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CASE NOTES

Consumer Being a Party to the Group Insurance Contract is Not Just a Silent Observer: The CJEU's Clarification in *Ocidental*

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Case C-263/22 Ocidental – Companhia Portuguesa de Seguros de Vida SA v LP, not yet published.

Abstract

If the consumer is insured under the group insurance contract and becomes a party to that contract, the consumer shall enjoy the protection envisaged under the Unfair Terms Directive. As a result, the consumer shall be allowed to get acquainted with the terms of the contract, otherwise the consumer is entitled to rely on protection against unfair terms even if they relate to the insurance cover (author's summary).

Keywords: Group insurance; Unfair Terms Directive; Consumer; Insurance cover; Main subject - matter of the contract

Insurers conclude insurance contracts[1] not only on an individual basis with each policyholder separately but also on a collective basis insuring a particular group of insureds. The contract, which is concluded in the latter situation, is called a "group insurance contract" in insurance law. Group insurance means that an individual can be insured under a group insurance contract only if that person is a member of the group.[2] Although the emergence of modern group insurance dates back to the early twentieth century,[3] the extent of its regulation varies from one country to another. As regards the European Union (EU), there are EU Member States with extensive regulation of group insurance such as France; countries with limited regulation such as Finland or Sweden; and countries with just a few rules on group insurance such as Germany, Poland, or Latvia.[4] Group insurance contracts may be concluded either by an insurer directly (for instance, a health insurance contract with an employer insuring the health of its employees) or through an insurance intermediary.[5] In practice, conclusion of group insurance contracts

[1] This case note is limited to the so-called direct insurance excluding reinsurance.

[2] RH Jerry and DR Richmond, *Understanding Insurance Law*, 4th ed. (LexisNexis Group 2007) 947.

[3] Ibid., p. 937.

[4] For a useful discussion of group insurance regulation in different European countries, see M Fras, "The European Context of the Group Insurance Contract" (2020) 27 Problemy Prawa Prywatnego Międzynarodowego 179–85.

[5] It should be noted that the currently effective insurance distribution regulation employs the term "insurance distribution" covering any insurance intermediaries, ancillary insurance intermediaries as well as the insurer itself (Article 2(1)(8) Insurance Distribution Directive (Directive (EU) 2016/97 of the European Parliament and of

is offered by credit institutions such as banks (for instance, insuring either financial risk for inability to cover regular credit payments or life of borrowers; or travel insurance for recipients of payment cards) and different tied insurance intermediaries such as airlines and tourism companies (providing travel insurance for their clients); or car rental companies (providing motor and property insurance in respect of cars rented to their clients).[6]

Though group insurance is considered a useful tool for the distribution of insurance products, it also involves significant risks for insureds. One such significant risk relates to the fact that insureds are usually deprived of the possibility of examining a group insurance contract and influencing its contents, as a group insurance contract is offered on a "take it or leave it" basis, or ancillary to the conclusion of another contract (usually a loan contract). However, if the insured is considered as a consumer while concluding the group insurance contract, consumer protection law intervenes by ensuring their protection within its scope of application, especially with respect to pre-formulated contract terms.

Recently, the Court of Justice of the European Union (CJEU or Court) dealt with a group insurance contract in its judgment in the *Ocidental* case[7] (henceforth "the Judgment") providing further clarification for the protection of insureds from the point of view of the Unfair Terms Directive (henceforth "the Directive").[8] The Judgment is discussed in the following structure: a brief overview of the facts is provided at the beginning; the CJEU's reasoning is explained further; the critical assessment of this reasoning follows; and the article finishes with the conclusion summarising the discussion.

I. Facts

The consumer (identified in the case under the initials "LP") and her spouse concluded a loan contract with a Portuguese bank,[9] and simultaneously "became [a] party to a group insurance contract" insuring a risk of impossibility to make loan repayments due to LP's permanent incapacity. It may be assumed from the CJEU judgment itself that the bank as a policyholder concluded the group insurance contract with the insurer[10] but LP being considered as the insured as well as the contract party in addition to the insurer and the policyholder.

During the fulfilment of the loan contract, the insured risk occurred, and LP became permanently incapacitated. Due to incomplete information about the illness provided before the conclusion of the contract, the insurer considered the group insurance contract as null and void. As it was established later, the bank employee completed the proposal for LP to become a party to the group insurance contract including the section on medical information and submitted it for signing to LP who signed that application. LP was not acquainted with the group insurance contract including its terms envisaging exclusion of the insurance cover leading to the subsequent refusal of insurance redress. LP challenged the insurer's refusal before a national first instance court which dismissed the claim. LP

the Council of 20 January 2016 on insurance distribution (recast) [2016] OJ L26/19 (Insurance Distribution Directive)).

[6] Interestingly the last two examples, i.e. travel agents and car rental companies, are listed as examples for ancillary insurance intermediaries in the insurance distribution regulation itself (Insurance Distribution Directive, preamble, recital 8).

[7] Case C-263/22 *Ocidental – Companhia Portuguesa de Seguros de Vida SA v LP*, not yet published.

[8] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L95/29 (Unfair Terms Directive).

[9] It is not explained in the Judgment; however, it may be concluded that this loan obligation was a solidary one jointly binding both borrowers.

[10] *Ocidental* in whose name the case is called.

applied before the appeal instance court that sustained the appeal and declared the contract invalid in the part concerning exclusions of the cover. The insurer appealed the appeal instance court's judgment before the Supreme Court, which stayed the proceedings and applied before the CJEU for a preliminary ruling with three questions concerning the interpretation of the Directive.

The Portuguese Government and the European Commission, as well as the plaintiff in the national court proceedings, submitted written observations to the CJEU. As regards Portugal,[11] an intervention of its Government in the discussed court proceedings before the CJEU might be explained by the fact that the case originated in Portugal and, therefore, its Government did not wish to miss the opportunity to provide its commentary on the present case.[12] The Court delivered the Judgment without the Opinion of an Advocate General demonstrating that there is no dispute about the outcome of the case.[13]

II. Judgment

The Court dealt with the first two referred questions together on the interpretation of Articles 4(2) and (5) of the Directive regarding the opportunity of a consumer to become acquainted with the contract (in this case a group insurance contract) terms before its conclusion.

At first, the Court stated that the requirement of transparency of contractual terms requires that the consumer shall be acquainted with the contract terms before its conclusion. The Court went on and concluded that this requirement shall be ensured irrespective of the fact that both contracts (i.e. the loan contract and the group insurance contract in the present case) are related and that certain terms (in this case the exclusion of the insurance cover) may be linked to the "main subject-matter of the contract" referred to in Article 4(2) of the Directive. Likewise, the Court emphasised that a particular contract shall be subject to the transparency requirement in the Directive although there is specific national law concerning that type of contract. Therefore, the Court established that a consumer must always be afforded the opportunity, before the conclusion of a contract, to become acquainted with all its terms.[14]

The third referred question was re-formulated by the Court as relating to the enforceability of a term, envisaging an exclusion or limitation of the insurance cover, that was unknown to the consumer.[15] The Court began by referring to its settled court practice by noting that the requirement of transparency of a contractual term is one of the elements that shall be considered within the assessment of the unfairness of a contractual term.[16] The Court went further and interpreted the unfairness of a term, contained in the group insurance contract with which the consumer was not acquainted, on the basis of Article 3(1) of the Directive.[17] The Court has previously established a three-stage test for this provision, which it applied here. First, the Court found that the discussed contract term was contrary to the requirement of good faith as the consumer was "induced" to agree to the group insurance contract, including the discussed terms, in order for the loan contract to be concluded.[18] Second, the Court established that the consumer "was unable

[11] The language of the case was Portuguese.

[12] However, it is unclear from the Judgment which views were expressed by the Portuguese Government in the present case as the Court did not refer to any of such views in the Judgment.

[13] The facts of the present case are summarised in paras 12–23 of the Judgment.

[14] Para 34 of the Judgment.

[15] Ibid., para 38.

[16] Ibid., paras 39–41.

[17] Ibid., para 42.

[18] Ibid., paras 43–44.

to become acquainted" with the discussed term, which could create a significant imbalance in the mutual obligations of the parties to the group insurance contract.[19] Third, the Court held that if the consumer was not acquainted with the exclusion of the cover, they would bear the consequences of the occurrence of the insured risk, rather than the insurer.[20]

At the same time, the Court explicitly admitted that the assessment of the factual circumstances of the case is still for the national court to make, but if the national court finds the contract term to be unfair following the Court's clarification, then it shall declare the term to be unenforceable.[21]

The Court finished its reasoning by stating that the unenforceability of the contract term being found unfair (if that would be established by the national court) does not affect the potential liability of the policyholder to the insurer for the failure to notify the contract terms to the consumer.[22]

III. Comment

The Judgment deals with the relationship between insurance law and consumer protection law and is therefore important for further development of regulation within both fields in EU and national law. So-called "consumer insurance law" becomes more and more important nowadays as insurers offer different insurance products (speaking in the terminology of insurance distribution[23]) to consumers, which requires ensuring high levels of consumer protection in the distribution of these products.

The present case was not the first time that the Court dealt with a group insurance contract. Previously the Court provided a clarification of "the main subject-matter of the contract" of the group insurance contract and interpretation of a respective ambiguous term based on the principle of transparency within the Directive in *Hove*.[24] Afterwards the Court analysed group insurance contracts from the point of view of insurance distribution (i.e. the issue of an insurance intermediary in group insurance in a specific scheme) in *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband*.[25] In the present case the Court continue to interpret group insurance contracts by further analysing the consequences of the term containing "the main subject-matter of the contract" of the group insurance contract which does not correspond to the principle of transparency.[26]

The use of pre-formulated (or standard) contract terms in the process leading to the contract relates to the problem of lack of transparency.[27] The principle of transparency deals with both plainness and intelligibility of a pre-formulated contract term, to be analysed separately.[28] The problem with ensuring the principle of transparency fully applies to an insurance contract in general and a group insurance contract in particular as they are usually based on pre-formulated contract terms. The principle of transparency

[19] Ibid., para 47.

[20] Ibid, paras 49–50.

[21] Ibid., paras 46, 49, 51 and 53.

[22] Ibid., para 55.

[23] Though this term is widely used in the Insurance Distribution Directive, it remains undefined by that Directive (see the legal definitions of terms in Article 2(1) of that Directive).

[24] Case C-96/14 *Jean-Claude Van Hove v CNP Assurances SA*, published in the electronic Reports of Cases.

[25] Case C-633/20 *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband eV v TC Medical Air Ambulance Agency GmbH*, not yet published.

[26] Article 4(2) Unfair Terms Directive.

[27] T Wilhelmsson, C Willett, "7. Unfair terms and standard form contracts" in G Howells, I Ramsay, T Wilhelmsson, D Kraft (eds), *Handbook of Research on International Consumer Law* (Edward Elgar 2011) 161.

[28] HW Micklitz, "Chapter 3: Unfair Terms in Consumer Contracts" in N Reich, H-W Micklitz, P Rott, K Tonner, *European Consumer Law* (Intersentia 2014) 142–43.

also applies to those contract terms which define "the main subject-matter of the contract" or "the adequacy of the price and remuneration"[29] being clarified specifically concerning insurance contract by the Directive itself.[30] The Directive states that assessment of the unfair nature of such terms shall not be made "in so far as these terms are in plain intelligible language." But the Directive does not envisage the consequences for breach of that rule, i.e. a contract term defining "the main subject-matter of the contract" is not drafted in plain intelligible language.

It is clear from the Court's reasoning in *Hove* that such a term may be interpreted based on the interpretation rule *contra proferentem* and thus in favour of the consumer.[31] However, the issue that was unresolved in *Hove* relates to a situation in which the group insurance contract term containing "the main subject-matter of the contract" and lacking transparency can still be assessed from the perspective of unfairness. It has been suggested that this question should be answered positively.[32] The Court in the present case essentially confirmed this suggestion, although the Court did not explicitly admit it. The Court only stated that it interprets Articles 3(1) and 4 to 6 concerning the unfairness of the group insurance contract terms on the insurance cover which relate to "the main subject-matter of the contract" lacking transparency.[33] At the same time, the Court acknowledged that such a term could be also subject to unfairness on the basis that the consumer was unable to get acquainted with that term, i.e. it is contrary to the principle of transparency.

In this regard, two situations should be differentiated concerning group insurance contracts depending on whether the consumer is a contract party.

One situation (not in the present case but possible in practice) exists when the consumer is not a party to the group insurance contract being just an insured enjoying the insurance cover. In this situation, the insured is not a party to the contract. Consequently, the consumer cannot rely on the Directive, and the insurer is not required to meet transparency requirements for that consumer in relation to the group insurance contract. However, the consumer might be willing to accede to that contract as a party in order to obtain protection under consumer protection law. Neither the Directive, nor any other regulation or directive, explicitly regulates the possibility for a consumer to voluntarily join a group insurance contract. Of course, national law may regulate such a situation in the absence of EU law. For instance, the Latvian Consumer Protection Act envisages that

> [i]n contracts by which [.] the service provider undertakes to provide services [.] for the benefit of the consumer as a third person, the contracting party which has received such promise has an obligation to familiarise the consumer with the contract concluded and to provide him or her with a possibility to join thereto within a specified time period so that the consumer would obtain an independent right to request performance of such contract from the [.] service provider and compensation for losses in case of inappropriate performance or delay.[34]

[29] Article 4(2) Unfair Terms Directive.

[30] Unfair Terms Directive, Preamble, Recital 19. This recital is also discussed in legal literature, see, for instance, HW Micklitz, "Chapter 3: Unfair Terms in Consumer Contracts" in N Reich, H-W Micklitz, P Rott, K Tonner, *European Consumer Law* (Intersentia 2014) 139–40.

[31] Art 5 Unfair Terms Directive.

[32] G Heirman, "Core Terms: Interpretation and Possibilities of Assessment" (2017) EuCML 33–34.

[33] Para 38 of the Judgment.

[34] Art 7(1) Latvian Consumer Rights Protection Act (Consumer Rights Protection Act. Its official translation into English is available at https://www.vvc.gov.lv/lv/latvijas-republikas-tiesibu-akti-anglu-valoda/consumer-rights-protection-law-amendments-20052021).

In this situation, a consumer may express his or her intention to accede to the group insurance contract and become bound by that contract. This leads to the same situation discussed in the present case.

Another possibility is that a consumer becomes a party to the group insurance contract as it was in the present case, whether right at the moment of the conclusion of the group insurance contract or afterwards.[35]

If the consumer becomes a party to the group insurance contract, he or she shall enjoy the protection afforded by consumer protection law, specifically within the Directive. Such an outcome cannot be a surprise as a similar conclusion was reached previously at the national level by the French Court of Cassation, by analysing similar circumstances regarding group insurance contracts.[36] In this situation, the Court justly concluded that the consumer should have a right to become acquainted with the contents of the contract. Such a conclusion, in turn, means that the consumer being the contract party is not just a silent observer anymore in a situation in which the insurer should fulfil its obligation to provide insurance redress, but acquires a legal entitlement to protection under the regulation of pre-formulated contract terms.

Therefore, it is not sufficient for proper consumer protection to allow the consumer just to be acquainted with the contents of the contract; the consumer shall be also protected if the contract contains unfair terms. The Court rightly took this route and analysed the application of the general clause[37] on the concept of unfair terms in this situation, as the non-exhaustive list of unfair contract terms was not analysed in the given case.[38] One may notice that the Court confirmed its previous approach commencing with the *Aziz* doctrine by referring to the three criteria test.[39]

In this regard, it should be noted that it is not fully satisfactory how the Court employed references to its previous court practice. The reasoning in the Judgment was essentially based on two previous cases, namely the Court's judgment in *Kasler*[40] concerning the first two questions and *Aziz* referred to above in respect of the last third question. As regards the former case, it is questionable how the Court refers to *Kasler,* and simultaneously to judgments in other cases that refer back to *Kasler*. For instance, the Court mentioned in paragraph 25 of the Judgment two previous cases, i.e. *Kasler* and *Gómez del Moral Guasch*,[41] even though the cited paragraph in the latter case directly refers to *Kasler*.[42]

As it arises from the Judgment, if the consumer becomes a contract party to the group insurance contract, the insurer (and alternatively also the policyholder) shall have certain duties towards the consumer as the contract party. Specifically, the insurer shall introduce the consumer to the contract terms and ensure that they do not contain unfair or ambiguous terms. In this particular situation, the insurer and the policyholder failed to perform both of these duties. Therefore, the obvious outcome of the present case at the national level would lead to the situation that the consumer should prevail as the Portuguese Supreme Court should apparently sustain the appeal instance court judgment following the Judgment.

[35] It should be noted that the capacity in which the consumer becomes as a party to the contract (i.e. either as a co-policyholder or just as a contract party not being a policyholder) was not under the discussion in the present case.

[36] Fras (n 4) 216–17.

[37] Article 3(1) Unfair Terms Directive.

[38] Annex to the Unfair Terms Directive.

[39] Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*, published in the electronic Reports of Cases, paras 68–69.

[40] Case C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt*, published in the electronic Reports of Cases.

[41] Case C-125/18 *Marc Gómez del Moral Guasch v Bankia SA*, published in the electronic Reports of Cases.

[42] Ibid., para 46.

Another consequence of the present case concerns the liability of the policyholder towards the insurer. Liability could arise in the case if the insurer would be forced to cover insurance redress and seek recourse from the policyholder. As this opportunity was explicitly allowed by the Court,[43] the existence of liability (if any) to compensate damages shall be established based on national law.

Finally, the Judgment will have a serious impact on the insurance industry within the EU. It could be assumed that insurers might be rather cautious by concluding a group insurance contract as they should expect that the consumer may express an intention to become a party to the group insurance contract. Another consequence would be that the existing or potential policyholders such as credit institutions, air companies, car rental companies, and sellers would be also more cautious while concluding group insurance contracts. It appears that already concluded group insurance contracts may be re-examined, and the consumers in favour of whom these contracts were concluded could be informed about the contents. Additionally, the contracts could also be amended considering the Judgment. Finally, the consumers who are insureds in group insurance contracts could bring claims against insurers for payment of insurance redress by requesting exclusion terms to declare as unfair and, therefore, unapplicable. Such consequences might lead to the increase of costs in consumer insurance which, ironically, will ultimately be borne by consumers themselves paying higher insurance premiums.

IV. Conclusion

The discussed Judgment deepens the CJEU's practice concerning group insurance contracts from the point of view of consumer protection law and their assessment in light of the Directive. One may assume that the potential impact of the Judgment on the insurance industry in the field of group insurance contracts could lead to a change of existing practices, but it will unlikely limit further development of group insurance and its use in the distribution of different insurance products. However, the most important development made by the Court in the Judgment leads to a change of the role of the consumer in group insurance from a silent observer to a more seriously treated contract party, if they adhere to the contract. In this situation, the consumer as the insured could rely on the broad ambit of consumer protection law, especially protection against unfair contract terms within the Directive, for the protection of their lawful interests.

[43] Para 55 of the Judgment.

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