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GROUP INSURANCE – VALUE FOR MONEY? COMPARATIVE AND EU LAW REFLECTION*

ABSTRACT

This article discusses the latest trends regarding the legal construction of group insurance through the prism of its efficiency and in the spirit of the CJEU judgments C-26/13, C-633/20, C-208/21. The subject of consideration is the role of the group organizer /insurer/ in the process of insurance distribution. Another issue is the information and advisory obligation towards the insured group members and the group organizer's responsibility for its performance. Correct performance of the information obligation and matching the insurance contract to the requirements and needs of the insured group members prevents misselling.

Keywords: group insurance, IDD, disclosure obligation, insured person

1. INTRODUCTION

The intense development of group insurance should encourage an in-depth reflection on the legal nature of solutions in which the insurance protection model goes beyond the classic formula of individual insurance. Group insurance contracts differ from individual insurance contracts, because of:

- their economic purpose,
- the insurance interest (i.e. of the party interested in insurance protection), which may be very diverse and, therefore, include the interest of the policyholder, the insured person or both,
- the fact that sometimes the only reason for concluding group insurance contracts is organizational convenience,
- the type of benefit for the person covered by insurance,
- the method of risk calculation, depending on whether the individual characteristics of a specific person or the characteristics of an abstract group member are taken into account.

Both in the IDD Directive¹ and in many Member States there are no legal regulations that, taking into account the specificity of group insurance, would provide a legal framework adapted to the needs of the market, and that would counteract the threats resulting from the specific structure of persons involved in group insurance (insurance company - policyholder /group organizer/ - the insured party). As a result, the level of the protection of persons insured as a group does not keep up with the dynamic changes in the legal structures used to offer insurance protection. In this paper, legal regulations of group insurance, both at the EU and Member State level, will be analysed in the context of law and economics, the information obligation, and the pursuit of claims under the group insurance contract. Achieving the goal of protecting the weaker party of group insurance is only possible if the assertion of claims is effective from an economic point of view, i.e. it leads to a reduction in social costs. Next, various legal solutions will be presented that properly or improperly implement the basic principles of law and economics. Another issue that will be analysed is the legal nature of the group insurance contract.

2. DUALISTIC CONCEPTION OF GROUP INSURANCE

In German literature the heterogeneous nature of the concept of group insurance is emphasized. Authors point to two contractual constructions that account for the system of affording protection to a group of insured parties. So called improper group insurance (*unechte Gruppenversicherung*) is based on a framework agreement. The contract from which insurance protection is directly derived is concluded between a group member and the insurer. The group member takes the role of both the policyholder and the insured party.² On the other hand, proper group insurance (*echte Gruppenversicherung*)³ is a construction in which the group organizer is at the same time the policyholder, and the insured parties within the group are not parties to the agreement concluded with the insurer. However, proper group insurance contracts do not form a uniform category. One can distinguish between their two forms.

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¹ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution.

² Herdter, F., *Der Gruppenversicherungsvertrag: Grundlagen und ausgewählte Problemfelder*, Karlsruhe 2010, p. 14.

³ This terminology was coined by Millauer, H., *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe 1966, p. 107 et seq.

The first one is automatic group insurance of a variable circle of persons (*automatische Gruppenversicherung eines wechselnden Personenkreises*). In principle, all members of one group at a given time will be covered by insurance protection against a specific risk without the need to take any independent action. Under this construction, the group is insured in its constantly variable composition.⁴ Therefore, persons who accede to the group specified in the agreement, automatically and without the need to take any action, obtain insurance protection, which they automatically forfeit upon leaving the group. The members covered by a group insurance contract who accede to the contract at a later date are automatically covered by the insurance protection as of the time when they become a part of the group (join the group).⁵ The discussed formula of group insurance is compared in German literature to the construction of so-called current insurance (*laufende Versicherungen*) governed by the provision of § 53 VVG. The essence of such insurance boils down to the fact that on the date of conclusion of the agreement, the insurance interest is specified only generally, and the specific risk is covered by the protection only upon its emergence.⁶

The other form of group insurance distinguished in German literature is group insurance of a variable circle of persons making declarations of accession (*Gruppenversicherung eines wechselnden Personenkreises mit rechtsbegründender Anmeldung*). The substance of this insurance type boils down to the fact that after the conclusion of the insurance contract it is possible for a new group member to make a declaration of accession. The person interested in being afforded insurance protection submits a declaration of accession to the insurer. This act enables the insurance coverage to emerge. The group enjoying such coverage is not closed as on the date of concluding the insurance contract but it is possible to accede to and leave the group in case of respectively: acquiring or losing the properties determining the range of persons belonging to the group of insured parties.⁷

Having regard to the two forms of proper group insurance, as discussed above, one should bear in mind that there are far-reaching differences between this construction and the French model of insurance with compulsory accession, as far as proper group insurance with automatic accession is concerned. In the context

⁴ Millauer, H., *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe 1966, p. 19.

⁵ Herdter, F., *Der Gruppenversicherungsvertrag...*, *op. cit.* note 2, p. 23.

⁶ This type of insurance contract is characteristic of transport insurance and such types of business activities in which both the number and value of goods are subject to constant fluctuation. More in Weigel H., *Niemiecka ustawa o umowie ubezpieczenia – Versicherungsvertragsgesetz (VVG) – nowe rozwiązania*, *Rozprawy Ubezpieczeniowe* 2008, No. 2, p. 110.

⁷ More in Herdter, F., *Der Gruppenversicherungsvertrag...*, *op. cit.* note 2, p. 24–25.

of the discussed constructions, H. Millauer, as the first author in the German doctrine, formulated a definition of group insurance according to which it is a uniform insurance contract covering a group of people to which, in any case, an individual group member belongs either automatically or by accession, but only jointly with the group to which he belongs; under this agreement, the entire group or a single insured party enjoy the same protection against the same risk concerning all the group members subject to the condition that the insurance benefit is paid separately to each insured person within the group.⁸

A special manifestation of the tendency for the unification of international contract law are the model rules on the insurance contract, better known as the Principles of European Insurance Contract Law (PEICL), prepared by the members of the Project Group on a Restatement of European Insurance Contract Law.⁹ As a part of the project, which initially was a typically academic undertaking, an effort was made to create uniform rules on the insurance contract which would make a set of solutions positively evaluated by the representatives of legal science and market participants. It was intended to accomplish that goal taking into account the conclusions following from comparative law analysis. Because of the supranational character of the prepared rules, priority in their interpretation was afforded to the conception of autonomous construction.¹⁰ In 2016, the full text of the PEICL was published, including a commentary.¹¹ The original version of the PEICL did not contain provisions on group insurance.¹² As the works progressed, the authors of the PEICL eventually decided to introduce a definition of the group insurance contract which – beside the definition of “insurance contract,” “damage insurance” and “fixed-sum insurance” – was covered by the provision of Art. 1:201, under paragraph (7) of that provision. It was concluded that group insurance contracts are based on the agreement between the insurer and the group organizer concluded for the benefit of the insured parties who have a common connection with the organizer and meet the requirements set forth in such agreement. So

⁸ So writes Millauer, H., *Rechtsgrundsätze...*, *op. cit.* note 3, p. 13.

⁹ Lakhan, M.; Heiss H., *An Optional Instrument for European Insurance Contract Law*, Utrecht Journal of International and European Law 2010, vol. 71, part 27, p. 1–11.

¹⁰ Fuchs, D., *Insurance Restatement jako europejski instrument opcjonalny służący regulacji umów ubezpieczenia*, RU 2010, No. 9, p. 132; *Status ubezpieczonego według rozporządzenia Rady (WE) nr 44/2001 – wnioski de lege ferenda dla prawodawcy polskiego*, EPS 2012, No. 5, p. 27.

¹¹ Basedow, J.; Birds, J.; Clarke, M.; Cousy, H.; Heiss, H.; Loacker, L., *Principles of European Insurance Contract Law (PEICL)*, 2nd Expanded ed Edition, Köln 2016. The text was published on the website: <https://www.uibk.ac.at/zivilrecht/restatement/sprachfassungen/peicl-en.pdf>.

¹² Armbruster, C., *PEICL – The Project of a European Insurance Contract Law*, Connecticut Insurance Law Journal 2013, vol. 20, p. 150.

determined circle of the insured parties is referred to as "group." At the same time, the definition expressly mentions the possibility of obtaining protection by members of the insured party's family under the group insurance contract.

Researchers from the Restatement Group opted as well for sanctioning the distinction between insurance with compulsory accession (*accessory group insurance*) and insurance with voluntary accession (*elective group insurance*). The first of these concepts is defined as group insurance in which the existence of insurance protection is a consequence of belonging to a given group. The insured party may not withdraw from the insurance coverage. The second category, on the other hand, refers to situations in which accession to a group insurance is a consequence of submitting to the insurer a notice of intention to join the circle of insured parties or the lack of refusal to accede to the insurance.¹³

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

At the same time, the authors of the PEICL decided to refer to the person entering into the group insurance contract with the insurer as "group organizer." This term applies regardless of the compulsory or voluntary nature of accession to the group insurance contract. However, the authors did not decide to define that concept under Art. 1:202, which specifies the meaning of such terms as "insured" (Art. 1:202 item 1) or "insurance agent" (Art. 1:202 item 5). It must be noted that the authors of the instrument use the term "group organizer" inconsistently. As a part of the provisions on group insurance contracts, they also make references to the "policyholder" (Art. 18:204 item 2). It seems, however, that the distinction is unintentional and the terms "group organizer" and "policyholder" can be used interchangeably for the purposes of the discussed rules.

There are essential structural differences between insurance contracts to which accession is compulsory and insurance contracts to which accession is voluntary. The insurance contract with compulsory accession (*accessory group insurance*) is an insurance contract *sensu stricto*. It is on its basis that individual insured parties obtain insurance protection. However, direct application of the PEICL could result in numerous doubts in the light of the special character of group insurance. The authors of the PEICL seem to share such fears. Under the rule expressed in Art.

¹³ More on the considered conceptions of the group insurance contract in Fras, M., *Umowa ubezpieczenia grupowego. Aspekty prawne*, Warszawa 2015, p. 400-402.

18:201 PEICL, the provisions of the PEICL apply only appropriately to insurance contracts with compulsory accession (*accessory group insurance*).

3. LEGAL POSITION OF THE POLICYHOLDER AND ORGANIZER OF THE GROUP

Article 2(3) and (5) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation, as amended by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016, on the distribution of insurance, as amended by Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018, must be interpreted as meaning that the concept of 'insurance intermediary' and, therefore, that of 'insurance distributor', within the meaning of those provisions, covers a legal person whose activity consists in offering its customers membership on a voluntary basis, in return for payment the legal person receives from them, of a group insurance policy to which the legal person has subscribed previously with an insurance company, where that membership entitles those customers to insurance benefits in the event, in particular, of sickness or accident abroad.

Group organizer is a distributor by terms of IDD. This is the main idea of Judgement of the Court (First Chamber) of 29 September 2022 in case C-633/20,¹⁴ Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH.¹⁵

In the justification of this judgment, the CJEU draws attention to the fact that the positive answer to the referred preliminary question is a consequence of interpretation of Directive 2002/92 and Directive 2016/97, taking into account not only the text of the provisions but also their context and purposes of the legislative instruments. In this regard, the CJEU shared the view that consumers should enjoy insurance coverage at the same level regardless of differences between the

¹⁴ ECLI:EU:C:2022:733.

¹⁵ Fras, M.; Zgonina, O., *ECJ – Group organizer as a distributor by terms of IDD*. Commentary Judgement of the Court (First Chamber) of 29 September 2022 in case C-633/20, Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v. TC Medical Air Ambulance Agency GmbH, Wiadomości Ubezpieczeniowe 1/2023, https://piu.org.pl/wp-content/uploads/2023/05/WU-2023-01_06_Fras.pdf 26 February, 2025

channels of insurance distribution. However, the qualification of the policyholder in the group insurance contract as insurance intermediary raises legitimate doubts of academic authors and may have major significance in the insurance practice.

An analysis of the commented judgment leads to the conclusion that the CJEU offered broad interpretation of the terms "insurance distribution" and "insurance intermediary," including the prerequisite "for consideration." In effect, the CJEU explained in very general terms in what situations and under what conditions a policyholder in a group insurance contract can qualify as insurance intermediary. In the first place, by giving expression to a broad understanding of the term "consideration," used by the EU legislator in Recital 11 of Directive 2002/92 and in Art. 2(1) item 9 of Directive 2016/97, the CJEU admits that "the condition relating to the existence of remuneration must be regarded as satisfied where every membership of a customer of the legal person which subscribed to the group insurance policy with the insurance company and which pays, on that basis, the insurance premiums to that company, gives rise to a payment to that legal person." One can only agree with the opinion of the CJEU that the defendant in the main proceedings actually acted in the defendant's own economic interest and, as a consequence, the benefits obtained by the defendant fell within the scope of the term "consideration." However, it is still dubious to put an equation mark between the activities of a group's organiser, who is a party to the insurance contract, and remunerated activities of an insurance intermediary or insurance distributor.¹⁶ A further part of the justification of the commented judgment reveals that, in the opinion of the CJEU, it is irrelevant that a legal person conducting such activities as examined in the main proceedings is in itself a party to the group insurance contract in respect of which the legal person intends to encourage its customers to make a declaration of accession (46). One should approach with criticism the lack of in-depth considerations in this respect.

In the same way, the CJEU points to two prerequisites permitting qualification of a policyholder in a group insurance contract as insurance intermediary. First of all, this is voluntary accession to the group insurance scheme, that is the possibility to make an individual decision, and the economic interest of the policyholder as organizer of the group. However, in the commented judgment, the Court did not address the difference between acquisition of membership in a particular group and the accession to the group insurance contract as such. It seems that the decisive factor in the assessment of the prerequisite of voluntariness, as invoked by the CJEU, should be intention and purpose for which potential members of the group

¹⁶ Armbrüster, C., EuGH, 29.09.2022 - C-633/20: Niederlassungsfreiheit: Erlaubnis zur Versicherungsvermittlung für Versicherungsnehmer einer Gruppenversicherung, Europäische Zeitschrift für Wirtschaftsrecht 20/2022, p. 954.

join the scheme. Therefore, it should be sufficient to resolve if, when joining a particular group, its members have a real possibility to withdraw from the insurance coverage offered within the framework of the group insurance contract.¹⁷ One should accept the opinion that the judgment of the CJEU should not be interpreted so that the policyholder in the group insurance contract must always be treated as insurance intermediary if the policyholder encourages to become members of the group organized by the policyholder, which involves the need to pay a membership fee, as a part of which members of the group obtain at the same time insurance cover under the group insurance contract concluded by the group organizer.¹⁸ As an example, M. Wandt points to a sports club whose members pay a fixed membership fee, in consideration of which they obtain insurance coverage under the group insurance contract concluded by the sports club.

In the case-law of the CJEU, a tendency can be noticed to treat a policyholder in a group insurance contract as insurance intermediary. In the commented judgment, the CJEU refers to an earlier judgment of 24 February 2022,¹⁹ in which the Court held that an entrepreneur being a policyholder in a group insurance contract has a disclosure obligation to the insured party. It was explained in the cited judgment that the status of insurance distributor is not incompatible in that context with the status of a policyholder. This view was consequently upheld also in the latest judgment of the CJEU of 2 February 2023.²⁰ In this judgement CJEU had already ruled that the accession of a consumer to a group contract between an assurance undertaking and a policyholder gives rise to an individual assurance contract between that assurance undertaking and that consumer. The policyholder should be considered to be carrying out an assurance mediation activity.²¹

¹⁷ Fischer, A., Lübecke, T., *Ende oder Neuanfang im Gruppenversicherungsmarkt? Zugleich Anmerkung zum Urteil des EuGH v. 29.9.2022 - C-633/20*, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht 23/2022, p. 1480.

¹⁸ Wandt, M., Versicherungsnehmer einer Gruppenversicherung als Versicherungsvermittler. Grund und Grenzen der Entscheidung des EuGH v. 29.9.2022 - C-633/20, Versicherungsrecht (VersR) Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht 23/2022, p. 1481 et seq.

¹⁹ Judgment of the CJEU of 24.02.2022 r., C-143/20, (EU:C:2022:118)

²⁰ Judgment of the CJEU of 2.02.2023 r., C-208/21, (EU:C:2023:64)

²¹ ECJ 24 Feb. 2022, A ('Unit-linked' assurance contracts), § 81, 87 and 88, with reference to ECJ 31 May 2018, Case C-542/16, *Länsförsäkringar Sak Försäkringsaktiebolag*, ECLI: EU: C:2018:369, § 47–54.

4. PRE-CONTRACTUAL OBLIGATIONS IN GROUP INSURANCE

In the judgment of 20 April 2023,²² the CJEU held that under Art. 5, first sentence, of Directive 93/13²³, the terms of consumer agreements concluded in the written form must always be drawn up in plain and intelligible language. The Court explained that this requirement has the same scope as the requirement laid down under Art. 4(2) of the above-mentioned Directive, which makes the exception provided for in the latter provision from a judicial review mechanism by a national court of the unfair status of the terms in question, in particular terms on the main subject matter of the contract, dependent on whether the terms have been formulated in plain and intelligible language.²⁴ The Court explained that the requirement of transparency of contractual terms must be interpreted extensively, and that it cannot be limited only to the intelligibility of those terms in a formal and grammatical sense. This requirement means that an average consumer, who is reasonably well-informed and reasonably observant and circumspect, is able to understand the specific operation of such term and to accordingly assess, based on clear and intelligible criteria, the potentially significant economic consequences of the term to the consumer's obligations.²⁵ As for the moment when the information should be provided to the consumer, provision of information about the contract terms and about the consequences of concluding the agreement prior to its conclusion is of fundamental importance to the consumer, because specifically on the basis of that information the consumer will decide if he or she wishes to be bound by the terms formulated in advance by an entrepreneur,²⁶ also when the consumer accedes to a group insurance agreement when entering into a loan contract. Essential importance, from the consumer's point of view, attaches to information provided before concluding the contract so that the consumer is in a

²² Judgment of the CJEU of 20 April 2023, *Ocidental – Companhia Portuguesa de Seguros de Vida SA versus LPI.*, C-263/22 (EU:C:2023:311).

²³ Dir. 93/13/EEC of 5 Apr. 1993 on unfair terms in consumer contracts, <http://data.europa.eu/eli/dir/1993/13/oj> (hereafter: UCTD).

²⁴ See the judgments of the CJEU of 30 April 2014, *Kásler i Káslerné Rábai*, C-26/13) EU:C:2014:282) and of 3 March 2020 r., *Gómez del Moral Guasch*, C-125/18 (EU:C:2020:138).

²⁵ See the judgments of the CJEU of 10 June 2021, *BNP Paribas Personal Finance*, C-609/19 (EU:C:2021:469) and of 10 June 2021 r., *BNP Paribas Personal Finance*, od C-776/19 to C-782/19 (EU:C:2021:470). In foreign literature, with regard to pre-contractual obligations of insurers and the related question of transparency, see in particular: Loacker L. D., *Informed Insurance Choice? The Insurer's Pre-Contractual Information Duties in General Consumer Insurance*, Edward Elgar Publishing, Cheltenham 2015, p. 78 et seq.

²⁶ See the judgments of the CJEU: of 21 December 2016, *Gutiérrez Naranjo et al.*, C-154/15, C-307/15 C-308/15, (EU:C:2016:980) and of 12 January 2023, *D.V.*, C-395/21 (EU:C:2023:14).

position to assess the contract's economic consequences to him- or herself on the basis of clear and intelligible criteria. In fact, such information is necessary so that the scope of a given provision can be understood by the consumer of whom, when concluding a linked contract, the same level of vigilance cannot be expected as when concluding separately the insurance agreement and the loan agreement.²⁷

The requirement of transparency of contractual terms gives rise to a requirement to provide to the consumer, prior to the conclusion of contract, all information necessary to enable the consumer to understand the economic consequences of the terms in question and to make a fully informed decision about entering into the contract. This requirement entails a necessary assumption that the consumer is in a position to become familiar with all the terms of the contract before entering into the agreement. In this context, the question if the discussed terms relate to the main subject matter of the agreement is irrelevant. As a matter of fact, if a consumer is to make an informed decision, in accordance with the objective pursued by the above-mentioned transparency requirement, whether or not he or she wishes to be bound by the provisions of the agreement formulated in advance by an entrepreneur, the consumer must be in a position to become familiar in advance with the entire agreement, because all of its provisions will specify, in particular, the rights and obligations of the consumer. The transparency requirement will apply also when a given term relates to the main subject matter of the agreement.²⁸ Moreover, such a requirement of prior familiarisation with all contractual terms was clearly emphasised in Recital 20 of Directive 93/13. For another thing, the requirement of transparency of contractual terms, laid down under Directive 93/13, cannot be excluded based on the existence of a special legal system applicable to a particular type of contracts. This is the case as, according to well-established case-law, under a reference to the transactors' status, Directive 93/13 defines contracts to which it applies²⁹ Therefore, at the end of the day, Art. 4(2) and Art. 5 of Directive 93/13, in the light of Recital 20 of the same Directive, must be interpreted so that the consumer should always be in a position to become familiar with all contractual terms before entering into the contract.

Going further, according to well-established case-law, the jurisdiction of the Court to examine possibly unfair nature of a contractual clause, in the understanding of Art. 3(1) of Directive 93/13, relates to the interpretation of the criteria a national court may or should adopt when examining the contractual clause in the light of the Directive's provisions. In the same way, the national court's task is to

²⁷ Judgment of the CJEU of 23 April 2015, *Van Hove*, C-96/14, (EU:C:2015:262).

²⁸ Judgment of the CJEU of 3 March 2020, *Gómez del Moral Guasch*, C-125/18 (EU:C:2020:138).

²⁹ Judgment of the CJEU of 21 March 2019, *Pouvin i Dijoux*, C-590/17 (EU:C:2019:232).

specifically qualify a given contractual term on the basis of the prescribed criteria and in the light of the circumstances of the examined case. In this regard, it must be reminded that, in the context of Art. 5 of Directive 93/13, transparency of a contractual term is one of the criteria the national court should take into account when making the assessment, as prescribed by the law, of unfair nature of the term in question under Art. 3(1) of the discussed Directive.³⁰ Inasmuch as the lack of transparency of a contractual term following from its unclarity or unintelligibility can constitute an element to be taken into account when assessing the unfair nature of the examined term, the lack of transparency following from the fact that the consumer was not in a position to become familiar with the term before concluding the given agreement can, even more so, constitute such an element. This thread involves an assessment of possible non-compliance with the requirement of good faith and, then, an assessment of a possible significant imbalance to the detriment of the consumer. According to Art. 4(1) of the discussed Directive, the national court should make such assessment taking into account, in the first place, the time of concluding the contract and any circumstances surrounding the contract's conclusion. As a part of assessing good faith, the national court should, in particular, take into consideration the strength of the parties' bargaining positions and whether the consumer was invited to give his or her consent to a given term.

When it comes to the question if, contrary to the requirement of good faith, a contractual term leads to significant imbalance between the parties' rights and obligations under the contract to the detriment of the consumer, according to well-established case-law, the national court should verify if an entrepreneur treating the consumer fairly and equitably could reasonably expect the consumer to accept the clause in question in the course of individual negotiations.³¹

In the light of the above, for the purpose of assessing if contractual terms lead to such imbalance to the detriment of the customer, one should take into consideration all circumstances that the entrepreneur could be aware of at the time of concluding the contract and that could have an impact on the subsequent performance of the contract. It must be determined if the consumer received all information that might have an influence on the scope of the consumer's obligations under the contract and that allowed the consumer to assess, in particular, the consequences of the contract. In this context, the circumstance that the consumer could not become familiar with a contractual term before concluding the contract constitutes an essential element of the assessment of possible unfair

³⁰ Judgment of the CJEU of 12 January 2023, *D.V.*, C-395/21 (EU:C:2023:14).

³¹ See the judgments of the CJEU of 3 September 2020, *Profi Credit Polska*, C-84/19, C-222/19 and C-252/19 (EU:C:2020:631), of 10 June 2021, *BNP Paribas Personal Finance*, from C-776/19 to C-782/19, (EU:C:2021:470).

nature of the contractual term in question because that circumstance could incline the consumer to incur obligations that he or she would not otherwise have accepted and, as a consequence, this could lead to a significant imbalance between the mutual obligations of both parties to a given agreement.

Giving effect to clauses excluding or limiting insurance protection in relation to the risk covered by the insurance leads to a situation in which the consumer no longer takes advantage of the protection in case of the materialisation of risk and in which the consumer, in principle, as of the date of ascertaining permanent inability to work caused by a health problem existing in advance about which the consumer was not in a position to notify the insurer, should independently pay the remaining loan instalments. In the given case, the consumer would be obliged to pay at least a part of those instalments if, under an applicable provision of national law, such as taken into account in the examined case in the main proceedings, the bank incurred liability for a damage caused by an omission to notify the contractual terms to the consumer, that is for not placing the consumer in a situation in which the consumer would have been if he or she had taken advantage of the above-mentioned insurance coverage. As a consequence, the consumer can be placed in a situation in which, because of the loss of incomes following from his or her permanent inability to work, the repayment of the instalments is difficult, or even impossible, to the consumer, even though this was precisely the risk the consumer wanted to be insured against by acceding to the insurance agreement such as the contract examined in the main proceedings.

In the same way, by an omission to allow a given consumer to become familiar, prior to concluding the agreement, with an information about the contractual terms and all the consequences of the agreement to be concluded, an entrepreneur imposes on the consumer, in whole or in part, a risk relating to possible permanent inability to work. At the end of the day, in the examined case, it was impossible to invoke, against the claimant, a term excluding or limiting insurance protection with regard to the insured risk.

The above considerations in general indicate that Art. 3(1) and Art. 4-6 of Directive 93/13 should be interpreted so that in a situation in which a term of the insurance agreement excluding or limiting insurance coverage with regard to the insured risk that the consumer was not in a position to read before concluding the agreement is found unfair by the national court, the court will be obliged not to give effect to that term so that the term does not have a binding force vis-a-vis the consumer.

Both the considerations made in the judgment of the CJEU and the resolution based on those considerations deserve full approval. At the same time, they are a

perfect starting point for an attempt to evaluate national legal provisions on the widely understood pre-contractual obligations to persons insured under group insurance agreements, and – in a wider context – under insurance agreements for the account of a third party. This follows from clear conclusion of the CJEU that an insured person who is not a party to the insurance agreement (either under Portuguese or Polish law) is a consumer and, in consequence, should have an actual possibility to become familiar with all the terms of the agreement.³² For example, in Polish judicial practice, the courts very often offer extensive interpretation, extending the scope of consumer protection to persons that are not a party to the insurance agreement. In the decision of 15 May 2014,³³ The Supreme Court held that the rationale behind Art. 808 § 5 of the Civil Code consists in extending consumer protection to a (non-entrepreneur) insured person under a contract concluded by the policyholder for his or her account. The consequence of such extension is that the person insured as a part of group insurance acquires the consumer status in the understanding of the provisions of the Civil Code, which, in turn, enables the application of the Act of 23 August 2007 on combatting unfair market practices.³⁴ In the opinion of the Supreme Court, it would be unreasonable and unfair to limit consumer protection only to the protection against the use in group insurance agreements of so called unfair contract terms. In the judgment of 16 April 2015,³⁵ the Supreme Court concluded (this time in the context of the Act of 16 February 2007 on the protection of competition and consumers³⁶) that for the acquisition of the consumer status in an insurance agreement for the account of a third party it is sufficient to make a unilateral legal act, that is a declaration of intention referred to in Art. 829 § 2 of the Civil Code. In the justification of the judgment of the Court of Appeal in Warsaw of 8 January 2015,³⁷ we can read that it would be difficult to find axiological reasons to substantiate forfeiture by a consumer incurring the entire financial burden of the agreement concluded with the insurer of the protection under Art. 384 of the Civil Code for the sole reason that the offer of group insurance was made to him through the employer.

³² Mantrov, V., *Consumer Being a Party to the Group Insurance Contract is Not Just a Silent Observer: The CJEU's Clarification in Ocidental*, European Journal of Risk Regulation, no. 15, 2024, p. 1062–1068. <https://doi.org/10.1017/err.2024.50>.

³³ Judgment of the Supreme Court of 15 May 2014, III SK 75/13 (LEX No. 1511062).

³⁴ Act of 23 April 1964 – Civil Code. Dziennik Ustaw 1964, No.16, item 93.

³⁵ Judgment of the Supreme Court of 16 April 2015, II SK 42/14 (LEX No. 1710374).

³⁶ Act of 16 February 2007 on the protection of competition and consumers. Dziennik Ustaw 2007, No. 50 item 331.

³⁷ Judgment of the Court of Appeal in Warsaw of 8 January 2015, I ACa 762/14 (Legalis 1186645).

5. REGIME OF LIABILITY

The CJEU ruled that the furnishing of the information obligations related to the unit-linked group contracts forms a commercial practice in the sense of the UCPD.³⁸ Moreover, these information obligations are to be deemed essential (or 'material') information obligations in the sense of Article 7 UCPD.³⁹ By consequence, failure to provide that information, concealment of that information or providing it in an unclear, incomprehensible, ambiguous or late manner may cause the consumer to take a transactional decision that he would not have taken otherwise and are therefore a misleading omission in the sense of Article 7 UCPD.⁴⁰ The disregard of transparency requirements under one set of legislation (insurance law directives), will lead to the violation of the transparency requirement that flow from Article 7 UCPD.⁴¹ The CJEU first confirmed that both the assurance undertaking and the policyholder fall within the definition of 'trader' of the UCPD.⁴² The Court thereby applied on the present facts its ruling of the RLvS judgment where it determined that the UCPD may apply in a situation where an operator's commercial practices are put to use by another undertaking, acting in the name or on behalf of that operator, with the result that the provisions of that directive could, in certain situations, be relied on as against both that operator and the undertaking, if they satisfy the definition of 'trader'.⁴³ Their legal qualification as a trader in case C-208/21 leads to the result that both traders (bank and insurer) are individually responsible for the proper performance of the pre-contractual information obligations mentioned above for the benefit of the consumer who accedes to the unit-linked group contract, for the part of that obligation which they are required to fulfil.⁴⁴ A good example in this respect, to illustrate effective

³⁸ Judgement of the CJEU of 24 February 2022, A v O and G.W. and E.S. v A. Towarzystwo Ubezpieczeń Życie S.A., Joined Cases C-143/20 and C-213/20 (EU:C:2022:118), § 130. Dir. 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/ 2004 of the European Parliament and of the Council, <http://data.europa.eu/eli/dir/2005/29/oj> (hereafter: UCPD).

³⁹ Judgement of the CJEU C-143/20 and C-213/20 (EU:C:2022:118), § 134–135.

⁴⁰ Judgement of the CJEU 2 February 2023, K.D. v. Towarzystwo Ubezpieczeń Ż S.A., Case C-208/21, (EU:C:2023:64)

⁴¹ Vereecken J. *Consumer Protection by the ECJ in Unit-Linked Group Contracts: On Transparency, Liability and Nullity under the UCPD*, European Review of Private Law, Kluwer Law International BV, The Netherlands, no. 5, 2023, p. 933–954.

⁴² Judgement of the CJEU C-208/21, (EU:C:2023:64), § 68.

⁴³ Judgement of the CJEU 17 October 2013, R.L. v. S., Case C-391/12, (EU:C:2013:669), § 38.

⁴⁴ Judgement of the CJEU C-208/21, (EU:C:2023:64), § 69; Vereecken J. *Consumer Protection by the ECJ in Unit-Linked Group Contracts: On Transparency, Liability and Nullity under the UCPD*, European Review of Private Law, Kluwer Law International BV, The Netherlands, no. 5, 2023, p. 943.

interpretation of IDD, is provided by French case-law. In the judgment of 25 November 2020,⁴⁵ the French Cassation Court (Cour de Cassation) held that the omission to inform the injured party – a person insured under the group insurance formula against accidents – about the benefits of taking out an insurance covering personal injuries to which the insured person might be exposed in the context of paragliding meant that the insured person lost a possibility to take out an insurance offering a wider coverage and was in a position to seek from the group organiser, i.e. sports club, damages for the loss of a chance to be insured on more favourable terms.

6. CONCLUSION

A well-informed customer and adjustment of the proposed insurance agreement to the customer's demands and needs are the principal objectives of IDD, irrespective of the legal form of the insurance contract. The Union legislator, under Art. 20 IDD imposes on insurance distributors an obligatory requirement to determine the demands and needs of the customer, and the demands and needs test is to be based on the information obtained from the customer.⁴⁶ In the Directive itself, there is no information on how the analysis of the customer's demands and needs should proceed. IDD does not specify its form, mechanisms or the scope of information an insurance distributor should obtain from the customer.⁴⁷ Therefore, the insurance distributor should take all possible measures allowing to fulfil the purpose of the Directive and to adjust the proposed insurance contract to the customer's demands and needs.⁴⁸ It can be inferred from the discussed CJEU judgments that the group organiser is a party obliged to provide information and to perform the demands and needs test for customers insured under the group formula. When the information is not given to the consumer in a manner that is compliant with the ECJ's requirements, a simultaneous determination of an infringement under both the UCPD and UCTD will arise. It follows that the

⁴⁵ Bigot, R., *L'obligation d'information et de conseil du club sporting*, (à propos de Cass. 1 civ., 25. Nov. 2020, nr 19-17195, F-D), *bjda.fr* 2021, No. 74.

⁴⁶ According to IDD, Recital (44): "In order to avoid cases of mis-selling, the sale of insurance products should always be accompanied by a demands-and-needs test on the basis of information obtained from the customer. Any insurance product proposed to the customer should always be consistent with the customer's demands and needs and be presented in a comprehensible form to allow that customer to make an informed decision."

⁴⁷ Tarasiuk, A.; Wojno, B., *Analiza wymagań i potrzeb klienta w procesie dystrybucji ubezpieczeń*, Prawo Asekuracyjne, no. 3., 2018 (96), p. 5.

⁴⁸ Czajkowska, A., *Analiza wymagań i potrzeb klienta w świetle ustawy o dystrybucji ubezpieczeń – zarys procesu*, Wiadomości Ubezpieczeniowe, no. 4, 2018, p. 20-22.

violation of a transparency requirement in the UCPD will most likely lead to the violation of the transparency requirement enshrined in the UCTD.

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