C:2018:369, paragraph 39).

### *(b) Systemic interpretation*

83. As regards the relevant context, in answering the question referred for a preliminary ruling we must not lose sight of the fact that the recognition of an entity as an 'insurance intermediary' may entail not only the obligation to obtain a specific licence (as required by national law, since the directives themselves only stipulate that such entities shall be registered; see the first subparagraph of Article 3(1) of Directive 2002/92 and the first subparagraph of Article 3(1) of Directive 2016/97), but also the imposition of certain requirements on that entity.

84. Insurance intermediaries are subject to information requirements (Articles 12 and 13 of Directive 2002/92, and Article 17 et seq. of Directive 2016/97), as well as obligations to provide advice (Article 12(3) of Directive 2002/92 and Article 20 of Directive 2016/97, although only in the case of the latter directive are those obligations already explicitly included in the definition of 'insurance distribution'). Hence, they should possess appropriate knowledge and ability (Article 4(1) of Directive 2002/92 and Article 10(1) of Directive 2016/97). They must also hold professional indemnity insurance, which is not a mere formality, as the amount of cover per claim may not be less than one million euro (Article 4(3) of Directive 2002/92; see also Article 10(4) of Directive 2016/97). The premiums paid to intermediaries by customers are protected (see Article 4(4) of Directive 2002/92 and Article 10(6) of Directive 2016/97). Obligations are also placed on intermediaries in order to prevent conflicts of interest. [31]

85. Looking at Directives 2002/92 and 2016/97 from a broader perspective, it can be seen that they impose certain obligations on the 'insurance intermediary' whose beneficiaries are persons interested in concluding an insurance contract and obtaining insurance cover or persons who already enjoy such cover. [32] In other words, using the terminology of the directives, those are obligations, the beneficiaries of which are 'customers'. [33]

86. The information requirements and obligations to provide advice under the directives appear to be primarily aimed at enabling 'customers' to decide whether to conclude an insurance contract through an insurance product distribution channel that involves an insurance intermediary. This is indicated by the provisions of the directives, which stipulate that the purpose is to ensure that insurance intermediaries provide certain information to customers 'in good time before the conclusion of an insurance contract' (Article 18(a) and Article 19 of Directive 2016/97).

87. The purpose of providing that information is to disclose that the person in question has the status of an insurance intermediary (with all the consequences that this entails, notably the obligation for that person to possess the knowledge and ability to ensure the proper performance of his or her information requirements and advisory duties) and to ensure that there are no conflicts of interest arising from his or her relationship with the insurer or from the manner in which he or she is remunerated. Similarly, the purpose of protecting premiums is to prevent the involvement of a third party (insurance intermediary) from creating a risk for those who pay the premium and obtain insurance cover that they could be deprived of that cover as a result of the third party's omission.

[31] This concerns conflicts of interest between the intermediary and the insurer where those entities are linked. To some extent, this is allowed by Directive 2016/97 itself, since an 'insurance distributor' may also be an insurance undertaking.

[32] As far as German law is concerned, the literature indicates that the obligations of insurance intermediaries (in the wider sense; persons engaged in insurance mediation) vis-à-vis policyholders and insurers are regulated outside the GewO. See Koch, R., *Insurance Law in Germany*, Wolters Kluwer, Alphen aan den Rijn, 2018, p. 269.

[33] See also point 65 of this Opinion.

88. This leads to the conclusion that, on a systemic interpretation, Directives 2002/92 and 2016/97 seek to regulate primarily three aspects that characterise the relationship between insurance intermediaries and the persons interested in obtaining insurance cover through distribution channels involving such intermediaries, that is to say, information requirements, insurance premium protection and the provision of insurance cover to those persons.

*(1) Information requirements*

89. Persons who make individual voluntary decisions to join group insurance with the involvement of a group organiser (who is paid a fee) and who indirectly finance the insurance premium are essentially exposed to the same risks as those persons who take out an individual insurance contract using distribution channels that involve an insurance intermediary. In the light of their systemic interpretation, Directives 2002/92 and 2016/97 seek to regulate the requirements and obligations imposed on insurance intermediaries also with respect to the former category of persons. This militates in favour of an interpretation of those directives which allows such enrolment in group insurance to be regarded as the 'conclusion of an insurance contract' within the meaning of the definitions of 'insurance mediation' and 'insurance distribution'.

90. By contrast, similar risks do not occur – or at least occur to a far lesser extent – in those types of group insurance where enrolment is mandatory. This supports the position that the mere acquisition of cover under group insurance which is mandatory and automatic should not be equated with the 'conclusion of an insurance contract'.

91. Of course, there may be cases where the enrolment is mandatory and occurs automatically by virtue of membership of a particular group or the presence of certain circumstances or characteristics, but at the same time group members may be able to exercise certain options and extend or reduce their cover. In such cases, the aforementioned risks materialise and those situations may be regarded as the 'conclusion of an insurance contract'.[34] However, that is not the case here.

*(2) Insurance premium*

92. There should also be no doubt that customers of the defendant in the main proceedings are also indirectly financing the insurance premium in exchange for cover against the relevant risks.

93. The referring court explains that the business of the defendant in the main proceedings consists in acting as an intermediary in enrolment to the group and enabling its members to take advantage of insurance cover. It is the defendant who pays the premiums owed to the insurer. Group members pay the defendant a fee for the insurance cover provided to them.

94. This leads to the conclusion that group members finance the insurance premium. Indeed, it could hardly be assumed that insurance cover is provided to them free of charge or funded by the defendant in the main proceedings without bringing any benefits to the defendant. However, members of the group finance that premium indirectly, with the involvement of the group

[34] This could lead to the conclusion that, in such cases, the relevant activities fall within the scope of 'insurance mediation' and 'insurance distribution'. In any event, however, this would not prejudge that all obligations provided for in the directives are imposed on a person engaging in those activities. Those obligations are imposed on 'insurance intermediaries' who engage in such activities 'for remuneration'. See point 125 of this Opinion.

organiser, which, as a matter of fact, corresponds to the role of an 'insurance intermediary' envisaged by the directives. After all, the directives oblige Member States to establish measures to protect customers in connection with transfers of premiums to insurers by insurance intermediaries. [35]

*(3) Insurance risk*

95. In the context of the present case, it may not be entirely clear whose risk is actually covered by group insurance. This raises the question of whether the persons whom the defendant in the main proceedings is targeting are in fact joining a group insurance arrangement that applies to them ('concluding an insurance contract'). In other words, the question is whether the risk in question is one that directly concerns group members and relates to incurring the costs of necessary medical treatment and transport or whether it is in fact a risk of the defendant in the main proceedings, as it would be obliged to cover such costs.

96. However, this is not an isolated ambiguity, but rather a phenomenon that sometimes arises in the context of group insurance due to its peculiar characteristics.

97. In any event, the referring court explains that, under the group insurance policy, 'customers of the defendant in the main proceedings' are covered for the risks that affect them. [36]

98. In answering a question posed during the hearing about the nature of the group insurance in the present case and the subject matter of the insurance risk, the defendant in the main proceedings indicated that group members ('insured persons') receive benefits from the insurer. Although the defendant in the main proceedings participates in loss adjustment, all insurance services are provided to group members: this follows from the terms of the group insurance contract and the assignment of benefits to those members provided for therein. Thus, regardless of whose risks are covered in the technical legal sense, insurance cover is functionally provided to group members as if the insurance concerned risks that affect them directly. In other words, it is just as if – by joining group insurance – those persons had concluded a contract to insure against those risks.

*(4) Indirect conclusion concerning the systemic interpretation*

99. To conclude, from a functional point of view, individual and voluntary enrolment in group insurance, which involves an obligation to finance the insurance premium indirectly, does not appear to differ from the traditional concept of concluding an insurance contract to an extent that would justify excluding persons who join such insurance from the group of entities benefiting from the protection afforded by Directives 2002/92 and 2016/97. In the light of their systemic interpretation, the directives seek to regulate the requirements and obligations imposed on insurance intermediaries also with respect to persons who join such group insurance.

100. The conclusions drawn from the systemic interpretation of both directives support the following interpretation of their provisions: that 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'.

35 See Article 4(4) of Directive 2002/92 and Article 10(6) of Directive 2016/97.

36 See point 11 of this Opinion.

101. The same conclusions can be drawn from a teleological interpretation of the concepts to which the question referred for a preliminary ruling relates.

### *(c) Teleological interpretation*

102. In its case-law, the Court accepts that the concept of 'insurance mediation' as defined in Directive 2002/92 (and, by extension, the concept of 'insurance distribution' as defined in Directive 2016/97), and the scope of the entities which that term covers, must be interpreted in such a way that they do not undermine the purpose of that directive.[37] The aims are, first, to complete the single market in insurance services by eliminating barriers to the freedom of establishment and the freedom to provide services, secondly, to ensure equal treatment for all categories of intermediaries[38] and, thirdly, to enhance consumer protection[39] in order to ensure a 'high level' of protection.[40]

103. With regard to the first two objectives mentioned above, engaging in activities consisting in insurance mediation with respect to the same types of insurance contracts should be subject to the same legal regulation. This not only creates the conditions for the completion and proper functioning of a single market in insurance services but, in addition, achieves the objective of ensuring, as follows from recital 9 of Directive 2002/92 and recital 5 of Directive 2016/97, equal treatment for all categories of insurance intermediaries.[41]

104. In the absence of sufficiently significant functional differences between the conclusion of an individual insurance contract and joining group insurance on an individual and voluntary basis,[42] there is no reason why third parties involved in the conclusion of the former should be regarded as insurance intermediaries, whereas those involved in organising enrolment to the latter should not be regarded as such, since they in fact offer – from the point of view of the persons taking advantage of insurance cover – a competing insurance product.

105. As regards the objective of enhancing consumer protection, given the risks that persons joining or wishing to join a group insurance policy on a voluntary basis may face, which are no different from those existing in the traditional situation of concluding an individual insurance contract, achieving that objective requires that the group organiser who concludes the contract with the insurer may at least be treated as an 'insurance intermediary'. This is made possible by the assumption that, in the light of the teleological interpretation, the activity of enabling group insurance to be joined on an individual and voluntary basis can be regarded as the 'conclusion of an insurance contract' within the meaning of the definitions of 'insurance mediation' in Directive 2002/92 and 'insurance distribution' in Directive 2016/97.

37 See judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 28). See also judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others* (C-542/16, EU:C:2018:369, paragraph 42).

38 See judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 29).

39 See judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 27).

40 Judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 30).

41 See, by analogy, judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 29).

42 See points 89 and 99 of this Opinion.

106. Therefore, the clear conclusions reached by way of systemic [43] and teleological [44] interpretation make it possible to conclude that enrolment in group insurance on an individual and voluntary basis, with the involvement of a group organiser, by a person who indirectly finances the insurance premium, also constitutes the 'conclusion of an insurance contract' within the meaning of the definitions of 'insurance mediation' and 'insurance distribution'.

107. It remains to be considered whether such a group organiser might be precluded from being deemed an 'insurance intermediary' by the fact that it is considered a 'policyholder' under domestic insurance law.

### *3. Intermediary as an entity external to the relationship arising from the insurance contract*

108. Referring to the findings of the court of second instance, which are not being challenged in the appeal on a point of law, the referring court explains that the defendant in the main proceedings is the 'policyholder'. The defendant pays the premiums owed to the insurer. Group members pay the defendant a fee for the insurance cover provided to them.

109. Against this background, a doubt arises as to whether Directives 2002/92 and 2016/97 require an 'insurance intermediary' to be a third party to the legal relationship from which the insurance cover arises. In the context of the present case, this question essentially boils down to whether, for group insurance, the group organiser being classified as the 'policyholder' under the applicable national rules of insurance law precludes that group organiser from being considered an 'insurance intermediary' within the meaning of the two directives.

110. To recall: it would appear from the referring court's explanations that this is the prevailing view in German case-law and literature, [45] although the referring court also notes a view in the doctrine that goes in the opposite direction and allows the group organiser of group insurance arranged on a voluntary basis to be regarded as an 'insurance intermediary'. [46]

111. The applicant association, the German and Italian Governments and the Commission appear to favour the latter doctrinal view and, in fact, take the position that a group organiser of insurance on a voluntary basis who acts for remuneration may be regarded as an 'insurance intermediary'.

112. The Czech Government, on the other hand, states in particular [47] that an 'insurance intermediary' must be an external entity ('third party') with respect to the insurance contract. The Czech Government adds that the mere fact that the defendant in the main proceedings is remunerated by its customers does not mean that it is acting 'for remuneration'.

113. That is also the defendant's position in the main proceedings. It is supposedly supported by recital 11 of Directive 2002/92 and recital 11 of Directive 2016/97, which state that '[the directives] should apply to persons whose activity consists in providing [insurance mediation or insurance distribution] services to third parties for remuneration …'.

[43] See point 100 of this Opinion.

[44] See points 103 and 105 of this Opinion.

[45] See points 56 to 59 of this Opinion.

[46] See point 60 of this Opinion.

[47] See also point 79 of this Opinion.

114. In my view, the wording of those recitals alone is insufficient to resolve the referring court's doubts. They are not included in the directives' operative parts. On the other hand, the word 'mediation' indeed appears to describe an activity consisting, in particular, in bringing together in the legal sense two or more entities which are 'external' to the intermediary.

115. In the context of Directives 2002/92 and 2016/97, however, it is a question of bringing together 'customers' and 'insurance undertakings'. [48]

116. At the same time, it does not appear that a 'customer' should automatically be equated with a 'policyholder', and on that basis a person regarded as a 'policyholder' under national insurance law should be excluded from being an 'insurance intermediary'.

117. First, it is no coincidence that the EU legislature uses the term 'customer' in both directives and does not expressly refer to national law or its legal classifications in that respect.

118. Secondly, the Court has already held in a recent judgment that, in the case of unit-linked group life assurance, the 'policyholder', which – using the terminology employed in this Opinion – is the group organiser, is subject to certain obligations arising from its classification as an 'insurance intermediary' under Directive 2002/92. [49]

119. Thirdly, it may appear a priori that the concept of 'customer' is somehow linked to the concept of 'policyholder'.

120. However, in the context of Directives 2002/92 and 2016/97, the concept of 'customer' must also include persons who are not yet 'policyholders' and only intend to obtain that status. After all, in the light of the definitions of 'insurance mediation' and 'insurance distribution', those terms also include activities undertaken prior to the conclusion of an insurance contract. This severs the link that is supposed to exist between the concepts of 'customer' and 'policyholder', all the more so when one considers that the concept of 'policyholder', which is not present at all in Directive 2002/92, is used inconsistently in Directive 2016/97 and only in a specific context – that of 'potential policyholders' (Article 2(2)(c) and (d)). It also appears, with similar inconsistency, in the annex to the latter directive, in the description of the minimum knowledge and competencies required from insurance intermediaries.

121. Fourthly, it is true that in *EEAE and Others*, [50] the Court stated that the purpose of Directive 2002/92 (and therefore, a fortiori, of Directive 2016/97) is 'to ensure a high level of protection for consumers on the insurance market, namely insurance policyholders'. However, the Court used the term 'consumer' rather than 'customer'. At the same time, it does not follow from that statement by the Court that the directive is not intended to protect persons other than 'policyholders'. Moreover, in its judgment in *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, [51] which was also delivered in the context of Directive 2002/92, in defining the 'insurance

[48] This conclusion follows from the very definition of the terms which the referring court is asking the Court to interpret. Indeed, it can be inferred from the third subparagraph of Article 2(1)(3) of Directive 2002/92 that 'insurance mediation' is an activity whose aim is to 'assist the customer'. That provision stipulates that 'the provision of information on an incidental basis in the context of another professional activity *provided that the purpose of that activity is not to assist the customer* in concluding or performing an insurance contract … shall also not be considered as insurance mediation' (my emphasis). A similar picture emerges from the definition of 'insurance distribution' in Directive 2016/97.

[49] See judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)* (C-143/20 and C-213/20, EU:C:2022:118, paragraphs 87 and 91).

[50] Judgment of 17 October 2013, *EEAE and Others* (C-555/11, EU:C:2013:668, paragraph 30).

[51] Judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others* (C-542/16, EU:C:2018:369, paragraph 50).

contract' to which the activities of an 'insurance intermediary' within the meaning of that directive relate, the Court used the concept of an 'insurance transaction', which is intended to mean 'the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, that is to say, the insured party'.

122. Therefore, the case-law of the Court confirms that the configurations arising in the context of insurance are sometimes complex and characterised by the presence of multiple entities whose legal situation is affected by that insurance. Hence, sometimes assuming that a particular concept of EU law, which is harmonised by means of Directives 2002/92 and 2016/97, must correspond to a concept of national insurance law – which is not always harmonised in that respect or, at least, is not harmonised by means of those directives – may yield results which are difficult to reconcile with the objectives of the directives in question.

123. Fifthly, the proposition that there is a close link between the classification as a 'policyholder' under provisions of national insurance law which do not transpose Directives 2002/92 and 2016/97, on the one hand, and as a 'customer' under those directives, on the other, must raise even more doubts in the context of group insurance. As can be seen from the comments in points 60 and 69 of this Opinion, the very issue of the classification of entities involved in group insurance relationships is problematic and raises numerous doubts both with respect to the legal construct itself and to the applicable terminology. It cannot be clearly determined that, in group insurance with mandatory enrolment, it is the group members who are treated as 'policyholders' rather than the group organiser. The classification of the contract concluded by the group organiser with the policyholder is ambiguous as well. In fact, the division into group insurance with mandatory enrolment and group insurance with voluntary enrolment is an attempt to propose a legal construct in order to explain the functioning of group insurance that is a product of practice, so as to ensure simultaneously the protection of those entities that benefit from insurance cover.

124. The classification of individual entities involved in group insurance relationships ('policyholder', 'group member', and so forth) should not therefore preclude the application of the provisions of the directives in a manner consistent with the conclusions drawn from their systemic and teleological interpretations with respect to the concepts of 'insurance intermediary' and 'customer'.

125. Sixthly, in the present case, it cannot be ruled out that, for all the complexity of the configurations that arise in the context of group insurance, the referring court's recognition of the defendant in the main proceedings as a 'policyholder' is due in part to the fact that when hearing an appeal on a point of law, it is bound by the unchallenged findings of the court of second instance.

126. On the other hand, the very fact that the referring court entertains the possibility that the question referred could be answered in accordance with the minority view within the doctrine may mean that the assumption that the defendant is a 'policyholder' under national insurance law does not preclude the assumption that the defendant is not a 'customer' for the purposes of Directives 2002/92 and 2016/97, but instead must be regarded as an 'insurance intermediary'. Indeed, in its reply submitted at the hearing, the defendant in the main proceedings indicated that it was not a 'consumer of the insurance contract' even though it had signed that contract, and was acting as the policyholder in its relationship with the insurer.

127. In the light of the considerations presented above, the provisions of Directives 2002/92 and 2016/97 must be interpreted as meaning that a group organiser who is regarded as a 'policyholder' under provisions of national insurance law which do not transpose those directives may be regarded as an 'insurance intermediary' within the meaning of those directives if it engages 'for remuneration' in the activities of 'insurance mediation' and 'insurance distribution'.

128. As regards the Czech Government's doubts in that regard, it is sufficient to emphasise that the concept of 'for remuneration' is construed broadly under both directives.[52] On the other hand, it should be remembered that a person who engages in activities that are fully within the definitions of 'insurance mediation' and 'insurance distribution' cannot be considered an 'insurance intermediary' and cannot be subject to the related obligations if that person does not engage in those activities 'for remuneration'.

129. In view of the conclusions drawn from the analysis of the referring court's doubts concerning 'joining group insurance'[53] and those drawn from the analysis of an intermediary's position outside the insurance relationship,[54] I propose that the Court should answer the referring court's question by declaring that Article 2(3) and (5) of Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of Directive 2016/97 must be interpreted as meaning that a natural or legal person who maintains 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 those persons memberships entitling them to claim insurance benefits in the event of illness or accident abroad and receives from recruited members (who indirectly fund the insurance premium) a fee for the insurance cover purchased, is an 'insurance intermediary' within the meaning of those directives. This is not precluded by the fact that the person in question is considered a 'policyholder' under national insurance law.

## V. Conclusions

130. In the light of the foregoing considerations, I propose that the Court should answer the question referred for a preliminary ruling by the Bundesgerichtshof (Federal Court of Justice, Germany) as follows:

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 and 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 insurance distribution should be interpreted as meaning that a natural or legal person who maintains 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 those persons memberships entitling them to claim insurance benefits in the event of illness or accident abroad and receives from recruited members (who indirectly fund the insurance premium) a fee for the insurance cover purchased, is an 'insurance intermediary' within the meaning of those directives.

[52] See recital 11 of Directive 2002/92 and Article 2(1)(9) of Directive 2016/97.

[53] See point 106 of this Opinion.

[54] See point 127 of this Opinion.