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Quo vadis Collective Insurance? Observations on ECJ Rulings Affecting Group Insurance

Introduction

The starting point and inspiration for addressing the topic of group insurance within the framework of this study is the latest ruling of the European Court of Justice (ECJ Case C-633/20) issued on September 29, 2022. However, its purpose is not just to comment on the verdict, but to attempt to consider its implications for group insurance. The topic seems important since neither European law nor rarely any national law of EU member states defines a group insurance contract. In turn, this may mean that it is jurisprudence that will have a major impact on the development of this model of insurance coverage. The purpose of this paper is thus to examine recent ECJ rulings as well as standpoints of the doctrine or European authorities in terms of the nature of group insurance, and to draw conclusions as to the prospects and path of its development in the future. The paper addresses the distribution of group insurance, the status of parties in a group insurance contract, and aspects of private international law based on case law issued under the Rome I¹ and Brussels I bis Regulations.²

In addition, the analysis is conducted by taking into account the development of (insurance) contract law in the European Union, including that resulting from regulatory measures introduced in the financial services sector by EU directives and regulations. Within the above, the trend of blurring the borders between private and public law in the financial markets should be noted.³ This issue is especially important for the author in the context of the influence that the regulatory measures such as the Markets in Financial Instruments Directive II (MiFID II),⁴ the Insurance Distribution Di-

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6).

² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (OJ L 351, 20.12.2012, p. 1).

³ See more generally O.O. Cherednychenko, *Rediscovering the public/private divide in EU private law*, "European Law Journal" 2020, vol. 26, issue 1–2.

⁴ Directive 2014/65/Eu of The European Parliament and of The Council of 15 May 2014 on Markets in

rective (IDD),⁵ and Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)⁶ may have on contracts between private parties. In this regard, as an introductory note it is worth mentioning that contract law in the European Union presents a primarily functional approach⁷ and proclaims a departure from a formalistic approach and an abstract understanding of legal principles. This is relevant when considering their current status and recent evolution, which remains worthwhile despite the fragmentary nature of the integration of private law, including insurance contract law.

The starting point for consideration is that there is no definition of group insurance in European Union law, which should not be surprising given the limited private-legal regulation of insurance (it may be recalled that the only piece of legislation that had the ambition to regulate the basis of the insurance contract as an instrument of private law was abandoned in the 1980s).⁸ In turn, in the subsequent years, we had to deal with the piecemeal regulation of specific aspects of the insurance contract in connection with the need to protect the insured consumer. And so this led to the regulation of the right to withdraw from an insurance contract or *actio directa* in compulsory insurance for vehicle owners. However, none of the regulations have gone so far as to define an insurance contract, much less a group insurance contract. It can be said that in this regard, the European legislature has followed in the footsteps of Anglo-Saxon doctrine, whose representative Professor Malcolm Clarke made the now famous statement that "The English courts know an elephant when they see one, so too a contract of insurance." He also pointed out that until 2001, English legislation did not define insurance or a contract of insurance at all.⁹ This has its undoubted advantages in terms of flexibility, since definitions can be both too broad and detrimentally too narrow.¹⁰ The definition of an insurance contract is useful from the perspective of regulating the business of insurance, in the sense that this business means the performance of activities related to offering and providing protection against the consequences of fortuitous events, and is provided only on the basis of an insurance contract (thus the insurance license is about the approval to conclude certain types of contracts, showing very specific features).

Financial Instruments and Amending Directive 2002/92/Ec and Directive 2011/61/EU, OJ L 173 (further referred to as MiFID II).

⁵ Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast), OJ L 26 (further referred to as IDD).

⁶ Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance, OJ L 335 (further referred to as Solvency II).

⁷ B. Lurger, *The "Social" Side of Contract Law and the New Principle of Regard and Fairness* [in:] *Towards European Civil Code*, eds. A. Hathkamp, M. Hessenlink *et al.*, London 2004, p. 384.

⁸ K. Malinowska, *Umowa ubezpieczenia w Europie bez granic*, Bydgoszcz 2008.

⁹ M. Clarke, *The Law of Insurance contracts*, London 2009.

¹⁰ *Ibid.*

The absence of the definition of group insurance is noted both in administrative regulations such as the IDD and Solvency II and in the Rome I or Brussels I bis Regulations. This should not come as a great surprise since the insurance contract as such is a civil law construct into which the European legislature tries not to interfere excessively. An analysis of the insurance law systems of the member states shows that only some of them have been tempted to create a definition of group insurance, as has been done in France, Sweden, and Finland.¹¹ These jurisdictions offer the definition of group insurance. For example in France, according to L141-1,

a group insurance contract is a contract taken out by a legal entity or an entrepreneur with a view to enrolling a group of persons who meet the conditions defined in the contract, to cover risks that depend on the duration of human life, risks affecting the physical integrity of the person or related to maternity, risks of incapacity for work or disability or the risk of unemployment.

Under other jurisdictions, including the new German Insurance Contract Act, it has been left to the judge to deal with the specific aspects of group insurance. Similarly in the United Kingdom and Poland, the distribution of insurance in group form has been subject to detailed supervision in terms of protecting the rights of policyholders, especially in the bancassurance model. As is stated in the Report of the Commission Expert Group,

any use of group insurance schemes as a tool for marketing insurance products at a European level would still have to be tested as to adverse effects of foreign law on the relationship of the insurer to the group insurance policyholder and individual group members.¹²

A definition of group insurance appears in PEICL. According to Article 1:201, "Contracts for group insurance' are contracts between an insurer and a group organizer for the benefit of group members with a common link to the group organizer." A contract for group insurance may also cover the family of the group members. In addition, two types of group insurance are distinguished, that is "accessory group insurance" meaning group insurance under which group members are automatically insured by belonging to the group and without being able to refuse the insurance and "elective group insurance" meaning group insurance under which group members are insured as a result of personal application or because they have not refused the insurance.

Despite the absence of group insurance definitions in most of the national legislation of EU member states, there is a fairly established doctrinal concept of the legal nature of group insurance, but it does not always seem to correspond to the defini-

¹¹ After M. Fras, *The European Context of the Group Insurance Contract*, PPPM 2020, vol. 27. Swedish law defines group insurance as an insurance contract under which protection is afforded to a group of persons. In Finnish law, group insurance is defined as an insurance contract in which protection is or may be afforded to members of a group specified in the insurance contract. See also *Principles of European Insurance Contract Law (PEICL)*, eds. J. Basedow et al., Köln 2016, p. 355.

¹² EU Commission, *Final Report of the Commission Expert Group on European Insurance Contract Law*, 2014.

tion proposed by the PEICL working group. This is generally understood as an insurance contract taken out by a person for the benefit of third parties who usually have a specific relationship with the policyholder. Some distinctions appear depending on whether the policyholder or the insured is bound to pay the premium (e.g., Portugal) or on the nature of the insurance (voluntary or compulsory, e.g., Sweden). The policyholder is not necessarily an insured, but not in all countries do they appear in the position of a “group organizer.” Insureds’ rights generally end automatically when the contract between the policyholder and the insurance coverage is terminated. This principle can be reversed (e.g., in Spain or the UK) either by contract or on the basis of the policyholders’ obligations (e.g., payment of premiums). As regards the existence of a contractual relationship between the insured and the insurer, with the exception of a few countries (e.g., Poland, Finland), there is generally a contractual relationship between the insured and the insurer. Even if this relationship is not qualified as contractual, the insured will always benefit from the rights (such as the right to be compensated in case of a claim) arising from the contract between the policyholder and the insurer. Non-payment of the premium usually allows the insurer to terminate the contract (sometimes after the expiry of a suspension period of the insurance contract, during which the insured or the policyholder is allowed to pay).¹³

1. Judgement of the European Court of Justice of 29 September 2022 in Case C-633/20

On September 29, 2022, a preliminary ruling was issued in case *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV versus TC Medical Air Ambulance Agency GmbH*. Though it concerns “just” the status of the policyholder, in fact it also tackles extensively the nature of group insurance. As such, it may have far reaching consequences for the regulative future of group insurance. The case concerned the question of the Federal Court of Justice in Germany:

Is an undertaking which maintains, as the policyholder, foreign travel medical insurance and insurance [covering] foreign and domestic repatriation costs as a group insurance policy for its customers with an insurance undertaking, distributes to customers memberships entitling them to claim insurance benefits in the event of illness or accident abroad and receives a fee from recruited members for the insurance cover purchased, an insurance intermediary within the meaning of Article 2(3) and (5) of Directive 2002/92/EC and Article 2(1)(1), (3) and (8) of Directive (EU) 2016/97?

The verdict was preceded by the Opinion of Attorney General Maciej Szpunar delivered on 24 March 2022.¹⁴ The attorney general, considering the substance of the

¹³ Y. Samothrakis, *AIDA Europe, Working Party symposium*, Zurich, 6–7 October 2022; M. Frás, *O dwóch typach umowy ubezpieczenia grupowego*, “Prawo Asekuracyjne” 2016, no. 3.

¹⁴ The attorney general’s opinion of 24 March 2022 (case reference: C-633/20) on a preliminary question submitted by the German Federal Court of Justice (Bundesgerichtshof).

case asked several questions partially concerning the nature of intermediation, such as whether the defendant is precluded from being considered an “insurance intermediary” by the fact that it is in the business of offering group insurance membership to its customers (rather than “concluding insurance contracts”) and is itself acknowledged by the referring court as being a “policyholder.”

More important, however, although related to that mentioned above, were two questions of law that essentially concern the peculiar legal construct of group insurance. The first question derived from the doubts of the referring court whether “joining a group insurance contract” can be equated with “concluding an insurance contract” for the purposes of establishing that we are dealing with “insurance mediation.” The second question concerned the position of the policyholder, namely, whether in the context of the Insurance Distribution Directive, as well as its predecessor – the Insurance Mediation Directive – an “insurance intermediary” must be external to the relationship arising from an insurance contract (including a group insurance contract).

The federal German court, which referred its doubts as to the position of an “insurance intermediary” outside the insurance relationship, stated that in the course of the legislative work aimed at transposing the provisions of Directive 2002/92 into German law,¹⁵ insurance intermediaries are defined as persons who were not themselves policyholders or insurers. This approach stemmed from national case law, which, in essence, appears to be based on the assumption that an insurance intermediary is an entity external to the relationship arising from the insurance contract, even if it should traditionally be guided by the need to protect the insured as the weaker party in the insurance relationship.

It was also pointed out that in separate provisions the German legislature imposed a duty on persons who conclude group insurance contracts to provide advice to persons who join group insurance contracts as well as certain duties regarding the insurance premium. However, as the referring court clarifies, it does not follow that the German legislature thus equated the status of the policyholder with that of insurance intermediaries. The obligations of the group insurance organizer are applicable even if no “classical” intermediation takes place. The same position was adopted for example in Polish law where the policyholder (art. 18 of the Insurance Act) is obliged to deliver information to the insured on: 1) the insurance company and the address of its headquarters; 2) the nature of the remuneration, within the meaning of the Law on Insurance Distribution, received in connection with the proposed accession to a group insurance contract; 3) the possibility of filing a complaint, filing a claim, and out-of-court dispute resolution. With respect to group insurance contracts referred to in paragraph (3), the provision of Article 7 of the Insurance Distribution Law shall apply to the policyholder accordingly.¹⁶

¹⁵ The 2002/92 Directive was the predecessor of the Insurance Distribution Directive, called Insurance Mediation Directive (IMD).

¹⁶ D. Maśniak, *Specyfika ubezpieczeń grupowych w świetle ustawy o działalności ubezpieczeniowej i reasekuracyjnej i kodeksu cywilnego*, GSP 2016, vol. 36.

Likewise, in the case of collecting remuneration, German legislation does not pre-judge that the collection of fees by the policyholder automatically places them in the position of an intermediary. In certain situations, the policyholder is entitled to receive not only reimbursement of costs, but also remuneration. Again, an example of such a solution can also be found in Polish law according to which the prohibition to collect remuneration or other benefits by the policyholder for offering the use of insurance coverage or for activities related to the execution of an insurance contract for someone else's account, especially in group insurance, does not apply to cases of group insurance contracts concluded for the account of employees or persons performing work under civil law contracts and members of their families or contracts concluded for the account of members of associations, professional self-governments, or trade unions. In view of the above and in accordance with the reasoning of the ECJ, it seems thus that the status of the policyholder does not depend just on the fact of receiving remuneration, but it is an effect of a combination of factors, where remuneration can be just one of them. The second factor seems to be the type of insurance group.

The considerations of the attorney general and the court seem to go in the same direction, and it is suggested that there exists a correlation between not just the duties and remuneration of the policyholder qualified as an intermediary or not, but the method of organizing the group and insurance coverage for its members. This approach necessitates analyzing the legal nature of group insurance, which has been done in quite a detailed manner.

The first criterion considered for the purposes of the case was the question of the interest that was served by the group insurance, and this does not refer only to the insurable interest, but rather to the general economic interest.¹⁷ The Attorney General raised the question on the operation of such group insurance policyholders which take out a group insurance policy not (only) in the interest of the insured persons but (also) in their own commercial interests. In other cases, the policyholders (by names or by features) also satisfying its own interests or fulfilling duties (contractual or statutory). This can be exemplified by professional chambers, or associations, employers, etc. Even this criterion alone provides an assumption to distinguish at least two mod-

¹⁷ The concept of the insurable interest is directly related to the principle of indemnity and the subject matter insured (possibility of suffering damage) and is therefore decisive for stating who may be insured from what risks in relation to what assets and who may sustain a loss that is insurable and be able to receive payment from the insurer under the insurance contract. Thus this notion is too narrow, and we should rather think of the social- economic function fulfilled by collective insurance. As regards the meaning of the insurable interest, see, for example K. Noussia, *Definition: Different Common Law and Civil Law Approaches to the Definition of insurance* [in:] *Research Handbook on International Insurance Law and Regulation*, eds. J. Burling, K. Lazarus, London 2012, p. 41; J. Bird, *Bird's Modern Insurance Law*, London 2016, pp. 61–69; E. Kowalewski, *Wprowadzenie do teorii interesu ubezpieczeniowego* [in:] *Ubezpieczenia w gospodarce rynkowej*, ed. A. Wąsiewicz, Bydgoszcz 1994, p. 70; P. Wszyńska-Ślufińska, *Interes ubezpieczeniowy w ubezpieczeniu mienia posiadanego na innej podstawie niż prawo własności*, "Wiadomości Ubezpieczeniowe" 2018, no. 2; S. Byczko, *Interes ubezpieczeniowy. Aspekty prawne*, Warszawa 2013; J. Loshin, *Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement*, "The Yale Law Journal" 2007, vol. 117, no. 3.

els of group insurance. The first consists in providing insurance coverage just on the basis of a contract concluded by the policyholder and the second contract takes the form of just a framework contract, where insurance coverage is provided basing on the declaration of will expressed individually by the members joining the group. The example of the second type could be contracts proposed by banks to cover the risk of borrowers being unable to repay loans because of disability, etc. (example given in the opinion of the Attorney General).

It was stressed by the federal German court in the reasons for applying for the preliminary ruling, that

so far, the prevailing view in German higher court case-law and especially German legal literature is that the policyholder of a genuine contract of group insurance, who facilitates insured persons to join a group policy in return for payment, does not act as an insurance intermediary. This activity neither requires a specific licence under German trade law nor is the policyholder required to fulfil the duties of an insurance intermediary, particularly the duty to give advice pursuant to Sec. 61 of the German Insurance Contract.¹⁸ The situation is different if the group insurance is designed to circumvent the requirements for insurance mediation. In this context, it is particularly important whether a legal relationship exists between the policyholder and the insured persons beyond the group insurance. The connection by which persons are grouped together may not be limited solely by the fact they joined the same group policy.

The other criterion applied by the attorney general and subsequently the Court, was the voluntary or mandatory character of group insurance. The interpretation as offered by the doctrine states that “the difference between voluntary and mandatory group insurance policies is that voluntary group insurance policies are ones that a customer can choose to opt into such as insurance protection for sickness or accident abroad. These products can add value to a merchant’s proposition and extra protection for customers who choose to purchase them. Automatic enrollment in the group takes place by virtue of membership of a particular group or the presence of certain circumstances or the possession of certain characteristics, usually resulting from or indicating the existence of a particular link with the person who has taken steps to provide insurance cover to other persons. Examples of mandatory group insurances include employer based schemes that cover some health or retirement benefits and where every employee belonging to the target group of the group insurance is automatically affiliated to it.”¹⁹

¹⁸ Section 61 provides for the duty of the insurance intermediary’s duty to advise the person wishing to take out insurance.

¹⁹ “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 insurance distribution in the European Parliament and of the Council of 14 March 2018 as amended must be interpreted as meaning that: for the purposes of those provisions, the term ‘insurance intermediary’ and thus the term ‘insurance distributor’ within the meaning of those provisions, covers a legal person whose activity consists

With respect to the above, analysis was conducted to verify whether the EU legislation attaches any legal significance to these characteristics. Specifically, it was significant for the court to state what is the moment of concluding the insurance contract or when the insurance coverage starts. Is it the conclusion of the contract by the policyholder or the joining the group by the member? Another issue subject to verification was the internal or external position of the policyholder in the insurance relationship.

As previously mentioned, although group insurance has not been regulated as such in EU legislation, some hints as to its nature are found in recital 49 of IDD that states

in the case of group insurance, 'customer' should mean the representative of a group of members who concludes an insurance contract on behalf of the group of members where the individual member cannot take an individual decision to join, such as a mandatory occupational pension arrangement.

In the opinion of the attorney general, "From the second sentence of that recital, it can also be inferred, that a group insurance contract where no individual decision is made to join the contract is concluded by the 'customer' with the involvement of an insurance distributor," entails the view that the policyholder in such cases shall not be qualified as an intermediary. Having said the above, the attorney general concluded that recital 49 can be interpreted in such a way that there may exist other types of group insurance "in which enrolment is not automatic and depends on the decision of the members of the group." Reasoning *a contrario*, it cannot be precluded that the policyholder ("the representative of a group") in such group insurance may be qualified as an intermediary.

The above considerations have given rise to the following statements:

- group insurance is not a distinguished legal concept but rather a model of "distributing" (or providing) insurance coverage;
- the legal nature of group insurance depends on whether (1) the members join the group voluntarily and can decide on the scope of coverage, or (2) the coverage and membership in the group is mandatory;
- the status and the interests of the group organizer may impact the nature of the group insurance and the organizer itself – making it (them) a policyholder or an intermediary. Although the interests may be various, starting from the organizer's "own" insurable interest – shared in a way with the group members, through the legal obligation to organize insurance coverage on their behalf and in their interest.

It is also possible to put forward the thesis that the views expressed by the parties and the courts involved in the case, as well as by the doctrine, lead to the formation of one model of group insurance contract, which we can consider group insurance *sensu stricto*. This would be, namely, only the types of insurance mentioned in recital 49 of

in offering voluntary membership of a group insurance previously taken out by it with an insurance company, for which it receives remuneration from its customers and which enables customers to benefit from insurance benefits, in particular in the event of illness or accident abroad."

the IDD, according to which, a contract concluded by the organizer of a group is in the interest of the members of the group and insurance coverage arises on the basis of the contract. It is not the conclusion of an individual insurance contract to join a group if it is compulsory. On the other hand, in a situation where we are dealing with an open group that can be voluntarily joined after the group organizer enters into a contract, and the organization of the group is in the economic interest of the group organizer, the contract itself does not bear the prerequisites of an insurance contract. Only the act of an individual member joining a group is then considered an insurance contract initiating coverage. We can call such a model group insurance *sensu largo*, or not call it group insurance at all for the sake of terminological purity.

Undoubtedly, the paradigm in this case is the level of protection of group members, guaranteed by the provisions of the IDD. In a situation where group membership is voluntary, especially when additionally combined with a decision on the scope of insurance coverage, the attorney general points out that the situation of such a group member is not different when taking out insurance individually, and thus the insured should be given protection at a comparable level. In a situation where the group organizer receives remuneration (i.e., acts in their own economic interest) and no other link exists between them, there can be no guarantee of protection of the interests of individual group members. Consequently, the paradigm of protection of the insured's interests dictates that the group organizer should be treated as an intermediary and be bound by the duty to act in the best interest of the insured group member, which in this case must be the recognized insured. Guarantees of the ability to behave in such a manner are regulated by licensing requirements and should encompass such policyholders.

A sure way to remedy this situation without building excessive doctrine around the legal concept of group insurance is to impose obligations on the group organizers regardless of whether they have the status of an intermediary or "only" a policyholder. This has been done in some EU member states, particularly in the legislation, such as Poland's, which has not adopted the concept of a "group organizer," the whole construct of group insurance is based on insurance for someone else's account, and the group organizer is always formally the policyholder. Thus, in accordance with Article 18 of the Polish Insurance Activity Act, the following has been introduced:

- prohibition to receive remuneration or other benefits by the policyholder in connection with offering the opportunity to take advantage of the insurance coverage or activities related to the execution of the insurance contract, unless the coverage applies to employees or persons performing work on the basis of civil law contracts and members of their families, as well as contracts concluded for the account of members of associations, professional self-governments or trade unions (in which cases the Polish legislator excluded the possibility of violating the interests of the insured members of the group or a conflict of interest on the part of the policyholder "group organizer");
- obligation to provide the insured by the policyholder with certain information before entering into a group insurance contract: (1) on the insurance company and the address of its headquarters; (2) on the nature of the remuneration, received by

the policyholder in connection with the proposed accession to the group insurance contract; (3) on the possibility of filing a complaint, filing a claim, and out-of-court dispute resolution;

- obligation of the policyholder to act in the best interest of the insured.

2. Private international law and collective insurance

Another context in which it is worth looking at the situation of group insurance in European Union law is the question of qualification as a large or mass risk and the consequences of this qualification for the location of the risk, and thus for the application of protective norms to the insured. While there is no doubt that this criterion, quite complex in its application, was intended to protect weaker and non-professional entities in the insurance market, the manner in which it was applied to group insurance raised doubts, which were ultimately also addressed by the ECJ in its judgments. One of them concerned (though indirectly) group insurance.

As with the issues analyzed in Section 2 of this paper, the starting point is the lack of regulations dedicated to group insurance in European Union legislation, including, in particular, the lack of its definition. As a result, there is a risk that rules designed to protect the insured, if only by specifically regulating the applicable law and jurisdiction of this purpose, fail in some cases. For this purpose, the norms of the Rome I Regulation in the context of group insurance should be considered in more detail.

As is well known, article 7 of the Regulation introduces protective norms according to which in insurance other than large risks, the only law chosen by the parties may be the law where the risk is situated, or the law of the country where the policyholder has their habitual residence, or the law of the member state which the policyholder is a national. As regards the country of the risk location, it is the country where, apart from the features of the risk itself (such as the location of the buildings, registration of the vehicles, place of concluding the contracts), the habitual residence of the policyholder is taken into account.

The similar approach is taken in case of defining large-risk insurance.²⁰ Large-risk insurance includes certain types of risks such as railway rolling stock, aircraft, ships, goods in transit, aircraft liability, and liability of ships. Additionally, the large risk criterion may be connected to the features of the policyholder, credit, and suretyship, where the policyholder is engaged professionally in industrial or commercial activity

²⁰ Art. 7 sec. 2 An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation. To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

or in one of the liberal professions, and the risks relate to such activity. Apart from the above, large-risk insurance may include fire and natural forces, other damage to property, motor vehicle liability, general liability, and miscellaneous financial loss, in so far as the policyholder exceeds the limits of at least two of the following three criteria: (i) net turnover: €12.8 million; (ii) average number of employees during the financial year is 250, or (iii) balance sheet total: €6.2 million.²¹

Looking at the above, it becomes clear that the features of the policyholder and not of the insured are taken into account when setting the level of protection. The doctrine²² in numerous cases points out that while it seems not to cause any problems when individual insurance comes into question, in group insurance the distinction between insured and policyholder may lead to not providing the intended level of protection of the insurance consumers. In order to find a solution, it is necessary to state whose features are decisive for the application of the protective measures. It seems obvious that in the case of the distinction between the policyholder and the insured, the features of the insured should be decisive. Though no definition of the policyholder can be found in EU legislation, there are ones proposed by the internal law of the member states and by PEICL (instead of the formal understanding of the policyholder, the features of "risk holder" are taken into account). This is also how it has been repeatedly advocated that it is the insured who should be assigned the status of customer (policyholder) through amendments to Article 7 of Rome I or its adequate interpretation to the structure of the insurance coverage.²³

Similar dilemmas exist in the face of the Brussels I bis Regulation on jurisdiction. The Regulation features policyholders, insureds, and beneficiaries as weaker entities requiring a higher standard of protection. The nature of the protective norms indicates a broad choice of jurisdiction where the insurer will be sued and the aforementioned persons are entitled to. There is no possibility of changing the rules to the disadvantage of insurance beneficiaries. There is, however, the possibility of an agreement on jurisdiction if the policyholder fulfills the prerequisites of "large risk" (jurisdiction clause in the insurance contract). In this case, as in the Rome I Regulation, the Regulation does not take into account the specifics of group insurance. Consequently, in the thought of a literal interpretation of the provisions of the Regulation, it is possible to impose on the insured group member the contractual jurisdiction agreed upon between the group organizer (policyholder) and the insurer. However, such a solution to this issue raised doubts in a national court, which led to an inquiry on the application

²¹ Solvency II Directive (Article 13(13)).

²² M. Frás, *The Group Insurance Contract in Private International Law*, "Netherlands International Law Review" 2019, no. 66; *idem*, *Obowiązki ubezpieczycieli przy zawieraniu umów na cudzy rachunek*, "Wiadomości Ubezpieczeniowe" 2016, no. 3; H. Heiss, *Insurance contracts* [in:] *Rome I: Another recent failure of the European legislature*, "Yearbook of Private International Law" 2008, vol. 10, pp. 261–283.

²³ U.P. Gruber, *Insurance contracts* [in:] *Rome I Regulation. The law applicable to contractual obligations in Europe*, eds. F. Ferrari, S. Lieble, Munich 2009, p. 125; H. Heiss, *Insurance contracts...*, pp. 261–283; A. Staudinger, *Commentary to Art. 7* [in:] *Rome I Regulation: Pocket commentary*, ed. F. Ferrari, Munich 2015, p. 279.

of the jurisdiction clause against the insured by the Supreme Court of Lithuania and the judgment in case AAS 'Balta' v UAB 'Grifs AG' (Case C-803/18). The national court asked the following question:

Must [Article 15, point 5, and Article 16, point 5] of Regulation [No 1215/2012] be construed as meaning that, in the case of large-risk insurance, an agreement conferring jurisdiction included in the insurance contract concluded between the policyholder and the insurer may be relied on against a [party] insured under that contract who has not expressly subscribed to that clause and who is habitually resident or established in a [Member State other than that in which] the policyholder and the insurer [are domiciled]?²⁴

After analyzing the case, the ECJ stated, that

Article 15, point 5, and Article 16, point 5, of Regulation No 1215/2012 must be interpreted as meaning that the jurisdiction clause in an insurance contract covering a 'large risk', within the meaning of the latter provision, concluded by the policyholder and the insurer, may not be relied on against the party insured under that contract, who is not an insurance professional, who has not consented to that clause and who is domiciled in a Member State other than that in which the policyholder and the insurer are domiciled.

In its argumentation, the Court held that, on the one hand, the prorogation of jurisdiction is strictly circumscribed by the aim of protecting the economically weaker party and it cannot be inferred from the nature of large-risk insurance that an insured (not being a party to this contract) is not a 'weaker party' (paragraphs 37 to 41 of the Judgment). On the other hand, the application of the special rules of jurisdiction in matters relating to insurance is not to be extended to persons for whom that protection is not justified.

The question of the addressee of protection in group insurance has become a focal point. As can be seen from the ECJ's argument above, in group insurance the court should take into account not so much the formal side of the insurance contract, but the party protected by such a contract. This is also the direction of the principles developed within the PEICL working group, where the protection of group members has become the starting point. In contrast, derogation from PEICL has been allowed only against those members who satisfy the criteria of a large risk.²⁵

3. Insured group member as an addressee of the suitability analysis in POG requirements

As mentioned in the introduction, the insurance contract ceased to be a refuge of private-legal norms some time ago. The blurring of the boundaries between private

²⁴ Lietuvos Aukščiausiasis Teismas (Supreme Court of Lithuania) decided to stay the proceedings and to refer the question to the ECJ for a preliminary ruling: AAS 'Balta' v UAB 'Grifs AG'.

²⁵ *Principles of European Insurance Contract Law...*, p. 357.

and public law is a very dynamic process present in all areas where consumer interests are at stake, and especially in contracts in the financial market area. While the principles of insurance contract are still of a private-legal nature, even if such as the principle of utmost good faith, the execution of these principles is already entrusted to norms of an administrative, or at least mixed, nature. This guarantees much more efficiency than just civil court control on a case-by-case basis. Thus, attempts, such as the one discussed in this paper, to derive the legal nature, or to predict the direction of development of the various institutions of insurance law on the basis of legislation of a public and economic nature, as well as norms of an outright technical nature (according to the Lamfalussy architecture of insurance market regulation²⁶ belonging to Level 2) should not come as a surprise. In this case, the regulation on insurance product governance could be taken into account (POG regulation).²⁷ Some insights emerge from the analysis of its provisions and interpretation by supervisory authorities (in this case, EIOPA). They may be helpful for the purposes of this study, although there is no ECJ jurisprudence on them yet, and there may not be for a long time to come due to the nature of these provisions.

The issue of group insurance has been raised by the EIOPA in its guidelines to the POG Regulation, as well as in its interpretive responses to the POG Regulation. These responses recognize the peculiarities of group insurance and suggest an emphasis on the protection of group members, rather than their organizer, or at least a conscious approach to the problem.²⁸ This issue has been tackled with respect to the examination of the adequacy of the insurance product. In accordance with the guidelines of EIOPA,

with regard to group insurance the insurance intermediary or insurance undertaking shall establish and implement a policy as to who shall be subject to the suitability assessment in case an insurance contract is concluded on behalf of a group of members and each individual member cannot take an individual decision to join. Such a policy shall also contain rules on how that assessment will be done in practice, including from whom information about knowledge and experience, financial situation and investment objectives shall be collected. The insurance intermediary or insurance undertaking shall record the policy established pursuant to the first paragraph.

The issue of applying the POG requirements in the context of a group insurance contract was also the subject of an inquiry to EIOPA, which gave a rather firm answer, based on Recital 49 of the of the IDD. (The question was: How would the Product Oversight and Governance requirements apply in the context of group insurance contracts?). According to the EIOPA standpoint

²⁶ https://finance.ec.europa.eu/regulation-and-supervision/regulatory-process-financial-services_en [accessed: 2022.12.28].

²⁷ Delegated Regulation (EU) 2017/2358 (related to product oversight and governance requirements).

²⁸ https://www.eiopa.europa.eu/sites/default/files/publications/submissions/eiopa_technical_advice_on_the_idd.pdf [accessed: 2022.12.28].

the Product Oversight and Governance requirements would apply to both compulsory and optional group insurance contracts. As regards compulsory group insurance contracts, these are referred to in Recital 49 of the IDD where the representative of a group of members concludes an insurance contract on behalf of the members where the individual member cannot take an individual decision to join, such as occupational pension arrangements. However, the application of this provision is specific to conduct of business rules such as information disclosure and suitability requirements for individual requirements at the point of sale. Product Oversight and Governance requirements serve a different regulatory objective, concerning the design of products for a wider group of customers. For this reason, the members should be considered as customers with regard to the application of Product Oversight and Governance requirements.

An important statement was made by EIOPA as regards the issue of who should be perceived as a customer. Taking into consideration that in both cases (mandatory and optional group insurance contracts), members are considered as customers with regard to the application of Product Oversight and Governance requirements, consequently, the target market has to be defined taking into account the features of the insurance product as well as the needs and objectives of the members.²⁹

Conclusions

Observing the discussions that have taken place in recent years in relation to group insurance in European doctrine, the positions of the courts in cases even indirectly related to group insurance, and European institutions, one gets the impression that while no one makes a firm statement on the essence of group insurance by regulating this matter, in fact, a rather clear tone emerges from the interpretation of the existing regulations. This tone may affect the further development of this popular form of providing insurance coverage.

Thus, despite the legal regulations being formally oriented toward the rights and obligations of the parties to the contract and the protection of the policyholder as a party to the contract, definitely the interpretation of the regulations (sometimes supplemented by *de lege ferenda* demands) places at the center of these regulations not the party to the contract, but the insured as the “risk-holder.” There are several reasons for this and several legal consequences. One of the main reasons for this approach is the risk of missing the purpose of regulations oriented toward the protection of the insured, when formally their application depends on the status of the policyholder and the possibility of a significant discrepancy between this status and that of the insured (this mainly concerns the application of the “large risk” criterion). Another reason is the possibility of a discrepancy between the interests of the policyholder and the insured, and in particular the possibility of policyholders being guided not only by the interests

²⁹ https://www.eiopa.europa.eu/qa-regulation/questions-and-answers-database/1617_en [accessed: 2023.05.16].

of the insured members of the group, but also, or even primarily, by their economic interests.

The consequence of recognizing the above, it seems that the insured, rather than the policyholder, should be at the center of protective legal provisions. Thus, the criteria for the insured group member and not that of the policyholder should affect the law applicable to the insurance contract, jurisdiction, the adequacy of insurance coverage, and contractual freedom in insurance. However, there is a possibility that such a rigorous approach could lead to halting the development of this popular and usually very convenient form of insurance coverage for the insured. In the opinion of the author, the factors above provide sufficient arguments to state that we are actually dealing not with two forms of group insurance, but actually only with one, namely the one that covers a group of members on a mandatory basis, and the contract concluded between the group organizer and the policyholder can be qualified as an insurance contract (rather than a framework contract, arranging just the terms of future insurance coverage). The second form, in which members join the coverage on a voluntary basis, and the policyholder receives remuneration for their activities, is not really group insurance, but an additional model of insurance distribution, which should be fully covered by the IDD regime. Although the above conclusion can derive from the specific legal provisions adopted in some member states, it seems reasonable to set this issue within the revision of the IDD.

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Summary

Katarzyna Malinowska

Quo vadis Collective Insurance? Observations on ECJ Rulings Affecting Group Insurance

This paper discusses the development of group insurance under European Union law. The topic is important since neither European law nor rarely any national law of the EU member states defines a group insurance contract. This, in turn, may mean that it is case law that will have a significant impact on the development of this model of insurance coverage. The purpose of this paper, therefore, is to analyze recent ECJ rulings and the positions of doctrine or European bodies on the nature of group insurance and to draw conclusions on the prospects and path of its development in the future. The topic also seems relevant to the ongoing work on the revision of the Insurance Distribution Directive.

Keywords: group; collective insurance; large risks; group organizer; policyholder.

Streszczenie

Katarzyna Malinowska

Quo vadis ubezpieczenia grupowe? Obserwacje na tle orzecznictwa ETS w zakresie ubezpieczeń grupowych

Niniejszy artykuł poświęcony jest rozwojowi ubezpieczeń grupowych w prawie Unii Europejskiej. Temat wydaje się istotny, gdyż ani prawo europejskie, jak również rzadko które prawo krajowe państw członkowskich UE definiuje umowę ubezpieczenia grupowego. To z kolei może oznaczać, że orzecznictwo sądowe będzie miało istotny wpływ na rozwój tego modelu ochrony ubezpieczeniowej. Celem opracowania jest zatem analiza ostatnich orzeczeń ETS oraz stanowisk doktryny, jak i organów europejskich w zakresie istoty ubezpieczeń grupowych, a także wyciągnięcie wniosków dotyczących perspektyw i ścieżki ich rozwoju w przyszłości. Temat wydaje się również istotny w kontekście trwających prac nad rewizją dyrektywy o dystrybucji ubezpieczeń.

Słowa kluczowe: grupa; ubezpieczenia grupowe; duże ryzyka; organizator grupy; ubezpieczający.