Case C-633/20

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 November 2020

Referring court or tribunal:

Bundesgerichtshof (Germany)

Date of the decision to refer:

15 October 2020

Applicant and appellant in the appeal on a point of law:

Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.

Defendant and respondent in the appeal on a point of law:

TC Medical Air Ambulance Agency GmbH

Subject matter of the main proceedings

Directives 2002/92 and 2016/97 – Concept of 'insurance intermediary' – Inclusion in that concept of an undertaking which, in order to cover the risk of sickness or accident abroad, offers consumers paid memberships in a group insurance policy taken out by it, and other services

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Question referred

The following question is referred to the Court of Justice of the European Union for a preliminary ruling on the interpretation of 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 (OJ 2003 L 9, p. 3) 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 (recast) (OJ 2016 L 26, p. 19):

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?

Provisions of EU law cited

Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, specifically Article 2(3) and (5)

Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), specifically Article 2(1)(1), (3) and (8)

Brief summary of the facts and procedure

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

2 The defendant has a contractual relationship with a company which, with its medical staff and its aircraft, provides some of the insurance benefits for the defendant and organises the round-the-clock alarm centre. The defendant pays the company a fee for this. 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 under foreign travel medical insurance and insurance covering foreign and domestic repatriation costs.

3 Neither the defendant nor the advertising companies appointed by it hold a licence to act as an insurance intermediary under national law.

4 The applicant is of the opinion that the defendant’s activity is anti-competitive. It takes the view, in essence, that the defendant practises insurance mediation, for which it requires a licence. It therefore brought an action before the national courts requesting that the defendant be ordered to refrain from offering or having

offered to consumers contracts for membership to a group of insured persons, without the licence required to practise insurance mediation.

5 The Landgericht (Regional Court) upheld the action. On appeal by the defendant, the Berufungsgericht (Court of Appeal) dismissed the action. The referring court is now called upon to rule on the appeal on a point of law in this dispute.

Brief summary of the grounds for the request

6 The success of the form of order sought by the applicant depends on whether the defendant requires a licence under national law for brokering to consumers, in return for payment, the memberships distributed by it. The answer to that question hinges, in turn, on the interpretation Article 2(3) and (5) of Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97.

7 The Court of Appeal dismissed the action on the ground that the defendant could not be classified as an insurance intermediary within the meaning of national law. Under national law, an insurance intermediary could only be a person who was neither a policyholder nor an insurer. This was not the case with the defendant. It was the policyholder of the undertaking with which it took out, in its own name, a group insurance policy for the account of third parties. In addition, by providing an alarm centre and organising and carrying out repatriation in the event of illness, it provided independent benefits that went beyond the scope of those provided by the group insurance policy.

8 The action concerns the contractual documents used by the defendant in September 2017. Directive 2002/92 was subsequently repealed and replaced by Directive 2016/97 with effect from 1 October 2018 and, in implementation of the latter directive, the national law applicable to the present dispute was also amended.

9 Pursuant to both the old and new versions of the national law, insurance intermediaries are persons who, as a representative of one or more insurance undertakings, are entrusted with brokering or concluding insurance contracts, or who, as insurance brokers, are engaged in brokering or concluding insurance contracts without being entrusted to do so by an insurance undertaking.

10 The predominant view in German case-law and legal literature is therefore 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.

11 However, some commentators also take the view that a group insurance policyholder can be regarded as an insurance intermediary if he takes out the group insurance policy not in the interest of the insured persons but rather in his own commercial interests.

12 It is not unambiguously clear from Directive 2002/92 or its replacement, Directive 2016/97, or the case-law of the Court of Justice to date whether and, if so, under what conditions, a person who is a group insurance policyholder can be an insurance intermediary.

13 According to the case-law of the Court of Justice, the activities referred to in Article 2(3) of Directive 2002/92 are broad in scope. The concept of insurance mediation is defined in that provision as the activities of 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. Accordingly, each activity listed in Article 2(3) of Directive 2002/92 constitutes in itself an insurance mediation activity (judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 37). Those considerations apply equally to the activities referred to in Article 2(1)(1) of Directive 2016/97. The concept of 'insurance mediation' defined in that provision covers, inter alia, 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.

14 Based on the benefits offered by it, it appears to be possible for the defendant to be regarded as an insurance intermediary in this sense.

15 Furthermore, the recitals of both directives militate in favour of a broad interpretation of the concept of insurance intermediary.

16 Directive 2002/92 and Directive 2016/97 assume that insurance products are distributed by various types of persons or institutions. Directive 2002/92 refers to agents, brokers and 'bancassurance' operators (recital 9), whereas Directive 2016/97 also refers to insurance undertakings, travel agents and car rental companies (recital 5). Equality of treatment between operators and customer protection requires that all those persons or institutions be covered by both directives. The scope of Directive 2016/97 is clearly wider than that of Directive 2002/92 (recitals 7 and 8 of Directive 2016/97). One of the declared objectives of Directive 2016/97 is to ensure that consumers benefit from the same level of protection despite the differences between distribution channels (recital 6).

17 It cannot be inferred from those recitals that the directives consider solely agents and brokers to be insurance intermediaries.

18 The purpose pursued by Directives 2002/92 and 2016/97 also suggests that persons who – like the defendant – distribute memberships of a group insurance policy to consumers in return for a fee should be regarded as insurance intermediaries. The registration requirement provided for in those directives is intended to ensure that only those who meet strict professional requirements in relation to their competence, good repute, professional indemnity cover and

financial capacity can act as insurance intermediaries (see recitals 14 and 16 of Directive 2002/92). The objective is, on the one hand, to ensure a high level of professional competence in insurance mediation and the harmonisation of the intermediary market throughout the Union by removing obstacles to freedom of establishment and freedom to provide services and, on the other, to enhance consumer protection – that is to say policyholder protection – in this field (see judgment of 17 October 2013, *EEAE and Others*, C-555/11, EU:C:2013:668, paragraph 27).

19 For customers wishing to insure a specific risk, it is irrelevant, in terms of the economic outcome, whether they obtain insurance cover directly as policyholders or indirectly through an undertaking as an insured person under a group insurance policy. It therefore would not appear to be justified to impose on persons who provide insurance cover to customers in return for a fee different requirements depending on whether the customer obtains the status of policyholder or insured. The consumer protection sought by Directives 2002/92 and 2016/97 could therefore justify treating as insurance intermediaries persons who, like the defendant, distribute memberships in a group insurance policy in their own commercial interests.

20 Unlike Directive 2002/92, Directive 2016/97 refers to group insurance, in recital 49. It is clear from that recital that, in the case of group insurance, the policyholder is a ‘customer’ and not an insurance intermediary. The recital does not, however, cover all cases of group insurance, but only those where the individual member cannot take an individual decision to join. In the present case, however, there is no such obligation on consumers to join.