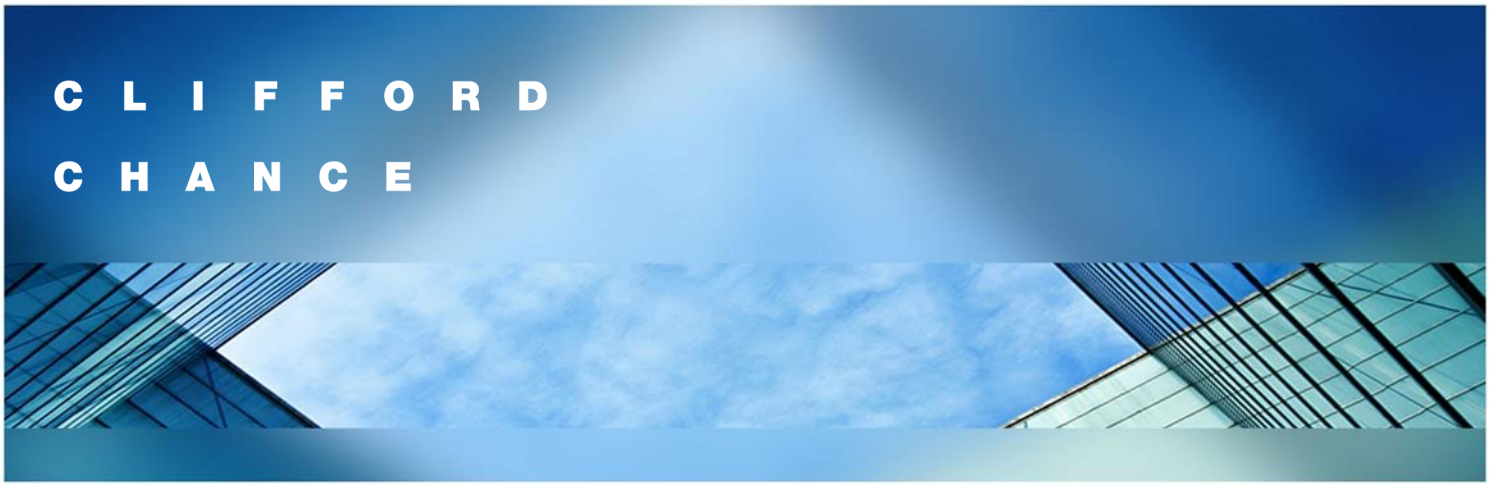

ECJ DECISION: ARRANGING MEMBERSHIP IN A GROUP INSURANCE POLICY (EVEN AS POLICYHOLDER) IN RETURN FOR PAYMENT IS INSURANCE INTERMEDIATION

The legal context

The Bundesgerichtshof (Federal Court of Justice, Germany) requested a preliminary ruling from the European Court of Justice ("ECJ") under Article 267 of the Treaty on the Functioning of the European Union ("TFEU") in the context of proceedings between the Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV (Federal Union of Consumer Organisations and Associations, Germany) and TC Medical Air Ambulance Agency GmbH ("TCMA") concerning an alleged activity of insurance mediation without authorisation.

The facts

TCMA appointed external advertising companies to offer consumers, by way of door-to-door sales, membership of a collective insurance scheme in return for a fee. TCMA (i) subscribed to a group insurance policy with W. Versicherungs-AG (the "**Insurer**") comprising coverage in the event of sickness or accident abroad and coverage for repatriation costs incurred abroad and in national territory and (ii) paid the premiums due to the Insurer under the group insurance policy. The customers of TCMA who joined the group insurance received the right to various insurance benefits under such group insurance policy and paid a fee to TCMA.

Neither TCMA nor the advertising companies which it used held the licence provided for under national law to carry out the activity of insurance mediation.

The ECJ ruling

The ECJ analysed whether the regulatory concept of "insurance intermediary" and "distributor of insurance products" would cover a legal person whose activity consists of offering its customers membership on a voluntary basis, in return for a payment made by such customers, of a group insurance policy (to which it was the policyholder), where that membership entitles those customers to insurance benefits in the event, in particular, of sickness or accident abroad.

The starting point of the analysis made by the ECJ was to analyse how the concepts of "insurance mediation" or "insurance distribution" and of "insurance intermediary" are defined in the Directive 2002/92 ("**IMD**") and the Directive 2016/97 ("**IDD**").

Under the IMD:

- "Insurance mediation" is defined by reference to those 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 (Article 2(3)).
- An "insurance intermediary" is a person who, for remuneration, takes up or pursues insurance mediation (Article 2(5)).

Key EU local markets
Please see specific details for the following jurisdictions:

- Germany
- Spain
- Italy
- France
- Poland
- Luxembourg
- The Netherlands
- Romania

Under the IDD:

- "Insurance distribution" is defined by reference to those 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 (Article 2(1)(1)).

- An "insurance intermediary" is any person, other than an insurance or reinsurance undertaking or their employees and other than an ancillary insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution (Article 2(1)(3)).
- An "insurance distributor" means any insurance intermediary, ancillary insurance intermediary or insurance undertaking (Article 2(1)(5)).

Considering the above, the ECJ ruled that the activities being performed by TCMA in the case at hand are captured under the definitions of "insurance mediation" and "insurance distribution" with TCMA itself being an "insurance intermediary" and an "insurance distributor" on the following grounds:

- **The definitions of "insurance mediation" under the IMD and "insurance distribution" under the IDD refer to several activities each of which individually constitutes "insurance mediation" or "insurance distribution" and that should be interpreted in broad terms**

  The activities being deemed as "insurance mediation" and "insurance distribution" as referred are presented as alternatives that each of them constitutes, on its own, an insurance mediation activity, i.e. it is not required that all such activities are carried out cumulatively in order for such activities to be considered "insurance mediation" or "insurance distribution" .

  In addition, such definitions should not be interpreted narrowly, as the activities included in such definitions are formulated in broad terms and comprise not only the presentation and the proposal of insurance contracts, but also the performance of other work preparatory to the conclusion of such contracts, and the nature of the preparatory work referred to is not limited in any way whatsoever (vid. the ECJ judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16).

- **Interpretation by analogy**

  Although the definitions of "insurance mediation" and "insurance distribution" do not expressly mention the specific activity carried out by TCMA, they must be read (by analogy and considering their purpose) as encompassing such an activity. The ECJ follows a "substance-over-form" interpretation of such concepts, deeming the activity carried out by TCMA substantially equivalent to those expressly referred to in the definitions.

- **The existence of remuneration is a paramount element to determine whether a person is an "insurance intermediary" or not**

  The existence of remuneration is a requirement for a person to be considered an "insurance intermediary". "Remuneration" is defined on broad terms in the IDD 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" (Article 2(1)(9)).

  The fact that membership by TCMA's customers of the group insurance policy gives rise to a payment by such customers in exchange is deemed sufficient by the ECJ to hold that there is remuneration in this case. Such payments represent an economic interest of their own for TCMA, which would likely induce it to work towards gaining a large number of members (so as to obtain a higher remuneration). The use of advertising companies to offer membership to end-customers is considered a clear indication of such economic interest.

  In fact, the ECJ sets out that the activity at issue 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, which are undoubtedly subject to the IDD (and the IMD before). They did not consider it relevant that TCMA is a party, as policyholder, to the group insurance policy which it intends to encourage its customers to join. It is possible to be both policyholder and carry on the regulated activity of insurance distribution.

  The fact that TCMA's economic interest consists of receiving the payments from customers who acquire membership of the group policy, and not of receiving a commission from the Insurer, is deemed irrelevant, considering that the concept of "remuneration" is defined broadly in the IDD.

- **Equal treatment for distributors of equal products**

  Insurance products may be distributed by different types of persons and, in order to ensure equal treatment between operators and consumer

protection, it is necessary that all those persons are covered by the same applicable rules. Ensuring such equal treatment is one of the main aims pursued by the IMD and even more so in the IDD and is enshrined as such in the recitals of such directives and in the ECJ case law (vid., judgment of 17 October 2013, *EEAE and Others*, C-555/11).

Considering that a person such as TCMA who carries out activities that are of a comparable nature to insurance distribution is an insurance intermediary, is consistent with the objective of ensuring equal treatment between all intermediaries and distributors of insurance products pursued by the directives.

- **Consistency with the consumer protection objectives pursued by the IMD and the IDD**

  In order to ensure that the activity of an insurance intermediary guarantees an adequate level of consumer protection, that intermediary is required, in accordance with the IMD and the IDD, to comply with *inter alia* a set of professional, financial and organisational requirements, rules of conduct such as those aimed at preventing the risk of a conflict of interest arising from any links between that intermediary and a given insurer, and with obligations to inform and advise those consumer.

  It is aligned with the consumer protection objectives of the applicable EU law provisions that TCMA, insofar as it carries out insurance intermediation and insurance distribution activities, is obliged to comply the authorisation and registration obligations set out in the IMD (before) and the IDD and implementing national legislation (now). That would only be achieved if TCMA is deemed to be an "insurance intermediary" (and "**insurance distributor**") for the purposes of the relevant applicable law.

Potential implications for the EU insurance distribution market

The full impact of the ECJ ruling remains to be seen - it will mainly depend on how national competent authorities for insurance supervision ("**NCAs**") enforce the ruling having regard to the national regulations applicable in each member state, which may differ to a certain extent, and the local specificities of the insurance distribution business models. NCAs may issue formal or informal guidance for businesses dedicated to the distribution of insurance products according to similar models as the one at issue in the ECJ ruling. One thing is clear - it is only a matter of time until businesses affected by the ECJ ruling need to revisit their distribution strategy.

The key takeaways from the ECJ ruling for insurance distribution structures are the following:

- Selling membership to a group insurance policy as policyholder to end customers in return for a payment will be deemed as insurance distribution activity, which will mean that the policyholder will be an "insurance distributor".
- Businesses being deemed as "insurance distributors" will need to assess whether they can either apply for a regulatory exemption (e.g. connected contracts exemptions) or obtain a full insurance distribution licence - thus complying with the full set of requirements in terms of fitness and properness of directors, training, know your customer rules, conflicts of interests, advisory terms and so on- or ancillary insurance distribution licences.

Key EU local markets
Please see specific details for the following jurisdictions:

- Germany
- Spain
- Italy
- France
- Poland
- Luxembourg
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- Romania

As far as some of the key EU local markets are concerned:

- In **Germany**, until the ECJ ruling, it was disputed in German legal literature whether, and under which circumstances a policyholder of a group insurance policy qualifies as an insurance intermediary subject to a licence requirement under section 34d of the German Industrial Code (*Gewerbeordnung*, "**GewO**").

  For a long period in time, most legal commentators as well as several German Higher Regional Courts and the Chambers of Industry of Commerce (responsible for the licensing of insurance intermediaries in Germany) and the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*, BaFin) were of the opinion that a group policyholder does – in most cases[1] – not qualify as insurance intermediary given that it is a party to the insurance contract **provided that** the insurance contract is closely related to another service provided by the policyholder. Against this background, this structure was widely used in Germany for a group of companies with the group holding (as the policyholder) not holding a licence for insurance distribution.

  Recently, German jurisprudence and accordingly legal commentators more often argued that an insurance intermediation is conducted where the group policyholder provides insurance coverage to its customers (also) in its own economic interest (but not only in the interest of the insured). In particular, in such cases where the group policyholders receive a remuneration from the customers for the customer's inclusion as a member of the group policy, the business model may be aimed (subject to the circumstances in the individual case) to avoid an insurance intermediary licence and this may therefore be considered as an abuse of rights circumvention (*rechtsmissbräuchliches Verhalten*). This development finally ended in the German Federal Court of Justice's (*Bundesgerichtshof*) requesting a preliminary ruling from the ECJ in the context of the TCMA decision.

  The impact of the ECJ ruling on the German insurance (distribution) market is material:

  - In consequence of the ECJ ruling, with immediate effect, group policyholders selling membership to a group insurance policy as policyholder to end customers in return for a payment need to obtain an insurance distribution licence if they intend to continue such business. Accordingly, in line with the IDD, the group policyholders must prove, among other things, the necessary fit and proper requirement (section 34d para 5 GewO).
  - The group policyholders are also subject to the general regime of insurance distributers under the German Insurance Intermediary Regulation (*Versicherungsvermittlerverordnung*, "**VersVermV**"), especially the registration and notification obligations (sections 8 *et seqq*. VersVermV), the requirement to hold liability insurance (sections 11 *et seqq*. VersVermV in conjunction with 34d para. 5 sentence 1 no. 3 GewO) and the requirements for the business organisation and information duties (sections 14 *et seqq*. VersVermV).
  - If a business conducts insurance intermediary business without licence, it commits an administrative offence and may end up with a fine of up to EUR 5,000 (section 144 para. 1 no. 1 lit. k, para. 4 GewO). It remains to be seen to what extent the competent authorities and the courts will enforce the ECJ ruling and impose such sanctions, especially considering the majority opinion prior to the ECJ ruling.
  - Insurance undertakings may also face a fine of up to EUR 500,000 if they (continue to) cooperate with a group holding that now qualifies as insurance intermediary without having a licence (cf. section 332 para. 3 no. 3, para. 5 in conjunction with section 48 para. 1 no. 1 of the German Insurance Supervisory Act (*Versicherungsaufsichtsgesetz*, "**VAG**"). Therefore, insurance undertakings should examine to what extent the sales cooperation with policyholders of group

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1 Section 7d of the German Insurance Contract Act (*Versicherungsvertragsgesetz*, "**VVG**") provides for an exception for residual debt insurance policies (*Restschuldversicherungen*) where the group policyholder shall have the duties of an insurer to advise and inform *vis-à-vis* the insured person.

insurance policies needs to be adjusted.

Immediate action is therefore required if a group of companies is using this business model without having the necessary licences. In the German insurance market, alternatives to the licensing requirement for insurance intermediaries are already being discussed:

- One alternative would be to limit the former business and act as a so-called lead provider (*Tippgeber*) who merely facilitates the contact between the potential policyholder and insurer. According to German case law, the distinction between insurance mediation and mere lead providing activity is based on case-by-case analysis of the objective appearance of the activity from the view of a reasonable consumer (*Bundesgerichtshof*, judgement of 28 November 2013, I ZR 7/13). A lead provider is prohibited from obtaining information from the customer that goes beyond the customer's general data and is directed at a specific insurance product. Consequently, the customers must take care of the conclusion of an individual contract with the insurer on their own.
- Another alternative for the group policyholder is to register as a so-called tied-agent (*gebundener Versicherungsvermittler*) of the insurer in which case the insurer must then assume full liability for the intermediary's, i.e. the group policyholder's activities (section 34d para 7 GewO). Although it provides advantages for the group policyholder who must not obtain an independent licence to conduct insurance business (but is still bound to certain regulations of the VersVermV / IDD), this alternative is already questioned by insurers who push back on assuming any liability for the group policyholder's activities.

- In **Spain**, the ECJ ruling calls into question the relatively common distribution models pivoting around improper policyholders (*tomadores impropios*) entering into group policies where premiums are in turn paid by the insureds joining such group policies by means of individual adherences.

Until now, those improper policyholders avoided to be authorised and registered as insurance intermediaries or distributors following the longstanding criterion held by the Spanish NCA (DGSFP) setting out that a policyholder could not be an insurance intermediary and distributor at the same time. On this basis, in many instances, improper policyholders were external collaborators (*colaboradores externos*) (a purely Spanish figure, which is allowed to carry out certain ancillary distribution activities on behalf of an insurance distributor) of insurance intermediaries when participating in those distribution schemes - and thus protection for end customers was guaranteed given the participation in the distribution scheme of the authorised insurance intermediaries. We note that there may be some discussion as to whether these schemes would need to change in view of the ECJ ruling.

Other key questions where clarification from the DGSFP would be welcomed are *inter alia*:

(i) the very own future role of the external collaborators of insurance intermediaries which provide legal cover to improper policyholders in their distribution models, considering that the ECJ ruling requires that an improper policyholder needs to be an insurance intermediary, and thus different to an external collaborator, which could theoretically render such distribution structures incompatible with the IDD Directive. It should be noted that the structure in which there is an external collaborator differs to a certain extent from the one assessed by the ECJ in that there is a regulated insurance distributor participating in the scheme (of which the external collaborator is a mere representative acting on its behalf) and the regulatory requirements in relation to insurance distribution are fully applicable given that they do apply to such insurance distributor, meaning that the protection of customers and the equal treatment of insurance distributors should not be undermined;

(ii) if the structure is considered compatible with the IDD Directive, the role that insurance intermediaries should have in such structures and the specific activities that insurance intermediaries have to perform necessarily and those that may be carried out by external collaborators.

The DGSFP has held the view until now that the distributor needs to be the party to the insurance mediation contractual relationship and actively perform certain key functions on its own (in particular, providing advisory) and that the external collaborator may only carry out certain limited ancillary obligations on behalf of the insurance distributor;

(iii) if the structure is considered incompatible with the IDD Directive, which type of insurance intermediary should an improper policyholder be amongst the different alternatives (should it be an agent given the relationship it would maintain with the insurer underwriting the group policy, and perhaps a complementary insurance intermediary as well, noting the definition for the latter seems to fit very well with what an improper policyholder may do?); and

(iv) how the scheme of remuneration of an improper policyholder should be (should it receive payments from end customers or insurers or a combination of both?).

Insurers may also want to revisit their distribution models which may be impacted by the ECJ ruling considering the legal prohibition to accept insurance mediation services from non-authorised intermediaries.

- In **Italy**, no overly disruptive impacts are however expected.

The Italian regulatory framework already had a rule - in the Italian regulator's (IVASS') second-level regulations on insurance distribution - to the effect that "insurance distribution includes the entering by a person into collective insurance coverage, for the account of multiple insureds (yet to be identified when the insurance policy is taken out), where the insureds ultimately bear the economic burden of the premium and the person entering into the policy receives a remuneration" (Art 3(3) of IVASS Regulation no. 40/2018).

With the above in mind, the case dealt with by the ECJ would either fall squarely in the scope of the already existing Art 3(3) of IVASS Regulation 40/2018 (i.e. this appears to be the case if TCMA charged its clients both (a) the incremental premium payable by TCMA as the policyholder to the insurer, to have the policy extended to a new insured (the client) and (b) a remuneration pocketed by TCMA itself) or moderately widen the scope of insurance distribution, as compared to Art 3(3) of IVASS Regulation 40/2018 (i.e. this appears to be the case if TCMA charged its clients only the remuneration pocketed by TCMA itself).

- In **France** also, the ECJ ruling should not result in disruptive impacts.

French law does not expressly and generally rule on the question of whether (and upon which conditions) a policyholder of a collective insurance policy would be regarded as being an insurance intermediary.

However, such a situation is indirectly covered with respect to policyholder associations by a specific provision[2] (introduced in 1999) pursuant to which policyholder associations which benefit from an exemption to the rules regarding the exercise of insurance intermediation and which carry out such an activity are notably required to declare to the French *Autorité de contrôle prudentiel et de supervision* (Prudential Supervision and Resolution Authority) their activity and the type of products they introduce. Accordingly, it has been generally admitted by legal authors[3], and confirmed by the French *Organisme pour le registre unique des intermédiaires en assurance, banque et finance*[4] (Undertaking for the unique register of insurance, bank and finance intermediary – ORIAS), that policyholders of voluntary collective insurance schemes (*assurance collective à adhesion facultative* – as opposed to accessory collective insurance schemes (*assurance collective obligatoire*)) conducting an insurance intermediation[5] activity against remuneration should be

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2 Article L. 514 of the French *Code des assurances* ("**French Insurance Code**").

3 J. Bigot, *L'intermédiation en assurance: les nouvelles règles du jeu*, JCPG no. 47, 22 November 2006, doctr. 189, paragraph 12.

4 ORIAS, Annual report, 2007, according to S. Choisez, *Association et Orias: analyse d'une idée fausse*, 5 September 2008, Argus de l'Assurance.

5 In the meaning of the IMD, as implemented into French law, in article L. 511-1 of the French Insurance Code.

regarded as carrying-out insurance intermediary activities. It is worth noting that legal authors maintained this position further to IDD[6].

Thus, the ECJ ruling is not a game changer with respect to French insurance distribution law, as it essentially confirms a legal reasoning which was already well admitted in France[7]. Its main impacts with respect to French insurance distribution law are to confirm that: (i) the above reasoning, which was essentially applied to policyholder associations of elective collective insurance, could be extended to other sorts of "legal persons"[8] (if and where relevant), it being noted that such an approach was not that much debated under French law considering the legal reasoning applied to associations; and (ii) a look-through substance over form approach of the economy of the transaction (which involved claims assignment in the case at hand) must prevail to determine whether the ultimate clients can be regarded as voluntary members of a voluntary collective insurance scheme[9].

- In **Poland,** no overly disruptive impacts are expected, although on slightly different grounds.

The concept of a conflict of interest and of combining the roles of a policyholder with a status as insurance intermediary has been discussed on the Polish insurance market in the context of third-party insurance contracts, in particular group contracts, even before the IDD came into force. It has developed under the so-called Recommendation U, which was addressed to banks offering group insurance policies to its customers and under the Insurance Distribution Guidelines addressed to insurers. Both these regulations have been issued by the Polish Financial Supervision Authority (KNF). Under the Recommendation U and the Guidelines, the KNF has introduced a requirement for transparency as regards the roles of the parties involved in a provision of insurance, which means that it should be clear who is bearing a role of a policyholder and who is an insurance intermediary. These two roles should not be mixed.

Moreover, according to the Guidelines, the insurer should not pay remuneration to entities responsible for the distribution of insurance other than insurance intermediaries and otherwise than on the terms set out in the insurance intermediation law. The insurer should not pay the policyholder an equivalent, in particular in cash, for activities related to the handling of the insurance contract. At the same time the insured under a third-party contract can bear the cost of the premium paid to the insurer. Similar rules have been introduced under the Recommendation U for banks distributing insurance. Only the bank being insurance intermediary may receive remuneration from the insurer. However, the bank being a policyholder may receive reimbursement of the costs (and no additional remuneration or benefit) from the customer related to the conclusion and handling of the insurance contract.

The above rules have become the basis for the regulation introduced under Article 18 of the Polish Insurance Law, which states that the policyholder under a third-party insurance contract, in particular under the group insurance, must not receive any remuneration or other benefits in connection with the offering of insurance cover or the performance of its duties under such contract. At the same time, the insured are not precluded from financing the cost of the insurance premium paid to the insurer.

There is, however, an exemption to the rule regarding receiving a remuneration by a policyholder, which is allowed in case of group insurance contracts concluded on behalf of employees or persons performing work for on the basis of civil law contracts and their

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6 J. Bigot, *La distribution d'assurance*, Traité de droit des assurances, directed by J. Bigot, volume 2, third edition, paragraphs 1096 *et seq.*

7 It being noted that the ECJ ruling seems to be referring to voluntary collective insurance schemes, as it rules on the activity consisting "*in offering* [….] *customers membership on a voluntary basis*" (underlying added by us) (second paragraph of the ECJ ruling (last paragraph of the judgment)) – in the same sense, see paragraphs 106 *et seq*. of the opinion of advocate general on the ECJ ruling delivered on 24 March 2022 (ECLI:EU:C:2022:220).

8 Second paragraph of the ECJ ruling (last paragraph of the ECJ judgment).

9 S. Choisez, *La définition de l'intermédiaire en assurances vue par le droit européen*, La Tribune de l'assurance, 2 November 2022.

family members, as well as contracts concluded on behalf of members of associations, professional self-governments or trade unions.

Contravening Article 18 of the Insurance Law, i.e. receiving remuneration or other benefits by a policyholder under third party insurance from the insurer or from the insured (save for the exemption above) may be considered as performing agency activities (either as insurance intermediary or ancillary insurance intermediary under the IDD) and may fall within the notion of engagement in the business of insurance intermediation without the appropriate licence. This is subject to criminal liability. Such a policyholder may also be placed on the list of the public warnings.

In the above context, it looks like the ECJ's decision follows the already existing concept in Poland that the existence of the remuneration (in its wide sense) is a key element to determine whether a person is an "insurance intermediary" or not.

The issue that might require regulatory consideration and clarification is whether and to what extent the ECJ decision may have an impact on the role and situation of the policyholders under the specific exemptional schemes in case of group insurance contracts concluded on behalf of employees or persons performing work on the basis of civil law contracts and their family members, members of associations, professional self-governments or trade unions.

- In **Luxembourg,** no overly disruptive impacts are expected.

As in other jurisdictions, the question whether a policy holder could qualify as an insurance distributor at the same time by letting end customers participate in the insurance has not been widely debated in Luxembourg and no specific guidance has been published by the Luxembourg insurance regulator *Commissariat aux assurances* ("**CAA**") in this area.

Luxembourg has implemented IDD in a faithful manner with no additional exemptions or specifications. In other words, the definitions of "insurance distribution" and "insurance mediation" as well as the exemptions from insurance distributor and intermediary regulation in Article 279 *et seq*. of the Luxembourg law of 7 December 2015 on the insurance sector (as amended) ("**ISL**") copy the IDD definitions and exemptions.

Therefore, none of the following activities will be considered insurance distribution for the purposes of the ISL:

- the provision of information on an incidental basis,
- the mere provision of data and information on potential policyholders, and
- the mere provision of information about insurance products or an insurance intermediary or insurance undertaking to potential policyholders if the provider does not take any additional steps to assist in the conclusion of an insurance contract.

Furthermore, as per the definition of "insurance intermediary" in Article 279 of the ISL, the existence of remuneration is a paramount element to determine whether a person is an "insurance intermediary" or not.

Where a person or legal entity established in Luxembourg other than a (re)insurance undertaking carries out the activity of insurance distribution, it needs to obtain in advance of taking up such activity an "insurance intermediary" licence (without prejudice to the EU passporting regime). Such licence is available either in the form of a "broker" or an "agent" licence. While "(re)insurance brokers" act as agent (*mandataire*) of a policyholder and intermediate between such policyholder and a (re)insurance undertaking, "(re)insurance agents" act in the name and for the account of one or more (re)insurance undertakings. Exempted from the insurance distribution licence requirement are persons or legal entities (other than credit institutions or investment firms) who, for remuneration, take up or pursue the activity of insurance distribution on an ancillary basis, provided certain conditions as set out in Article 285(1)c) of the ISL are met (so-called 'connected contract exemption'). Persons or entities falling under such exemption however, in principle need to register with the Luxembourg insurance distributor register. Non-compliance with the licence or registration requirements may give rise to criminal, administrative and civil law sanctions for the responsible persons involved.

Accordingly, businesses being in the same or comparable situations as TCMA in the case dealt with by the ECJ would need

to assess whether or not they qualify in light of the decision of the ECJ as "insurance distributors", if so whether an exemption from the ISL distributor regime is available (*e.g.*, they act as mere lead provider (*indicateur*)) or, otherwise, whether they are able to obtain the then required ISL insurance intermediary licence and/or registration or need to stop or not take up the relevant activities. This analysis may also need to be carried out by employers who enter into a collective insurance agreement for the benefit of their employees and by companies who enter into insurance agreements on behalf of their group companies or other collective insurance distribution activities. Crucial elements in this analysis may also be the existence or not of a remuneration or whether the employees, group companies or collective insurance scheme participants would also become policyholders or only insured persons/entities. (Re)insurance undertakings using distribution channels with business potentially affected by the ECJ decision should also consider the impact on the relevant business relationship. It remains to be seen whether the CAA (or EIOPA) will issue further guidance in respect of the impact of the ECJ decision in Luxembourg or take enforcement action.

As Luxembourg entities act in many cases in a cross-border context, they may also need to take into account all relevant foreign law regimes and exemptions in their analysis.

- In **The Netherlands**, no overly disruptive impacts are expected.

The question whether a policy holder could qualify as an insurance distributor at the same time by letting end customers participate in the insurance has not been widely debated in the Netherlands. This may have been caused by specific exemptions from the licence requirement for insurance distribution activities. In particular, based on the Exemption Regulation to the Dutch Financial Supervision Act (*Vrijstellingsregeling Wft*) such licence requirement, as it implemented the IMD in the past and is currently based on the IDD, does not apply to activities conducted by employers *vis-à-vis* their employees nor to group companies among themselves. This means that employers may enter into a collective insurance agreement for the benefit of their employees and companies may enter into insurance agreements on behalf of their group companies without triggering licensing requirements as an insurance distributor.

Other cases where a central party intermediates insurance contracts for a collective and which cannot fall within the abovementioned exemptions have generally been considered in accordance with the relevant definitions of insurance intermediation (*bemiddelen*) and insurance advice (*adviseren*) as well as guidance by the Dutch NCA (AFM). For instance, in 2015 the AFM published guidance for managers of Home Owners Associations (*Verening van Eigenaren*) in relation to home insurances. The AFM indicated that where a manager of a Home Owners Association transmitted to the insurer more information from home owners than their contact details, or where it would provide an insurance recommendation to the respective home owners, the manager would qualify as a licensable insurance intermediary or insurance advisor, i.e. as an insurance distributor.

The above means that collective insurance distribution activities that are not conducted within a company (for the benefit of employees) or within a group of companies (for the benefit of group companies), including the case dealt with by the ECJ, in principle require a separate licence for insurance distribution. Examples where the licence requirement is not triggered include the following:

(i) the activities do not fall within the scope of the concepts of insurance intermediation (*bemiddelen*) and insurance advice (*adviseren*), e.g. where a person merely facilitates the contact between the potential policy holder and insurer, i.e. by acting as a lead provider and only transmitting objective information and not information that is relevant for an insurance policy; or

(ii) a party that wishes to offer insurance to a collective of potential insureds may choose to cooperate with an authorised insurance distributor, and let such authorised party conduct all regulated activities (while the former party would merely act as the lead provider as referred under (i) and provide limited support to the (potential) insureds); or

(iii) a party that wishes to offer insurance to a collective of potential insureds may choose to register with the AFM as a so-called tied agent (*verbonden bemiddelaar*) of an authorised insurer or insurance distributor, in which case the authorised insurer or insurance distributor, as the case may be, must assume full liability for the former party's (which could include a group policy holder) intermediary or advisory activities.

- In **Romania**, the impact of the ECJ ruling on the Romanian insurance distribution market is material:

(i) As a result of the ECJ ruling, with immediate effect, group policyholders selling membership to a group insurance policy as policyholder to end customers in return for a payment need to obtain an insurance distribution licence if they intend to continue such business.

(ii) The group policyholders are subject to the general regime of insurance distributors under Law no. 236/2018 on insurance distribution ("**Law no. 236/2018**") and under the Romanian Financial Supervisory Authority ("**Romanian FSA**") Rule no. 22/2021 on insurance distribution ("**Rule no. 22/2021**"), especially the registration and notification obligations, the requirement to hold liability insurance and the requirements for the business organisation and information duties (Article 8 and the following of Law no. 236/2018).

(iii) If a business conducts insurance intermediary business without a licence, it commits a criminal offence which may be sanctioned with a criminal fine (or, in the case of individuals, also with imprisonment of up to 2 years) (Article 29 of Law no. 236/2018). In case of failure to comply with other provisions of the regulations relating to insurance distribution that are considered administrative offences, it may end up with fine of up to RON 5,000,000 (approx. EUR 1,010,000), temporary prohibition of work or withdrawal of licence (Article 28 of Law no. 236/2018).

(iv) Insurance undertakings could also face a fine of up to RON 150,000 (approx. EUR 30,400) if they utilise the services of persons not registered with the Romanian FSA or the activity of auxiliary insurance intermediaries and intermediaries in violation of the legal provisions (Article no. 29 of Law no. 236/201).

(v) Having approached the Romanian FSA on an unofficial basis, they mentioned that at the moment the Romanian FSA does not have an official position regarding the ECJ ruling and are waiting to see further guidance (if any) from EIOPA or the approach that will be adopted by regulators from other member states.

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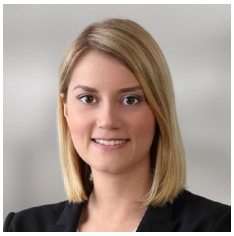

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