

Comments on the Judgment of the Court of Justice of the European Union of 29 September 2022 (case C-633/20): will the DGSFP's historical criterion on the impossibility of acting simultaneously as policyholder and intermediary in the same policy be modified?

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On 4 October the First Chamber of the Court of Justice of the European Union ("CJEU") published its Judgment of 29 September 2022, whereby it concludes that "a legal person whose activity consists in offering its customers membership on a voluntary basis, in return for payment which it receives from them, of a group insurance policy to which it has subscribed previously with an insurance company" should be deemed an insurance intermediary. With this interpretation, the CJEU has ruled against the criterion that the Spanish Insurance Authority (the "Dirección General de Seguros y Fondos de Pensiones", hereinafter "DGSFP") has historically maintained in several of its public consultations, according to which the dual role of policyholder and intermediary would distort the activity of advice, which is why it de facto prohibited the concurrence in the same person or entity of the figures of policyholder and insurance intermediary. We analyse the Judgment and its possible implications in Spain below.

The Judgment of the Court of Justice of the European Union (hereinafter "**JCJEU**") has decided on the preliminary ruling requested by the *Bundesgerichtshof* (Federal Court of Justice of Germany), which concerned the interpretation of Article 2 (3 and 5) of the repealed Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 (hereinafter "**Directive 2002/92**") and Article 2.1 (paragraphs 1, 3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, "**TCMAAA**") which discussed the alleged activity of insurance mediation carried on by the latter without the required authorisation.

The defendant, TCMAAA, hired advertising companies with the task of offering consumers, by way of door-to-door sales, the adherence to a group insurance policy of which it was the policyholder and in which, in that capacity, TCMAAA 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. TCMAAA's customers who adhered to the group policy paid a remuneration to TCMAAA in exchange for the right to the referred benefits in the event of sickness or accident abroad. However, according to the CJEU, the benefits to the insured persons were paid by means of claims (credits) which TCMAAA assigned to its customers.

Neither TCMAAA 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 Civil and Criminal Court of Koblenz, Germany) seeking an order requiring TCMAAA 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 by the *Oberlandesgericht Koblenz* (Higher Regional Court of Koblenz, Germany), who found that TCMAAA 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 CJEU for a preliminary ruling, as it considered that the debate should focus on whether TCMAAA is an insurance intermediary within the meaning of the repealed Directive 2002/92 and Directive 2016/97 or not. The question referred to the CJEU 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?"

In the CJEU'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

"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 CJEU understood that TCMAAA received remuneration within the meaning of the Directive, since each adherence by a customer to the group insurance policy entailed the payment of an amount to TCMAAA. Thus, in doing so TCMAAA 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 Court, 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 TCMAAA used advertising companies with the task of offering such membership by means of door-to-door sales.

What is relevant here is that the CJEU 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 (TCMAAA) 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

These 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 CJEU 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 CJEU 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 CJEU 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 TCMAAA (*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 CJEU, 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 CJEU 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**”.*

This interpretation had already been taken up by the CJEU in its Judgment of 24 February 2022 (see the decision in Spanish [here](#)), in which it acknowledged tangentially (since it was not a matter in dispute) the possibility that an entity acting as an insurance intermediary could also be the policyholder of a unit-linked insurance policy which it offered to its customers (“*that policyholder entity carries on, for remuneration, the activity of insurance mediation within the meaning of Article*

2, point 3 of Article 2(3) of that directive, consisting in offering consumers the possibility of taking out a unit-linked group insurance contract and thereby concluding, a life assurance contract with the insurance undertaking, and in giving financial advice on the investment of the capital constituted by the insurance premiums paid by those consumers in the assets representing the unit-linked group contract”).

However, this interpretative criterion of the CJEU, which seems to admit without reservation the compatibility of the activity of mediation with that of policyholder of a group insurance policy, would clash head-on with the position that the DGSFP has historically maintained in several of its public consultations (note that, although the consultations cited below were published under the repealed Act 26/2006, of 17 July, on private insurance and reinsurance mediation, they are still fully in force, as they are not directly affected by the amendments introduced by the new insurance distribution regulations and no other consultation contradicting them has been published subsequently).

In its Consultation 3873/2008 of 19 December 2008 (you can consult the document in Spanish at this [link](#)), the DGSFP concluded that “*acting both as policyholder (whether of an individual or group policy) and as intermediary would distort the advisory activity that the intermediary would carry out for himself, and would convert the policy into one of direct contracting with the insurance company*”.

More revealing of the DGSFP's position is Consultation 88/2009 of 17 February 2009 (see the document in Spanish at this [link](#)) in response to the questions raised by the Royal Spanish Hunting Federation. In it, the Federation asked the Spanish Supervisor, among other questions, whether there was any incompatibility between the Federation's mediation activity and the execution of group insurance contracts with insurers, in which the Federation had the role of policyholder, as representative of the insurable and insured group. In response to this question, the DGSFP argued that “***it is the criterion in these cases that the dual role of policyholder, who is a party to the insurance contract, and insurance intermediary, is not in line with the obligations that Act 26/2006 imposes on insurance intermediaries in terms of advice and assistance. The intermediary essentially carried out the activities listed in article 2.1 of Act 26/2006 between the consumer (policyholder and insured) of the service and the insurance company. The advice that, where appropriate, he may give for himself in the intermediation of insurance policies would have the effect that these policies are sold by the insurance company directly to the policyholder***”.

Despite the above, the DGSFP's forcefulness in determining without a shadow of a doubt the incompatibility of the figure of an improper policyholder of a group policy and that of an intermediary was somewhat compensated by the fact that it allowed the dual role of external collaborator of an intermediary (except brokers) and policyholder of an improper group insurance policy, provided that certain requirements were met. In the opinion of the Spanish Insurance Authority, in such a case, there would be no incompatibility, provided that: (i) firstly, in relation to the insurance contract itself, it was guaranteed that the power of disposal over the entire contractual relationship corresponded to the real *dominus negotiorum* - that is, to the insured persons who joined the group policy of which the external collaborator was the policyholder - (a requirement demanded by the DGSFP for all improper group insurance) and (ii) secondly, in relation to the activity of the external collaborator itself, that it be guaranteed, on the one hand, that the functions performed by the latter in no case included advice, but only administrative processing, and, on the other hand, the active participation of the intermediary so that the clients were really advised.

It is noteworthy that the DGSFP's historical concern that the concurrence in the same person or entity of the figures of policyholder and intermediary would entail a breach of the mediator's advisory role has not been such for the CJEU, which has not objected to the possibility of this dual status in several decisions.

But the most relevant question that inevitably arises now is the following: is the CJEU's interpretative criterion binding on the DGSFP, and should the DGSFP therefore review its position?

In our opinion, the answer is yes. Judgments of the CJEU that resolve preliminary rulings are not only binding (Article 91 of the Consolidated Version of the Rules of Procedure of the Court of Justice) to the national Court that raised the request for preliminary ruling for the resolution of the main dispute (*vid.* Order of the CJEU of 5 March 1986 in Case 69/85) but, in practice, their effects go further, *erga omnes*, serving as an interpretative precedent in other similar proceedings, which inevitably binds the national authorities in similar cases where the community regulation interpreted by the CJEU is applicable.

We will have to wait to see the final position that the DGSFP might adopt in the light of the CJEU's Judgment, although it seems that the categorical nature of the CJEU's reasoning in its recent Judgment would leave little room for the Spanish Insurance Authority to depart from it.

You can access the full Judgment in English by clicking on this [link](#).



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