

Insurance-based investment products, between the market and policyholder protection. What responses from European Union Law?

Francesco Petrosino (Hg.)

**Schriften des Italienzentrums der Freien Universität Berlin
Band 12**



Schriften des Italienzentrums der Freien Universität Berlin

Die Schriften des Italienzentrums der Freien Universität Berlin werden vom Italienzentrum herausgegeben. Die einzelnen Bände sind auf unserer Webseite sowie dem Dokumentenserver der Freien Universität Berlin kostenfrei abrufbar:

www.fu-berlin.de/italienzentrum

<https://refubium.fu-berlin.de/handle/fub188/22221>

Die Veröffentlichung erfolgt nach Begutachtung durch den Direktor des Italienzentrums und die Mitglieder des Beirats der Schriften. Mit Zusendung des Typoskripts überträgt die Autorin / der Autor dem Italienzentrum ein nichtexklusives Nutzungsrecht zur dauerhaften Hinterlegung des Dokuments auf der Webseite des Italienzentrums. Die Wahrung von Sperrfristen sowie von Urheber- und Verwertungsrechten Dritter obliegt den Autor*innen.

Die Veröffentlichung eines Beitrags als Preprint in den Schriften des Italienzentrums ist kein Ausschlussgrund für eine anschließende Publikation in einem anderen Format. Das Urheberrecht verbleibt grundsätzlich bei den Autor*innen.

Zitationsangabe für diesen Band:

Petrosino, Francesco (Hg.): *Insurance-based investment products, between the market and policyholder protection. What responses from European Union Law?* Freie Universität Berlin 2025.

DOI <http://dx.doi.org/10.17169/refubium-46938>

ISBN 978-3-96110-525-0

Schriften des Italienzentrums – Beirat:

Prof. Dr. Christian Armbrüster

Prof. Dr. Giulio Busi

Prof. Dr. Daniela Caspari

Prof. Dr. Dr. Giacomo Corneo

Prof. Dr. Johanna Fabricius

Prof. Dr. Karin Gludovatz

Prof. Dr. Doris Kolesch

Herausgeber: Prof. Dr. Bernhard Huss

Editorische Betreuung: Sabine Greiner

Lektorat: Sabine Greiner

Wissenschaftliche Beratung: Dr. Selene Maria Vatteroni

Freie Universität Berlin

Italienzentrum

Geschäftsführung

Habelschwerdter Allee 45

D-14195 Berlin

Tel: +49-(0)30-838 50455

mail: sabine.greiner@fu-berlin.de

Inhalt

Insurance-based investment products, between the market and policyholder protection. What responses from European Union Law?

	Seite
Introduction to the proceedings Francesco Petrosino (Freie Universität Berlin/Università di Trento)	3
How information duties in plain and intelligible language finally caught up with Dutch ULIP-backed mortgage loans Willem H van Boom (Radboud Universiteit)	8
Between insurance policy and investment contract – How does the transparency paradigm (re)shape? Christian Armbrüster (Freie Universität Berlin)	17
The boundaries of the insurance contract: group insurance through the lens of the ECJ Margarida Lima Rego (Universidade NOVA de Lisboa)	25
Product oversight and governance (POG) and the principle of value for money: between the case law of the European Court of Justice and the sector-specific regulatory framework Francesco Petrosino (Freie Universität Berlin/Università di Trento)	43
The link between Directive 2005/29/EC and the information duties of intermediaries Sara Landini (Università di Firenze)	63

Introduction to the proceedings

Francesco Petrosino (Freie Universität Berlin/Università di Trento)

“Insurance-Based Investment Products, Between the Market and Policyholder Protection: What Responses from European Union Law?” is the title of the seminar held on Thursday, June 20, 2024, at the Freie Universität in Berlin.

Such an event provided the opportunity to initiate a fruitful debate focusing on the most recent decisions of the Court of Justice of the European Union (hereinafter, ECJ) regarding complex insurance products, involving Professors Lima Rego and Landini, as well as Professors Armbrüster and Van Boom, to whom I am grateful for their positive response to the invitation.

The proceedings of the seminar have been collected in the *Schriften des Italienzentrums*, and I would therefore like to express my gratitude to the Department of Philosophy and Humanities, and more specifically to Professor Huss, who enthusiastically embraced the opportunity to organize this event and subsequently compile the individual contributions into a unified volume. I extend these thanks also to Frau Greiner for her valuable organizational support.

I also wish to thank the Department of Law, represented by Professor Armbrüster and Professor Aust, who have consistently involved me in the initiatives organized by and for the legal community at FU, and have provided invaluable scientific guidance my tenure as Gastdozent.

At the outset of this brief overview of the discussions and outcomes of the seminar, a clarification regarding the content and methodology is necessary.

A key aspect, the most significant one, related to the theme of the seminar and the subject of the individual interventions, can be inferred from the title itself: it aims to explore how European Union law has addressed the increasingly widespread distribution of insurance policies with financial content (the so-called IBIPs).

The research focuses primarily on insurance transparency as regulated by the European Directives concerning the distribution and intermediation of complex (insurance) products.¹ Insurance transparency, in this specific investigative perspective, refers to the informational duties imposed on producers and distributors, not only during the pre-contractual phase but also during the execution of the contractual relationship with policyholders, as well as the information needed by beneficiaries, those who do not enter into the contract directly with the company but benefit from the insurance coverage.²

Regarding methodology, the precedents of European case law were a necessary precondition for addressing the issue of informational duties.

Furthermore, the methodological approach was enriched by a comparative research framework. The dialogue with the courts, as well as with regulators and legal scholars from the Member States, has not only made it possible to examine the topic from multiple perspectives, reflecting the diverse legal traditions involved. More importantly, the lens of the comparative lawyer has allowed the scope of the

¹ The rulings that were analyzed concerned both life insurance Directive (Directive 2002/83/EC), as well as, of course, the insurance mediation Directive (Directive 2002/92/EC) and the insurance distribution Directive (Directive (EU) 2016/97).

² The subject of transparency in the insurance sector has been analyzed, also from a comparative perspective, in the volume of MARANO, Pierpaolo/NOUSSIA, Kyriaki: *Transparency in Insurance Contract Law*, Cham 2019, which is referenced for reading the individual contributions. With regard to the outcomes of transparency in the insurance sector, aimed at helping consumers understand the contents of the contract in clear terms, through readable clauses, see VAN BOOM, Willem/DESMET, Pieter/VAN DAM, Mark: “It’s Easy to Read, It’s Easy to Claim – The Effect of Readability of Insurance Contracts on Consumer Expectations and Conflict Behaviour” in: *Journal of Consumer Policy* 39,2 (2016) 187-197. The issue of insurance transparency, explored in relation to linked products and in a economics’ study perspective, is further examined by POUFINAS, Thomas/ZYGIOTIS, Dimitrios: “How transparency affects investment-linked insurance products” in: *International Advances in Economic Research* 23,4 (2017) 405-418.

research to extend to aspects that are not merely ancillary to transparency but are, in fact, at the core of the debate among insurance law scholars.

It cannot therefore be denied that the central idea behind the seminar and the individual contributions was, in the first instance, to understand how the system of obligations – particularly informational duties – has evolved in recent years and how it has ultimately been established in light of the intense legislative activity in the sector.

At the same time, as mentioned earlier, it would be overly simplistic to consider that the outcomes of the meeting were confined solely to the conduct duties of companies and intermediaries. On the contrary, the rulings of the ECJ led the discussion to a subsequent critical level: once it was understood how the EU Court of Justice sought to protect the normatively and economically weaker parties to the insurance contract, the focus of the individual contributions shifted towards the development of additional themes, albeit closely related to the original issue. The points explored by the seminar participants proved to be significant, as they were not only related to the regulation of the contract – or rather, not only to the aspects directly tied to the individual contractual relationship – but also to the broader activity and, consequently, the market.

A first part of the debate focused on the evolution of insurance transparency, evident in the transition from the Directive on insurance mediation (Directive 2002/92/EC) to the Insurance Distribution Directive (Directive (EU) 2016/97) and its subsequent amendments.

The issue of the clarity of benefits, contractual costs, profit prospects, and the underlying financial mechanisms involves not only the distribution of the product but also the “design” phase. With the advent of product governance, in fact, the sectoral legislator has increasingly emphasized the internal organization of companies as an efficient tool for combating cases of mis-selling.³

Over time, while the methods of transparency have changed, the content, or the subject of this rule, has evolved accordingly. Therefore, with the growing presence of IBIPs in the market,⁴ the informational documentation has inevitably had to include a clearer description of the financial aspect of the policy.⁵

At the same time, as correctly noted in Professor Armbrüster’s contribution, insurers and distributors, in line with EU Regulations, must provide the customer with a complete and clear framework, also with regard to the sustainability profiles of the intermediated products.⁶

Focusing the analysis on transparency and the duties arising therefrom, this meeting thus represented a valuable opportunity, first and foremost, to critically reflect on some aspects more strictly related to the insurance contract and the business itself.

This includes the direction taken by European case law on the contractual configuration of IBIPs, which are considered true insurance policies due to their synallagmatic nature, determined by the exchange between premiums and indemnities. This position could be critiqued, especially in the case of partially guaranteed or “pure” unit-linked distribution, where indemnity (plausible, but not certain) depends solely on fluctuations in indices or the value of underlying funds. However, the Court’s choice

³ For the relationship between product governance and the distribution of IBIPs, please refer to the contribution of PETROSINO, Francesco: “Product oversight and governance (POG) and the principle of value for money: between the case law of the European Court of Justice and the sector-specific regulatory framework”, further in the text.

⁴ The figures on the spread of IBIPs in the European insurance market can be further explored through the latest Costs and Past Performance Report by EIOPA, December 2023, particularly pages 9-30.

⁵ The reference applies to Chapters V and VI of Directive (EU) 2016/97, as well as Articles 5 and following of Regulation (EU) 1286/2014 regarding the Key Information Document (so called KID).

⁶ Particular reference is first made to Regulation (EU) 2019/2088, as subsequently amended by Delegated Regulation (EU) 2022/1288. Then, Regulations (EU) 2017/2358 and 2359, both amended by Delegated Regulation (EU) 2021/1257, were modified to enhance transparency regarding the sustainability content of the product. For the integration of sustainability factors during the distribution phase, see COLAERT, Veerle: “Integrating sustainable finance into the MiFID II and IDD investor protection frameworks” in: *EUSFIL Research Working Paper Series 16* (2024) 1-43.

appeared consistent with a regulatory policy aimed at creating precise conduct rules for each financial sector, leveling the playing field, and thereby strengthening protective measures.⁷

Special attention should then be paid to group insurance policies, specifically their nature, the negotiation mechanisms pertaining to their conclusion, and their subsequent operability. ECJ case law has indeed addressed the issue of insurance transparency, but, in almost all cases, it has always related to the subscription (or rather, the membership) of group insurance contracts.

In this regard, Professor Lima Rego outlined a precise picture of the phenomenon of collective bargaining in the insurance sector and explained how the dialogue between the European judge, national legislators, and regulators allows distinguishing between a genuine collective contract and a framework contract, to which insured parties join by entering into individual insurance contracts.⁸ This is an area of significant practical interest: in group insurance contracts, the contracting subject also performs intermediation activities – more precisely, distribution – and, based on a substantialist approach promoted by the ECJ,⁹ must provide the individual policyholders with adequate informational protection.

Subsequently, the discussion focused on a central issue in the broader review of the conduct duties of intermediaries. This refers to the available remedies, which, according to the doctrinal approach adopted by the Authors, were addressed from different but complementary perspectives.

One aspect of the analysis, emerging from the reading of the Court's rulings, concerns the issue of the remedies specifically consumerist in nature, applicable in cases of insufficient, missing, or misleading communication.

A large number of preliminary rulings referred by national judges have focused on the relationship between insufficient informational duties and the application of the Directive on unfair commercial practices (Directive 2005/29/EC), as well as that on unfair terms in consumer contracts (Directive 93/13/EC). It is noteworthy that the Court allows for significant intervention from consumer protection laws, leading to a composite framework that is open to various scenarios. Indeed, where the private remedies available for insufficient transparency are not regulated by insurance law, the regime of unfair commercial practices may apply.

The Court, in the first instance, states that “there is no conflict between the provisions of that directive and those of the Unfair Commercial Practices Directive, those two directives in fact being complementary”¹⁰ before referring, in general terms, to the responsibility of the undertaking.¹¹ Similarly, with regard to the adoption of Directive 93/13/EEC, the European jurisprudence adopts a deliberately broader perspective and seeks to involve Member States directly in determining the preferred remedial

⁷ The client best interest is the subject of a specific regulatory policy and must be tailored to the different regulated financial sectors, as stated in Recital 6 of Directive (EU) 2016/97. Regarding the creation of a set of rules, although differing from sector to sector, they are all inspired by the necessary protection of clients, see COLAERT, Veerle: “European Financial Regulation: Levelling the Cross-Sectoral Playing Field. A Research Agenda”, March 2018, 1-11, available SSRN: <https://ssrn.com/abstract=3153754> or <http://dx.doi.org/10.2139/ssrn.3153754> [last access: 08.04.2025]; HOFFMANN, Annette/NEUMANN, Julia/POSSER, David: “Plea for Uniform Regulation and Challenges of Implementing the New Insurance Distribution Directive” in: *The Geneva Papers* 43 (2018) 743; COLAERT, Veerle/PEETERS, Maarten: “Is There a Case for a Cross-Sectoral Duty of Care in the Financial Sector?” in: Veerle COLAERT/Danny BUSCH/Thomas INCALZA (eds.): *European Financial Regulation. Levelling the Cross-Sectoral Playing Field*, London 2019, 319.

⁸ In particular, see paragraph IV of the contribution by Professor Lima Rego.

⁹ Case C-633/20, *Bundesverband der Verbraucherzentralen und Verbraucherverbände- Verbraucherzentrale Bundesverband e.V. v TC Medical Air Ambulance Agency GmbH*, ECLI:EU:C:2022:733.

¹⁰ Judgment of the Court of 24.02.2022, C-143/20 and C-213/20, ECLI:EU:C:2022:118, para 138. Even from the reasoning put forward by Advocate General Bobek in the Conclusions, there is an openness to the integration of insurance legislation with that on unfair commercial practices, specifically with reference to para. 132.

¹¹ Judgment of the Court of 2.2.2023, C-208/21, ECLI:EU:C:2023:64, para 70 which reads as follows: “Thus, where the unfair commercial practice consists of the fact that the assurance undertaking drafted the standard unit-linked group contract in a misleading manner, and which was transmitted to the consumer in a timely manner before he or she acceded to that group contract, *that undertaking must, in principle, be held liable for such a practice*” (emphasis added).

solution. Therefore, when a clause is deemed unfair, it is not only void, unenforceable, and inapplicable,¹² but the consumer may directly seek compensation.¹³

The relationship between insurance distribution and consumer protection disciplines thus led to a second, consequential point of discussion, relating to the connection between the conduct rules prescribed in regulated financial sectors and domestic private law standards. Thanks to Professor Van Boom's contribution, it was possible to appreciate in particular how some core principles of private contract law, interpreted according to the case law of the Member States, may impose stricter conduct on undertakings.¹⁴

ECJ has thus made use of the interpretation provided by domestic courts of private law principles to affirm a more efficient policy aimed at client best interest. This strategy, on the one hand, aims to strengthen client safeguarding, but on the other, it could create a differentiated model of protection, in which each Member State adopts different solutions, thereby hindering a faster and more widespread harmonization of insurance regulation.

Finally, the study of the remedial dimension was enriched by an exploration of the public intervention model.

Based on an approach prevalent in regulated financial markets, including the insurance sector, there is an interaction between public intervention and private actions. Thanks to the insights proposed by Professor Landini, the intersection between public and private enforcement was explored in undoubtedly original terms.

Given that insurance law, like financial services law, does not provide a harmonized regime for private remedies – except for a general reference to alternative dispute resolution solutions¹⁵ – the enforcement of transparency duties must also involve the intervention of national courts. Therefore, a sanctioning structure emerges in which private law solutions are not limited to regulating private relationships. On the contrary, according to a view endorsed by certain scholars,¹⁶ in regulated financial markets, private enforcement could even serve as a tool to ensure the policy objectives underlying European financial legislation, including insurance law.

At both the European and national levels, however, the protection of the end-users of services lies in the hands of the supervisory authorities, and distribution bans, along with sanctioning powers, represent the implementing tools of the financial legislative framework. In certain cases, as demonstrated by the Italian case, the concurrent presence of multiple authorities could lead to risks of overlapping regulatory powers. However, the *ne bis in idem* principle, to the detriment of regulated entities, is excluded in light of

¹² Article 6, para. 1, Directive 1993/13/EEC.

¹³ Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 55, where the Court recalls that “The unenforceability of such a contractual term classified as unfair with regard to the consumer is, however, without prejudice to the possible consequences, in respect of the policyholder’s civil liability vis-à-vis the insurer, of the fact that the policyholder failed to notify the consumer of that term”.

¹⁴ Clear in this sense is the judgement of the Court of 29 April 2015, C-51/13, ECLI:EU:C:2015:286 which in para. 34 specifies that: “Consequently, the answer to the first question is that Article 31(3) of the third life assurance directive must be interpreted as not precluding an insurance company, on the basis of general principles of domestic law such as the ‘open and/or unwritten rules’ at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive, provided that the information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment and that it ensures a sufficient level of legal certainty, which it is for the referring court to ascertain”. On the topic of the imposition of stricter obligations arising from domestic private law standards, mention should be made of CHEREDNYCHENKO, O. Olha: “Contract Governance in EU: Conceptualising the Relationship between Investor Protection Regulation and Private Law” in: *European Law Journal*, 513-514.

¹⁵ See in this sense recital 38 of of Directive 2016/97/EU. Indeed, Directive 2014/65/EU also provides for the implementation of ADR procedures, specifically in Article 75.

¹⁶ CHEREDNYCHENKO, O. Olha: “Two sides of the same coin: EU financial regulation and private law” in: *European Business Organization Law Review*, 22 (2021) 144.

the higher norms of sector-specific legal systems. National authorities adopt the necessary measures to ensure the proper conduct of activities in line with the guiding principles of the relevant sector.¹⁷

Finally, the overview of the methodology and content of the interventions allows for some concluding thoughts on the judgments analyzed and on the role of EU jurisprudence. It is important to note that the decisions of the Court share a common trait of uniformity, understood as interpretive consistency with regard to both contractual structure and, importantly for our purposes, conduct duties, specifically those related to transparency. The preliminary reference thus represents not merely a tool that generally ensures the homogeneous application of EU law across all Member States. The Court's responses are, in fact, expressions of political choices initially formulated by the Institutions, designed to impose a specific approach to regulating activity and, most importantly, relations with retail clients.

In essence, the contributions of the Authors also highlighted the proactive role of the Court.

Consumer protection, as invoked by the IDD¹⁸ and provided for in all financial sectors,¹⁹ constitutes an important interpretive reference for judicial power. In light of such considerations, EU jurisdiction is destined to play an even more decisive role in interpreting European law from a client-oriented perspective. This is indeed the direction of the Commission's most relevant initiatives, launched with the Capital Markets Union project and, with a view to imminent regulatory developments, advanced particularly through the Retail Investment Strategy.²⁰

Francesco Petrosino
Università di Trento/Freie Universität Berlin

Berlin, February 2025

¹⁷ With regard to the Italian experience, as explored by Professor Landini, Article 3 of the Private Insurance Code provides that the competent authority for the supervision of insurance activities monitors the sound and prudent management of insurance and reinsurance companies and the transparency and fairness of the behavior of companies, intermediaries, and other operators in the insurance sector, considering the stability, efficiency, competitiveness, and proper functioning of the insurance system, the protection of policyholders and other individuals entitled to insurance benefits, as well as consumer information and protection. On the other hand, the AGCM (the Antitrust Authority), under Law No. 287 of 1990, is responsible for the protection of competition and the market and, pursuant to Legislative Decree No. 206 of September 6, 2005 (Consumer Code), is also responsible for the protection of consumers.

¹⁸ Recital 6 of Directive 2016/97/EU.

¹⁹ Recital 10 of Directive 2016/97/EU.

²⁰ Article 2 of the proposal for a Directive of the European Parliament and of the Council amending Directives 2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU and (EU) 2016/97 as regards the Union retail investors protection rules. This article, in particular, introduces the most substantial and significant changes to the Insurance Distribution Directive.

How information duties in plain and intelligible language finally caught up with Dutch ULIP-backed mortgage loans

Willem H van Boom (Radboud Universiteit)

I. Introduction

Between roughly 1990 and 2006, the Dutch insurance industry introduced and vigorously marketed and distributed a new form of home financing: the combination of a mortgage loan offered by one subsidiary of the insurance company with a special capital life insurance contract offered by another subsidiary, typically the unit-linked insurance plan (ULIP).¹ These ULIP-backed mortgage loan schemes became known as investment mortgage loans.

For insurance companies, the development of this new product was a godsend, opening up a new market. While in the past it was mostly banks that offered mortgage loans with simple annuity or linear interest terms, the introduction of ULIP-backed mortgage loans meant that insurance companies could enter the consumer mortgage product market. What better way to sell more life insurance in a country where the life insurance market was already saturated?

Typically, the consumer would be granted a loan and repayment of the loan would be postponed for the running period of the ULIP, usually a 30-year period. During that period, the monthly repayments made by the consumer would go towards:

- Risk premium for a life insurance module in case of early death of the consumer
- A deposit into one or several investment plans, mostly in varying proportions, in fixed-rate investments, variable-rate investments and financial investment products of the insurance company conglomerate offering the contract
- Administrative fees and investment management costs
- Sometimes, the monthly payments would also cover interest payments on the mortgage loan but in most cases the interest would simply accrue and be added to the debt

The basis idea was that on maturation of the loan after 20 or 30 years, the investment plan would have yielded enough returns to repay the outstanding debt on the loan. The loan would thus be repaid *at once* in *one sum* with the proceeds of the investment.

Obviously, at the end of the running period, the investment would have to have shown a positive yield, the *equity*. Typically, the product would contain contractual levers for the consumer to bank some of the returns, to transform the portfolio along the way into investments with less risk exposure such as government bonds and to maximize the chances of producing sufficient equity to cover the loan sum.

In theory, ULIPs have the potential of wealth creation over the long term by the mechanism of consumer policyholders entrusting investment experts with their money for at least a certain lock-in period, while maintaining certain levels of autonomy to switch between different investment funds to attain the policholder's long terms goals.

The typical downside of ULIP schemes is their lack of transparency in terms of the exact allocation of the periodic contributions made by the policyholder. Various charges are associated with ULIPs, including life insurance premium allocation charges, mortality charges, fund management fees, policy administration charges, and surrender charges. Ideally, ULIP contract clauses should be able to transparently communicate to policyholders 'where their money goes' so they can both develop some understanding of the allocation of contributions and model the equity growth trajectory. Also, ULIPs typically experience an overstretched demand due to tax benefits – where government policy encourages consumers to become policyholders of ULIPs rather than save their money in ordinary savings accounts, the effect may be skewed demand for ULIPs. And where government policy is unstable, withdrawal of tax benefits may be a major threat to the sustainable viability of ULIP schemes. In the

¹ ULIPs are part of the family of insurance-based investment products (IBIPs).

Netherlands, this was in fact was one of the causes of the prior collapse of another ill-fated investment scheme, the consumer securities lease agreements scheme.

The Dutch schemes for ULIP-backed mortgage loans were, in hindsight, rather risk-prone and shockingly opaque for consumers. In reality, they ensured rather one-sided profits for the insurance companies. Whereas in a traditional home financing scheme, the deal is pretty straightforward – the consumer knows in advance the loan sum, the interest rate, the annuity vs linear repayment calculation, the running period for both the loan and the interest rate, and therefore the monthly repayment obligations with a view to clearing his overall debt during the running period, this was certainly not the case with ULIP-based mortgage loans.

In the traditional mortgage loan, the outcome is defined: full repayment with interest. It assumes a risk-averse consumer. In investment, only the periodic input is defined: deposits to investment vehicles. Whether upon maturity, the homeowner can in fact repay the mortgage, remains to be seen. This in itself is problematic: if we agree that home mortgages should aim at maximum home security, investment is perhaps not the most fitting answer for risk averse consumers. Admittedly, an investment structured mortgage loan may fit consumers with risk appetite and the ability to absorb those risks. The problem here was that in the 1990s, consumers were not tested properly for their risk attitudes before these investment products were let loose on them.

So, there is the issue of potential *inherent unfitness for purpose*. As early as 2003 the Dutch Financial Markets Authority (AFM) calculated that an average household with a ULIP-backed mortgage ran a 55% chance of incurring residual debts. Here we can ask how well the average consumer understands the risks associated with the ULIP-backed mortgage.

The ULIP-backed mortgage loan also combines investment with life insurance. So the monthly installments are not fully invested. Does the product provide a breakdown of the installments so that the consumer knows which part is invested and which part is a risk premium? Here we can ask whether the product information and the general contract terms clearly distinguish and define the allocation of the installments.

It is important to consider the reasons why consumers have massively opted for ULIP-backed mortgage schemes. Why would someone choose this product over a traditional mortgage? The answer is multifaceted:

- Some consumers may have been persuaded by intermediaries to consider this product, despite not actively choosing it.
- It appears that consumers may have had an inaccurate understanding of the ULIP's lever effect.
- Others, who attempted to compare products, encountered difficulties due to the limited availability of traditional options.
- There are a number of reasons why a ULIP-backed mortgage might be selected over a traditional mortgage. Initially, it provided a tax advantage that was not available with previous products. Additionally, it is worth noting that commission-driven intermediaries often chose to exclude traditional annuity or linear loan products from their range of offerings.
- The product and its tax benefits may have led to an increase in the buying capacity of home buyers.
- In retrospect, there were concerns about the transparency regarding the commission fees earned by the intermediary. It appears that there could have been more clarity from both the insurers and the intermediary about these fees. This lack of transparency may have contributed to the economic incentives for insurers and the intermediary to promote this particular product line.

By far the most important problem with ULIP products launched between 1990 and 2006 was the complete lack of transparency in cost allocation. Most of the policies did not make it clear what part of the monthly premium went to the life risk premium, what part was the net investment, and what part was allocated to expenses and investment portfolio management. Obviously, if the running costs are high, the net investment will be low and the chances of accumulating sufficient funds at the end of the term will also be

reduced. This raised two issues: were the contract terms sufficiently clear and comprehensible, and did they provide a solid legal basis for the cost allocation decisions taken by insurers?

What happened between 2006 and 2022 is too much to discuss in this context, but the short version is this: growing consumer dissatisfaction associated with more than 2,5 million policies, media onslaught (the term "woekerpolis" or "usury insurance policies" was coined, and this framework was impossible to shake off), political intervention, advisory committees, guidelines on cost allocation and transparency, attempts at mass claims settlements, and so on. A significant portion of the insurers involved slowly agreed and implemented positive changes for the future as well as some form of token compensation for the past. By 2010, some insurers were willing to settle mass claims. Others, however, rebuffed all attempts by consumer advocates to settle, preferring to litigate each case individually, hoping for some miracle or redemption that would exonerate them. The result was a wave of individual litigation that was unproductive and inefficient.

In a way, the industry's stance was understandable. The stakes were unprecedented and extremely high: the life insurance industry had become totally dependent on ULIPs, and if the products were deemed defective or mis-sold, the insurance industry would likely collapse if they were forced to unwind and settle the outstanding policy obligations. On the other hand, if the products were allowed to run their course, thousands of homeowners would most likely be left with residual debt. The slow and painful process that took place between 2006 and 2022 was perhaps the lesser of several evils.²

As we will see, a landmark decision by the Dutch Supreme Court in 2022 finally caught up with ULIP-backed consumer mortgage loans. The 2022 Supreme Court decision was the final push to remove the remaining pockets of resistance to the mass claims settlements that were completed in 2023-2024, amounting to millions of euros. To understand the 2022 decision, we first need to step back and take a broader view of the contractual background against which ULIPs were positioned. In particular, we need to clarify the relevant parts of the framework of Directive 93/13/EEC on unfair terms in consumer contracts. Therefore, in the next section we will first review the development in the ECJ case law on the concept of "plain, intelligible language" in Art. 4(2) and Art. 5 of Directive 93/13/EEC, before turning to the ECJ jurisprudence that led to the 2022 Supreme Court ruling.

II. Directive 93/13/EEC

The capital life assurance contract is in part insurance, in part investment contract. In the Dutch contract law context, such contracts are considered insurance contracts subject to the Civil Code rules of life insurance.³ Note that the ECJ also appears to classify these contracts as insurance contracts rather than investment contracts. For example, in *Länsförsäkringar* (ECJ May 31, 2018, C-542/16, ECLI:EU:C:2018:369), the issue was whether intermediary activities in relation to capital life insurance contracts - essentially: the provision of financial advice on such insurance contracts - fall within the scope of MiFiD I (2004/39) or the Insurance Mediation Directive 2002/92 (now the IDD). The ECJ ruled that such activities were covered by the Insurance Mediation Directive.⁴

In any case, capital life insurance and therefore ULIPs are considered as contracts with mutual obligations for the insurer and the policyholder. Thus, the general framework of the Civil Code for contracts and for consumer contracts applies.

² In more detail, VAN BOOM, Willem H., book review of "B. van Hattum, De afwikkeling van zorgplichtclaims – Een onderzoek naar het adequater oplossen van affaires rondom retail producten en dienstverlening op de financiële markten" in: *Tijdschrift voor Consumentenrecht en Handelspraktijken* 6 (2018) 322-325.

³ See art. 7:975, 7:964 and 7:925 of the Dutch Civil Code.

⁴ See also ECJ March 1, 2012, C-166/11, ECLI:EU:C:2012:119 (*Alonso v Nationale Nederlanden*), where it was held that the Doorstep Selling Directive 85/577, which excluded the sale of insurance contracts from its scope, was therefore not applicable to ULIPs.

As mentioned, the general complaint that emerged was that the opacity of the general contract terms associated with ULIP-backed mortgage loans made it difficult to assess the decomposition of the monthly installments: it was unclear how life insurance premium allocation charges and mortality charges were calculated, fund management fees were typically unclear, and policy administration charges and surrender charges were hidden. This raised the question of whether the terms of the contract were actually drafted in a clear and unambiguous manner and whether the balance of obligations under the contract was sufficiently balanced. For ULIPs entered into after December 31, 1994,⁵ the framework of Directive 93/13/EEC on unfair terms in consumer contracts (as implemented in the Dutch Civil Code) was applicable to deal with these matters. The general test under the Directive is one of fairness: contract terms are regarded as unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Furthermore, the terms need to be drafted in plain and intelligible language. Art. 4 (2) Directive 93/13 provides:

Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in *plain intelligible language*. [emphasis added]

Moreover, art. 5 Directive 93/13 adds:

In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in *plain, intelligible language*. [emphasis added] Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

This concept of 'plain, intelligible language' in Art. 4(2) and Art. 5 has developed from a linguistic into an overarching *transparency requirement* against the backdrop of average consumer financial literacy. Two pivotal cases stand out: *Kásler* (2014) and *Van Hove* (2015).⁶

The case of *Kásler* concerned a credit agreement between two Hungarian borrowers and a bank. The capital provided to the borrowers was denominated in Hungarian currency and was made available in Swiss francs (at the purchase rate) under a single clause. However, the monthly repayment obligations were expressed in terms of the selling rate under a separate clause. The borrowers subsequently lodged a complaint regarding this discrepancy. The ECJ had to rule on the interpretation of the concept of "clear and intelligible" in Art. 4(2) Directive. Was this just a linguistic test of the terms, or was there more to it? The Court ruled:

Having regard to all the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.⁷

⁵ See Art. 10 (1) of Directive 93/13/EEC.

⁶ ECJ 30 April 2014, C-26/13, ECLI:EU:C:2014:282 (*Kásler and Rábai v OTP Jelzálogbank Zrt*) ; ECJ 23 April 2015, C-96/14, ECLI:EU:C:2015:262 (*Van Hove v CNP Assurances SA*). See also ECJ 12 January 2023, C-395/21, ECLI:EU:C:2023:14 (*Lithuanian solicitor*), para. 37. In ECJ 20 April 2023, C-263/22, ECLI:EU:C:2023:311 (*Occidental*), the ECJ has effectively transposed the transparency requirement into a duty to provide the opportunity to become acquainted with the entire set of general contract terms before conclusion of the contract.

⁷ *Kásler* para. 75.

In brief, the ECJ ruled that:⁸

- core terms must also be drafted in plain, intelligible language
- the requirement of plain and intelligible language in Art. 4(2) Directive has the same scope as in Art. 5 Directive
- terms must not only be linguistically and grammatically comprehensible but given the consumer's weak position and lack of information, the requirement of transparency must be interpreted broadly
- the terms harbour the possibility of an unlimited increase in the cost for the consumer of the financial service
- the reasons for the particulars of the exchange rate mechanism should be transparently specified so that the consumer can foresee the economic consequences on the basis of clear and comprehensible criteria
- the court will have to determine whether a normally informed and reasonably prudent and observant average consumer, on the basis of all the relevant factual data, including the advertising and information provided by the lender in the negotiation of a loan agreement, could not only know that in the securities market there is usually a difference between the selling and buying rate of foreign currency, but could also estimate the potentially significant economic consequences for him of the application of the selling rate to the calculation of the repayments ultimately due by him and thus of the total cost of his loan
- the requirement for a clause to be drafted in plain, intelligible language requires that the concrete operation of the exchange rate mechanism to which the clause in question refers, as well as the relationship between this mechanism and the mechanism prescribed by other clauses concerning the loan amount made available, be transparently specified so that the consumer can foresee, on the basis of clear and comprehensible criteria, the economic consequences arising from it for him.

Van Hove (2015) involved a dispute over the interpretation of the term "total disability" in an insurance contract. *Van Hove* was declared totally unfit to perform his former occupation, but he was considered able to perform modified activities part-time. The insurer held that this did not fall under "total disability" but under "permanent partial disability. *Van Hove* argued, among other things, that consumers cannot understand the scope of these definitions without knowledge of the facts. The ECJ ruled that:⁹

- Art. 4(2) must be interpreted strictly
- terms which are ancillary to core clauses do not fall within the concept of "main subject matter of the contract"
- in the case of insurance, the characteristic feature is that the insurer undertakes, in return for the prior payment of a premium, to provide a service agreed upon when the insured risk materializes
- that in insurance contracts there is no test as to whether or not terms which clearly define or delimit the insured risk and the insurer's commitment are fair, when those restrictions are taken into account in calculating the premium paid by the consumer
- the nature, overall design and all the terms of the contract and the legal and factual context must be taken into account when determining whether a term falls within the concept of the "main subject matter of the contract"
- the court must assess the extent to which the term, having regard to these factors, establishes a core performance of the contractual framework of which it forms part, which as such is characteristic of that framework
- if the clause is a constituent part of the actual subject matter, the court must also consider whether it was clearly and intelligibly worded by the insurer

Regarding the plain and intelligible language requirement, the ECJ considered that linguistic and grammatical comprehensibility are not sufficient and that the requirement of transparency must be interpreted broadly given the consumer's weak position and having less information than the insurer. In

⁸ *Kásler* paras. 67-75.

⁹ *Van Hove*, paras. 31-39.

addition, the Court held that it is essential that the consumer, before concluding the contract, be informed not only of the conditions of coverage, but also of the mechanisms for payment and their relationship with other mechanisms, so that he can assess the economic consequences for him on the basis of clear and comprehensible criteria. It is on the basis of this assessment that he will decide whether he wishes to be bound by the terms and conditions set by the insurer. The Court thus places the requirement of plain and intelligible language at the heart of informed consent to the terms and conditions.

In conclusion, according to Art. 4(2) and Art. 5 Directive 93/13/EEC a term is written in plain language which is intelligible to the normally informed and reasonably prudent and observant average consumer if all the following conditions are met:

- the clause is linguistically and grammatically comprehensible
- the concrete operation of the mechanism to which the term refers is set out in a transparent manner
- the relationship of the mechanism to other mechanisms arising from other terms is set out in a transparent manner,
- the consumer can assess, on the basis of clear and comprehensible criteria, the potentially significant economic consequences arising for him.

In reviewing terms, consideration should be given to all relevant factual data, including advertising and information provided by the insurer in the negotiation of the insurance contract and, more generally, within the contractual framework.¹⁰

The upshot of all this for ULIP-backed mortgage loans is that general contractual terms which do not comply with the requirement of plain and intelligible form may be examined for fairness, even if these terms define the main subject matter or relate to the adequacy of price and remuneration. If the terms are found to be unfair, they are not binding on the consumer (Art. 6(1) Directive 93/13/EEC). However, under Dutch law, the mere fact that contract terms are not written in plain and intelligible language does not make them unfair. A holistic assessment is required, as the lack of plain and intelligible language may be outweighed by other terms that benefit the consumer.¹¹ In any event, a lack of clarity in the language chosen can cause another problem. It can create a gap in the contract as agreed, as was the disastrous outcome of a case in 2012. There, the standard terms and conditions of a ULIP sold to a consumer did not specify what percentage of the total monthly payments related to the death risk premium payable. As a result, the policyholder knew what the total periodic payment was, but could not determine what portion of the payment was for the purchase of investments and what portion (percentage) was for the premium. The court therefore held that the contract provided a basis for the premium due, but not for the amount of the premium. Therefore, the insurer could not simply unilaterally determine what that premium would be; what followed was the court's own determination of a reasonable premium, and it was lower than the amount the insurer had unilaterally determined.¹²

1. 2015 ECJ Ruling *Nationale Nederlanden / Van Leeuwen*

A new chapter in the ULIP saga concerned whether information requirements based on open-ended concepts of national private law were preempted by the European regulatory framework for life insurance information requirements. This question came before the ECJ in the 2015 case *Nationale Nederlanden / Van Leeuwen*.¹³

In *Van Leeuwen*, the question was whether the framework for precontractual information duties laid down in the Third Life Assurance Directive 92/96/EEC (succeeded by Directive 2002/83/EC and then in 2012,

¹⁰ *Van Hove*, para. 48.

¹¹ Hoge Raad 22 November 2019, ECLI:NL:HR:2019:1830 (*Euribor mortgage loan*).

¹² Hoge Raad 14 June 2013, ECLI:NL:HR:2013:BZ3749 (*Aegon v Stichting Koersplandewegkwijt*).

¹³ ECJ EU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale Nederlanden/Van Leeuwen*).

by Directive 2009/138/EC (Solvency II) pre-empted any room for national legislation and courts to apply stricter rules.

Article 31(1) of the Third Life Assurance Directive 92/96/EEC provided that at least the information listed in point A of Annex II must be communicated to the policyholder before the conclusion of the assurance contract. Article 31(2) provided that the policyholder must be kept informed throughout the term of the contract of any change concerning the information listed in point B of that annex. The Netherlands had transposed these regulatory information duties into Dutch law by means of the 1998 Regulation regarding the provision of information to policyholders (Regeling informatieverstrekking aan verzekeringnemers 1998; 'RIAV 1998').

However, if there is no full harmonisation at the European level, may national courts, by way of interpreting national private law standards of conduct, place a more far-reaching burden on the shoulders of the regulated insurer?¹⁴ The private law practitioner would probably exhort: of course it can, since private law is separate from regulatory requirements, and it is autonomous in nature, since it defines the horizontal legal relationship between private persons. More specifically, in the Netherlands, private law practitioners would point to the landmark 1957 Supreme Court decision in *Baris vs. Riezenkamp*. Ever since this case was decided, Dutch case law has consistently held that contract negotiations are governed by the principles of reasonableness and fairness. In *Baris*, the Supreme Court speaks of a "special legal relationship" that gives rise to "care" and "duties" and considers that the negotiating parties must allow their conduct to be partly determined by the legitimate interests of the other party.¹⁵ In subsequent case law, the pre-contractual duty of care has become a cornerstone for assessing the pre-contractual conduct of negotiating parties. Indeed, it follows from subsequent case law that the duty may lead to a pre-contractual duty of disclosure on the part of the party that has better information than its counterpart.

From the perspective of European law, however, the role of 'reasonableness and fairness' as an autonomous source of information duties is far from self-evident. Consequently, in *Nationale Nederlanden* (2015), the ECJ was asked to consider the relationship between Article 31(1) of the Third Life Assurance Directive 92/96/EEC and the Dutch practice of using open-textured and context-dependent information duties in private law arising from precontractual reasonableness and fairness. The CJEU had to balance the wording and purpose of the Third Life Assurance Directive against the open-textured private law framework at the national level.

It did so by ruling as follows:

34 Consequently, the answer to the first question is that Article 31(3) of the third life assurance directive must be interpreted as not precluding an insurance company, on the basis of general principles of domestic law such as the 'open and/or unwritten rules' at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive, provided that the information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment and that it ensures a sufficient level of legal certainty, which it is for the referring court to ascertain.

This, I would argue, is a well-balanced outcome. In essence, the ECJ allows national courts to apply autonomous private law standards and to derive from these rules certain information obligations (in addition to those set out in the Directive), even if they go beyond the obligations arising from written, specific public law rules of market regulation. However, national courts may only do so under the condition that the concrete obligation arising from the unwritten rule is clear, precise and necessary for a proper understanding by the policyholder of the essential elements of the commitment and ensures sufficient legal certainty. So, the requirement that the additional information required by national law or court practice must be "clear, accurate and necessary" serves to protect the interest of *the insurance company*:

¹⁴ The MiFID II Directive (Directive 2014/65/EU) may be a case in point.

¹⁵ Hoge Raad 15 november 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*).

it cannot be required to provide additional information if the requirement does not provide information that is clear, accurate and necessary to improve consumers' transactional decisions.

However, the flipside of this argument is that it can also be said that the average consumer in turn needs this "clear, accurate and necessary" information and should be allowed to seek a fitting remedy in cases where the insurance company is not in compliance with this duty. This is exactly what had been happening in the Netherlands. By using the open standards of the 1957 *Baris vs. Riezenkamp* ruling in conjunction with the requirement set forth by article 2 (2) of the 1992 Civil Code ("Creditor and debtor are obliged to behave towards each other in accordance with the requirements of reasonableness and fairness."), Dutch lower courts increasingly considered the regulatory information duties stemming from the 1998 Regulation regarding the provision of information to policyholders (RIAV 1998) to be insufficient. They considered that reasonableness and fairness put additional duties on the shoulders of insurance companies, in order to enable consumers to make well informed choices. In the 2022 *Woekerpolis / Nationale Nederlanden* ruling, the Supreme Court effectively gave its 'seal of approval' to this trend.¹⁶

2. The 2022 Supreme Court decision

In 2022, the Dutch Supreme Court ruled in the test case between Vereniging Woekerpolis (Consumer Association against Usury Policies) and the insurance company Nationale Nederland. The case concerned the application of the ECJ ruling in the *Van Leeuwen* case. The question before the Court was essentially whether Dutch law was in conformity with the *Van Leeuwen* judgment: could the private law requirements of reasonableness and fairness (Article 2 of Book 6 of the Civil Code) be used to supplement the statutory requirements on pre-contractual information duties set out in the RIAV 1998?

The Supreme Court basically held the following: it is for the Dutch courts to determine whether the obligations to inform the other party, which the insurer has under civil law standards when entering into, concluding or performing an investment insurance contract, satisfy the requirements of *Van Leeuwen*. This evaluation consists of three distinct steps.

First, it must be determined whether the insurer has any civil law obligations to provide additional information beyond the information already required by the RIAV 1998, and if so, which ones.

Second, it must be assessed whether those obligations (i) relate to information that is clear and precise, (ii) are necessary for a proper understanding of the essential elements of the investment insurance offered or provided, and (iii) provide sufficient legal certainty.

The third requirement is met if those obligations enable the insurer to determine with a reasonable degree of predictability what additional information it must provide and what the policyholder can expect to receive. In this regard, it should be noted that it is for the insurer to determine the nature and characteristics of the insurance products it offers, and therefore it should in principle be able to determine which characteristics of those products justify the provision of additional information to the policyholder. If the obligation does not meet the three requirements, the court may not impose the obligation.

If it does meet the requirements, the policyholder may seek redress in court.

This follows from Dutch civil (procedural) law, the RIAV 1998 and the interpretation of the Life Assurance Directive by the ECJ. It is also in line with the intention of the Dutch legislator, who, in enacting rules relating to the implementation of Art. 31 Third Life Assurance Directive in the RIAV 1994 and the RIAV 1998, stated that the application of these provisions "is governed by civil law, whereby, for example, the requirements of reasonableness and fairness (Article 2 of Book 6 of the Civil Code) also apply".¹⁷

The policyholder is therefore entitled to this legal protection, with reference to the requirements of reasonableness and fairness, even if the insurer has faithfully complied with the information obligations set out in Art. 31 (3).

¹⁶ Hoge Raad 11 February 2022, ECLI:NL:HR:2022:166 (*Woekerpolis.nl/NN*).

¹⁷ See *Staatscourant* (Official Gazette) 1994, no. 97, p. 19 and *Staatscourant* 1998, no. 134, p. 8.

III. How information duties in plain and intelligible language finally caught up

It seems that there are two ways in which the ULIP-backed mortgage loans that became dominant in the Netherlands in the 1990s and 2000s have been addressed by private law: On the one hand, courts emphasized the existence of pre-contractual information duties based on common principles of reasonableness and fairness between insurance companies and consumers. On the other hand, the fairness test of opaque standard contract terms according to the requirement of plain and intelligible language in consumer contracts was applied with increasing rigour.

As regards the first approach, the ECJ and the Dutch Supreme Court essentially resisted calls by the insurance industry to grant them the so-called regulatory compliance defense. Conversely, courts upheld the principle that private law standards may exceed the requirements stipulated by public law.¹⁸

As for the second path, since the beginning of the 2010s, the ECJ has begun to extend the scope of the requirement of plain and intelligible language in consumer contracts to the area of transparency of the economic mechanisms at work in financial products. This slowly led to a whole new paradigm of testing the overall comprehensibility of financial product terms.

With the benefit of hindsight, when insurers embarked on the ULIP adventure in the 1990s, they could have reviewed their small print more thoroughly. This would have made their general contract terms less opaque and given consumers a clearer insight into the breakdown of the allocation of the monthly instalments of their ULIP-backed mortgage loan.

Whether such an alternative scenario would have prevented the ‘usury policy scandal’ from unfolding remains an open question. If anything, decades of legislative efforts to achieve product transparency in the financial products sector should make us very humble about our ambitions to make the average consumer a better version of themselves. Admittedly, hordes of consumers would still not have bothered to understand the workings of their loans as long as they were able to pay their monthly installments. Consumers with a higher need for cognition, however, would have taken the opportunity to compare offers. So would financial experts, intermediaries, and specialized journalists. This would have at least created a chance for a better past for consumer welfare.

¹⁸ On the regulatory compliance defense in private law, see, e.g. VAN BOOM, Willem H.: “On the Intersection Between Tort Law and Regulatory Law – A Comparative Analysis” in: VAN BOOM, Willem H./LUKAS, Meinhard/KISSLING, Christa (eds.): *Tort and Regulatory Law*, Wenen-New York 2007, 436.

**Between insurance policy and investment contract –
How does the transparency paradigm (re)shape?
Christian Armbrüster (Freie Universität Berlin)**

I. Introduction

The European Court of Justice's (ECJ) recent judgments on insurance-based investment products (IBIPs) have shed light on the complexities surrounding these products, which often blur the lines between insurance policies and investment contracts. Despite the clarity provided by the ECJ in regard to unit and index-linked insurance policies, serious issues persist within the insurance regulatory framework, regarding the contractual and activity-related aspects of these products.

In addressing these concerns, the transparency paradigm plays an important role. In relation to IBIPs, it seems to be essential to ensure that retail investors are adequately informed and protected. Simultaneously, it is important to ensure that excessive transparency requirements do not cause significant difficulties for the user of the terms and do not lead to uncertainty in the contractual relationship.¹ This is because the more specific and thus more detailed a term is, the more incomprehensible it can be for the customer.² It may also be considered how such products can be regulated in a way that increasing the investor's protection does not block innovations or procedures in the financial sector.

This raises the question: How does the transparency paradigm (re)shape for products between insurance policy and investment contract?

In order to answer this question, a more nuanced understanding of the transparency paradigm is required in the first place. Subsequently, the developments at legislative and judicial level with regard to transparency requirements in the context of IBIPs shall be examined.

II. The transparency paradigm

The transparency paradigm refers to the basis of an essential mutual exchange of ideally clear and understandable information. Usually there exists a mutual lack of information between the insurer and the policyholder. Each party to the insurance contract has certain information at its disposal that is important to the other party, but which the other one does not have. Thus, there is a mutual asymmetry of information.

With regard to the features of the insurance product (as opposed to the factual risk and demand situation in the sphere of the insured person), this information asymmetry is usually in favour of the insurer in the sense that the latter knows better what the use of a specific insurance product for the respective customer will be. In order to correct this asymmetry the insurer needs to ensure an appropriate level of information of the consumer before and after the conclusion of the contract.

In the period before the contract is concluded the consumer (who, in contrast to entrepreneurs, is in the focus of EU law) needs to receive the prior information which is required in order to properly evaluate the offered financial service and make a well-informed choice.³ This leads to a duty of the insurer to inform the customer which is aimed at enabling the consumer to understand the risks, benefits and terms of the respective insurance products which are at stake. This leads to a correction of the information asymmetry, thus underlining the transparency paradigm. Still, transparency can fail due to lacking, incomplete, incorrect, incomprehensible or late information.

¹ Comp. ARMBRÜSTER, Christian: *Privatversicherungsrecht*, Tübingen 2019, mn. 610.

² Comp. ARMBRÜSTER, Christian: *Privatversicherungsrecht*, Tübingen 2019, mn. 607.

³ Directive 2002/65/EC, Off. Journal of the EC, L 271/16, 18, recital no. 21 regarding the conclusion of the contract using means of distance communications.

In order to ensure the exchange of information the EU has introduced various information as well as disclosure obligations in the insurance sector. The most relevant legal sources of those duties are the Solvency II Directive⁴, the Distance Marketing of Consumer Financial Services Directive⁵ and the Insurance Distribution Directive (IDD)⁶, which has replaced the Insurance Mediation Directive (IMD)⁷. Regarding the packaged retail and insurance-based investment products (PRIIPs) market, such disclosure and information obligations have so far been uncoordinated. However, they are crucial in order to make those products attractive and in particular to regain the trust of retail investors which was lost after the financial crisis in 2007/2008.⁸

III. Sustainability quality of insurance-based investment products

In order to assist retail investors to understand and compare the key features, risks, rewards and costs of different insurance-based investment products (IBIPs)⁹, the PRIIPs-Regulation,¹⁰ which became effective in 2017, was issued.¹¹

1. Insurance-based investment products

According to Art. 4 para. 2 of the PRIIPs-Regulation, IBIPs are insurance products which offer a maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations.¹² This includes both with-profit and unit-linked life and annuity insurance policies, as well as death benefit insurance and capitalization products with profit participation.¹³ Thereby IBIPs are embraced by the term of *financial products* according to Art. 2 para. 12 lit. (c) of the Disclosure-Regulation (Disclosure-Reg)¹⁴.

IBIPs represent over 70 % of retail investments and are often the first, sometimes the sole retail investment products which most customers buy.¹⁵ These customers often are small investors with small sums of money to invest. They don't have sufficient power or funds to manage their portfolio and risks

⁴ Directive 2009/138/EC, Off. Journal of the EU, L 335/1, primarily its Art. 183 to 186.

⁵ Directive 2002/65/EC, Off. Journal of the EC, L 271/16.

⁶ Directive (EU) 2016/97, Off. Journal of the EU, L 26/19.

⁷ Directive 2002/92/EC, Off. Journal of the EC, L 9/3.

⁸ Comp. POUFINAS, Thomas/ZYGIOTIS, Dimitrios: *How transparency affects investment-linked insurance products. International Advances in Economic Research* (2017) 405-418, Abstract. <https://link.springer.com/article/10.1007/s11294-017-9661-9> [last access: 17.05.2024].; PRIIPs-Regulation (EU) No 1286/2014, Off. Journal of the EU, L 352/1, recital no. 1 and 2.

⁹ Respectively more generally: products that include retail and insurance-based investment: PRIIPs.

¹⁰ Regulation (EU) No 1286/2014, Off. Journal of the EU, L 352/1.

¹¹ Regulation (EU) No 1286/2012, Off. Journal of the EU, L 352/1, recital no. 1 ff.

¹² In detail on this ARMBRÜSTER, Christian, in: Theo LANGHEID/Manfred WANDT (eds.): *Münchener Kommentar zum Versicherungsvertragsgesetz*, München 2022, § 7b mn. 4 ff.

¹³ CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn. 6; PRÄVE, Peter: "Die Informationspflichten der Versicherer zur Nachhaltigkeit", in: GESAMTVERBAND DER DEUTSCHEN VERSICHERUNGSWIRTSCHAFT (ed.): *Verlässlichkeit, Verantwortung, Vertrauen: Festschrift für Jörg Freiherr Frank von Fürstenwerth*, Karlsruhe 2020, 245 f.; comp. EIOPA: Packaged retail and insurance-based investment products (PRIIPs). https://www.eiopa.europa.eu/browse/regulation-and-policy/packaged-retail-and-insurance-based-investment-products-priips_en [last access: 07.05.2024].

¹⁴ Regulation on sustainability-related disclosures in the financial services sector, (EU) 2019/2088, Off. Journal of the EU, L 317/1.

¹⁵ MARRIATTE-WOOD, Valérie: Ensuring insurance consumers are adequately protected as retail investors (2023), https://www.eiopa.europa.eu/ensuring-insurance-consumers-are-adequately-protected-retail-investors-2023-06-30_en [last access: 08.05.2024].

adequately.¹⁶ IBIPs offer guaranteed returns which limit the exposure to market fluctuations. That is why they are interested in a combination of investment and insurance protection.¹⁷

However, compared to plain investments, IBIPs are more complex and difficult to understand. In addition, the market is large and diverse. For example, retail investors have to determine overlapping risks and the correct exposure.¹⁸ This causes an even bigger information asymmetry. In order to ensure that retail investors, when purchasing IBIPs, are treated fairly and that they are in a position to take their decisions well-informed, transparency and disclosure by rendering comprehensive information is required.

The PRIIPs Regulation is the first dealing with pre-contractual information in the form of so-called key information documents (KIDs).¹⁹ These documents have to be provided by those entrepreneurs who produce or distribute the financial products to consumers. Aiming to improve transparency in the investment market, KIDs provide consumer-friendly information about the key features of investment products, including possible profits for the investors as well as the risks and costs involved. KIDs also allow investors to compare PRIIPs across the EU, whether offered by banking, insurance or security firms.²⁰

In addition to the PRIIPs Regulation, the IDD was issued in 2016, which regulates extensive information requirements for IBIPs in its Art. 29 in order to ensure consistent investor protection and avoid regulatory arbitrage.²¹ Robo-advice plays a major role in this area, as it is capable to improve transparency by enabling users to interact directly with financial platforms and receive personalized advice for both investments and insurance. It also offers an affordable alternative to people of all demographics who do not have access to financial advisors, ensuring long-term financial planning²² and appealing to tech-affine generations in particular.²³ The difference to the PRIIPs Regulation is that the information within the meaning of Art. 29 of the IDD does not have to be provided before the customer makes his contractual declaration. According to Art. 29 para. 1 s. 1 of the IDD it is sufficient if the customer's information is provided in good time, prior to the conclusion of a contract. However, in regard to Art. 20 para. 1 s. 1 and para. 4 of the IDD, it seems reasonable to assume that the information is no longer received in good time after the customer has made the contractual declaration.²⁴

¹⁶ MARRIATTE-WOOD, Valérie: Ensuring insurance consumers are adequately protected as retail investors (2023), https://www.eiopa.europa.eu/ensuring-insurance-consumers-are-adequately-protected-retail-investors-2023-06-30_en [last access: 08.05.2024].

¹⁷ MARRIATTE-WOOD, Valérie: Ensuring insurance consumers are adequately protected as retail investors (2023), https://www.eiopa.europa.eu/ensuring-insurance-consumers-are-adequately-protected-retail-investors-2023-06-30_en [last access: 08.05.2024].

¹⁸ HULDT, Mikael: The importance of transparency in private markets. Insurance Investor (2020), <https://insuranceinvestor.com/articles/the-importance-of-transparency-in-private-markets/> [last access: 17.05.2024].

¹⁹ EIOPA: Packaged retail and insurance-based investment products (PRIIPs). https://www.eiopa.europa.eu/browse/regulation-and-policy/packaged-retail-and-insurance-based-investment-products-priips_en [last access: 07.05.2024].

²⁰ EIOPA: Packaged retail and insurance-based investment products (PRIIPs). https://www.eiopa.europa.eu/browse/regulation-and-policy/packaged-retail-and-insurance-based-investment-products-priips_en [last access: 07.05.2024].

²¹ KÖHNE, Thomas/BRÖMMELMEYER, Christoph: "The New Insurance Distribution Regulation: in the EU", in: *The Geneva Papers on Risk and Insurance* (2018) 704, 730.

²² FORCUCCI, John: Robo-advisors find their niche. <https://insurancenewsnet.com/innarticle/robo-advisors-find-their-niche> [last access: 07.11.2024].

²³ LIFE INSURANCE INTERNATIONAL: Robo-Advice in Insurance: Macroeconomic Trends. <https://www.lifeinsuranceinternational.com/comment/robo-advice-insurance-macroeconomic-trends/?cf-view> [last access: 07.11.2024].

²⁴ RUDY, Mathis, in: PRÖLSS, Jürgen/MARTIN, Anton (eds.): *Versicherungsvertragsgesetz*, München 2024, § 7b mn. 4.

2. Disclosures on IBIPs' sustainability quality

Following the Disclosure-Reg as well as the Commission Delegated Regulation (Del-Reg)²⁵ insurers have to provide pre-contractual information about the sustainability quality of IBIPs. For end investors it can be essential to know to which extent the invested money flows into "sustainable" economic activities.²⁶ For a better overview the possible content of the sustainability information, for instance, is divided into quantitative and qualitative indicators.²⁷

Furthermore, according to Art. 4 para. 5 of the Disclosure-Reg, financial market participants respectively financial advisers have to publish information about their policies on the integration of sustainability risks in their investment decision-making process respectively insurance advice. In accordance to Art. 11 Disclosure-Reg, the insurers also have to inform the policyholders in periodic reports about to what extent the sustainability goals have been achieved with each product.

3. Legal consequences

The aforementioned pre-contractual sustainability information can be considered as terms in consumer contracts in the sense of Art. 3 Council Directive 93/13/EEC on unfair terms in consumer contracts.²⁸ If they are controllable, they may be qualified as unfair terms in consumer contracts because – besides capital growth and financial investment – the policyholder could consider the sustainability aspects as a purpose of the contract.²⁹

If the insurer systematically fails to comply with its obligations to use the Del-Reg's templates³⁰ or fails to do so correctly, for example by diverging from them, the competent authorities may intervene within the meaning of Art. 14 of the Regulation (EU) 2019/2088^{31, 32}.

Additionally, in order to ensure a certain degree of transparency of IBIPs, the Delegated Regulation (EU) 2016/1904 provides the EIOPA respectively competent authorities with (temporary) product intervention powers. According to Art. 1 para. 2 and Art. 2 para. 2, this applies in the event that there are significant investor protection concerns or that there is a threat to the orderly functioning, integrity or stability of the financial market. The relevant factors and criteria include the degree of transparency of the IBIP, for example regarding hidden costs and charges or nature and transparency of risks, each para. 2 lit. (d).

All these instruments, taken together, grant a certain degree of transparency for the policyholder regarding a chosen product's sustainability and thus a certain possibility of monitoring and also control of the insurer. In this aspect, the transparency paradigm shapes in favour of the policyholder.

²⁵ Commission Delegated Regulation (EU) 2022/1288, Off. Journal of the EU, L 196/1.

²⁶ Comp. Regulation (EU) 2022/1288, Off. Journal of the EU, L 196/5, recital no. 23; ARMBRÜSTER, Christian, in: LANGHEID, Theo/WANDT, Manfred (eds.): *Münchener Kommentar zum Versicherungsvertragsgesetz*, München 2022, § 7a mn. 1; CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn. 2.

²⁷ Regulation (EU) 2022/1288, Off. Journal of the EU, L 196/5, recital no. 25; comp. CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn. 10.

²⁸ CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn. 81.

²⁹ CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn. 84 f.

³⁰ Commission Delegated Regulation (EU) 2022/1288, Off. Journal of the EU, L 196/1, Annex II and III.

³¹ Regulation on sustainability-related disclosures in the financial services sector, (EU) 2019/2088, Off. Journal of the EU, L 317/1.

³² CLAUSSEN, Victor/HOFFMANN, Markus: "Nachhaltigkeitsinformationen als Gegenstand der versicherungsvertraglichen AGB-Kontrolle", in: *recht und schaden* (2024) 591, mn.74.

IV. Information in standard group insurance contracts

1. General considerations

In addition to regulations and directives at this regulatory level, the European Court of Justice is also ensuring higher transparency and protection for consumers and retail investors, thus enhancing transparency additionally in favour of the policyholder. Over the last years, the ECJ has made several judgments regarding the information of policyholder and consumer.

Fundamentally, clauses should be drafted in plain, intelligible language in accordance with Art. 5 of Directive 93/13/EEC on unfair terms in consumer contracts and recital 20 of this Directive.³³ Furthermore, this transparency requirement of contractual terms should not be reduced to their plain comprehensibility in formal and grammatical aspects, but must be understood in a broad sense. Consequently, it is necessary that a reasonably well-informed, reasonably observant and circumspect average consumer is able to understand the concrete functioning of such a term and thus evaluate the potentially decisive economic consequences of that term for his financial obligations.³⁴

Therefore, the consumer has to be informed before concluding such a contract. Disposing about the contractual terms before that is fundamentally important to him, as he decides on the basis of this information whether he wants to be bound by the previously drawn up terms.³⁵ However, it is irrelevant whether the terms relate to the main subject matter of the contract. The consumer must be able to take note of all terms before concluding a contract, which is highlighted by the 20th recital of Directive 93/13.³⁶ With regard to IBIPs, the ECJ has issued multiple judgements on standard group insurance contracts³⁷ in the last decade, producing a new case law.

2. Original policyholder as insurance intermediary

Until this recent case law was produced, in the case of an actual group insurance contract, in which the 'group leader' is the contracting party of the contract with the insurer and therefore the policyholder and the acceding parties are insured persons, the policyholder generally was not an intermediary.³⁸

According to the recent approach taken by the ECJ, if the unit-linked group contract is designed in such a way that the customer has to pay the premium to the 'leader' of that group insurance contract, that 'group leader' requires a permission to intermediate insurance for policyholders. According to that judgment, the term insurance intermediary also comprises a legal person offering voluntary membership of a group insurance contract which it has previously arranged with an insurer, for which it receives a fee from its customers and which allows the customers to claim insurance benefits.³⁹ As explanation it stated the comparability of the activity of the 'group leader' with those of the insurance intermediary, supported

³³ Judgment of the Court of 30.04.2014, C-26/13, ECLI:EU:C:2014:282, para. 69; Judgment of the Court of 03.03.2020, C-125/18, ECLI:EU:C:2020:138, para. 46; Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 25.

³⁴ Judgment of the Court of 03.03.2020, C-125/18, ECLI:EU:C:2020:138, para. 50 f.; Judgment of the Court of 10.06.2021, C-609/19, ECLI:EU:C:2021:469, para. 42 f.; Judgment of the Court of 10.06.2021, C-776/19 to 782/19, ECLI:EU:C:2021:470, para. 63 f.; Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 26.

³⁵ Judgment of the Court of 21.03.2023, C-92/11, ECLI:EU:C:2013:180, para. 44; Judgment of the Court of 21.12.2016, C-154/15, C-307/15 and C-308/15, ECLI:EU:C:2016:980, para. 50; Judgment of the Court of 12.01.2023, C-395/21, ECLI:EU:C:2023:14, para. 39; Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 27.

³⁶ Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 30 f., 34.

³⁷ In the following: group insurance contracts.

³⁸ ARMBRÜSTER, Christian: Annotation of the Judgement of the Court of 29.9.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 953.

³⁹ Judgment of the Court of 29.09.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 950 w. ann. ARMBRÜSTER, Christian, mn. 59.

by wording, context and objectives of the two Directives on insurance mediation and distribution (IMD/IDD).⁴⁰

In another judgment, the Court ruled equally with regard to constellations in which the insured persons in the group contract have to pay the premium to the insurer, which leads to the insurance relation between the insurer and the consumer becoming an insurance contract within the meaning of Art. 36 para. 1 of Directive 2002/83⁴¹. As a result, by joining the group contract, the consumer obtains the position of a policyholder. This leads to the original policyholder acting as an insurance intermediary within the meaning of Art. 2 para. 5 of the IMD, which means it has to provide the consumer with the required information as provided in Art. 36 para. 1 of Directive 2002/83.⁴²

These judgments make clear that in the eyes of the ECJ the status as an intermediary can align with that of a policyholder even though, generally speaking, the policyholder acts fundamentally differently to an intermediary.⁴³ The consequences of this case law, especially of the second ECJ judgment, for German law are significant, as the previous practice and procedures were clearly different.⁴⁴ Nevertheless, the recent ECJ case law offers the consumer who obtains insurance cover through a group insurance contract the same level of protection, in particular with regard to pre-contractual information, as when obtaining insurance cover by other means of distribution.⁴⁵

3. Additional information about IBIPs

Some ECJ judgments also refer to certain information about IBIPs. As stated above, with regard to the requirement for transparent contract terms, it is essential for the consumer to receive the necessary information before concluding the contract. This also applies to constellations in which the consumer joins a group insurance contract, for example when concluding a loan agreement. But when concluding linked contracts, the consumer cannot be required to have the same vigilance with regard to the risks covered by the insurance contract as when concluding this contract and the loan agreement separately. Therefore, the consumer also needs to be informed about the relevant special aspects, such as the mechanism according to which the payment obligations towards the lender are transferred in the event of the borrower's inability to work.⁴⁶

In the case of a group insurance contract, regarding investment the insurance product contains an investment component that cannot be separated from this product. Information about the main aspects of the assets underlying this group contract must be included in the pre-contractual information. For example, the economic and legal nature of the assets, including the general conditions that apply to their

⁴⁰ Judgment of the Court of 29.09.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 950 w. ann. ARMBRÜSTER, Christian, mn. 40 ff.; ARMBRÜSTER, Christian: Annotation of the Judgement of the Court of 29.9.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 953. On the applicability of the IMD to financial advice relating to the placement of capital in the context of insurance mediation relating to the conclusion of a capital life assurance contract, see Judgment of the Court of 31.05.2018, C-542/16, ECLI:EU:C:2018:369, para. 58.

⁴¹ Directive 2002/83/EC concerning life assurance, Off. Journal of the EC, L 345/1.

⁴² Judgment of the Court of 24.2.2023, C-143/20, C-213/20, ECLI:EU:C:2022:118, in: *Neue Juristische Wochenschrift* (2022) 1513 w. ann. ARMBRÜSTER, Christian, Rn. 80 ff., 87.

⁴³ ARMBRÜSTER, Christian: Annotation of the Judgement of the Court of 29.9.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 953.

⁴⁴ ARMBRÜSTER, Christian: Annotation of the Judgement of the Court of 29.9.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 953 f.; more detailed on effects and consequences TEICHLER, Maximilian: "Der EuGH und die Gruppenversicherung. Anmerkung zum Urteil des EuGH vom 29.9.2022 (c-633/20) zur Vermittlereigenschaft der Gruppenspitze", in: *recht und schaden* (2023) 529, mn. 28 ff.

⁴⁵ Judgment of the Court of 29.09.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 950 w. ann. ARMBRÜSTER, Christian, mn. 52; ARMBRÜSTER, Christian: Annotation of the Judgement of the Court of 29.9.2022, C-633/20, ECLI:EU:C:2022:733, in: *Europäische Zeitschrift für Wirtschaftsrecht* (2022) 953.

⁴⁶ Judgment of the Court of 23.04.2015, C-96/14, ECLI:EU:C:2015:262, para. 41 and 48; Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 28.

rate of return, and the associated structural risks must be disclosed, for example, the risk of a loss in value of the units of the investment fund linked to the contract. This information must be described clearly, precisely and comprehensibly. However, it does not necessarily have to contain a detailed and comprehensive description of the nature and extent of all investment risks associated with the assess underlying the group contract. Nor is it necessary to provide the same information that the issuer of these financial instruments must disclose to its clients as a provider of investment services.⁴⁷

4. Legal consequences of lack of information

Some of the most recent judgments of the ECJ concerning unit-linked group insurance contracts referred to legal consequences in the case of insufficient, incomprehensible or no information of the policyholder. Firstly, if it is not possible for the consumer to take note of the terms before concluding the contract, this lack of transparency can lead to the term being unfair in the sense of Art. 3 para. 1 of the Directive on unfair terms in consumer contracts.⁴⁸ Is such a term, of which the consumer could not gain knowledge prior to the conclusion of the contract, categorized as unfair, it is inapplicable and therefore not binding on the consumer, complying with Art. 6 para. 1 of the Directive on unfair terms in consumer contracts.⁴⁹ Furthermore, terms that allow the lender to unilaterally alter the interest rate or apply a 'risk charge' are generally excluded from the scope of application of Art. 4 para. 2 of Directive 93/13, as they concern the primary performance obligation.⁵⁰

If the original policyholder is the one who has not informed the consumer about the terms, this may result in a liability on the part of the policyholder towards the insurer.⁵¹

The ECJ also ruled that insufficient, incomprehensible or no information of the policyholder can be an unfair business-to-consumer commercial practice in terms of Art. 3 para. 1 of Directive 2005/29/EC⁵² on unfair commercial practices.⁵³ If the proposal is made by an entrepreneur as policyholder, the consumer acceding to that group contract needs to be enabled to understand the nature and structure of the assurance product offered as well as the risks associated with it.

If the consumer is not properly instructed because the unit-linked contract was drafted in a misleading manner this may constitute an "unfair commercial practice"⁵⁴ leading to a liability of the insurer.⁵⁵ This case law also ensures a certain transparency of standard group insurance contracts and strengthens the consumer's position, especially if the insurer is facing the risk of liability or cancellation of the contract by the policyholder. This confirms the tendency in ECJ case law that the transparency paradigm is additionally strengthened in favour of the policyholder.

V. Conclusion

There have been recent developments on the level of EU legislation as well as of ECJ case law which are relevant for (re)shaping the transparency paradigm. In particular, new disclosure obligations regarding the

⁴⁷ Judgment of the Court of 24.02.2022, C-143/20 and C-213/20, ECLI:EU:C:2022:118, para. 97, 102-105.

⁴⁸ Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 41, 47; comp. Judgment of the Court of 21.03.2024, C-714/22, ECLI:EU:C:2024:263, para. 76, 78; Judgment of the Court of 10.06.2021, C-609/19, ECLI:EU:C:2021:469, para. 62.

⁴⁹ Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 57; comp. Judgment of the Court of 21.04.2016, C-377/14, ECLI:EU:C:2016:283, para. 101.

⁵⁰ Judgment of the Court of 26.02.2015, C-143/13, ECLI:EU:C:2015:127, para. 78.

⁵¹ Judgment of the Court of 20.04.2023, C-263/22, ECLI:EU:C:2023:311, para. 55.

⁵² Unfair Commercial Practices Directive, Off. Journal of the EU, L 149/22.

⁵³ Judgment of the Court of 2.2.2023, C-208/21, ECLI:EU:C:2023:64, in: *NJW Rechtsprechungs-Report Zivilrecht* (2023) 557, para. 66.

⁵⁴ Within the meaning of Art. 5 of Directive 2005/29/EC.

⁵⁵ Judgment of the Court of 2.2.2023, C-208/21, ECLI:EU:C:2023:64, in: *NJW Rechtsprechungs-Report Zivilrecht* (2023) 557, para. 70.

sustainability of IBIPs as well as the impacts of the recent ECJ case law on group insurance contracts are gradually levelling out the information asymmetry regarding the position of the policyholder or the insured respectively. Thereby the transparency paradigm is being (re)shaped or, more accurately, strengthened. In consideration of the complexity of IBIPs and the fact that consumers acting as retail investors are usually inexperienced, this is an important development towards increasing consumer protection by enabling individuals to take an informed decision on the respective products.

The boundaries of the insurance contract: group insurance through the lens of the ECJ

Margarida Lima Rego (Universidade NOVA de Lisboa)

I. Introduction

No legal or doctrinal definition of an insurance contract has gained universal acclaim. Both academics and practitioners acknowledge the difficulty of accurately defining ‘insurance contract’. The Principles of European Insurance Contract Law (PEICL) define ‘insurance contract’ as “a contract under which one party, the insurer, promises another party, the policyholder, cover against a specified risk in exchange for a premium” (Article 1:201). This definition is as good as any. The devil, however, is in the details. Determining what qualifies as insurance versus something else often leads to debates about the boundaries of an insurance contract. In the 18th and 19th centuries the discussion on the boundaries of the insurance contract revolved around the distinction between insurance and gambling.¹ In the 20th century it often resurfaced, for instance in the context of the proliferation of different types of guarantees and risk management instruments.² In the 21st century the digital transition and new P2P insurance business models brought it back to the limelight.³ Some gave up putting forward any definition whatsoever. The late Malcolm Clarke disputed that one was even needed, famously remarking at the very beginning of his textbook that “[t]he English courts know an elephant when they see one; so too a contract of insurance”⁴.

Whether or not reaching a workable definition of insurance is a viable ambition is not what this paper is about. This paper asks where we should draw the line that separates what is from what is not an insurance contract for the purpose of applying EU Law and, more specifically, Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (the ‘Insurance Distribution Directive’). This paper looks into some recent case law from the Court of Justice of the European Union on group insurance, including insurance-based investment products, which has revealed some hidden differences – some possibly still in hiding – between Member States in interpreting and applying EU Insurance Law and Regulation.

In Section 2, I shall briefly examine such case law. In Section 3, I will contrast how the rulings were received in different European jurisdictions, with a particular focus on Italy and Portugal, Germany and the Netherlands. In Section 4, I will dissect the seminal distinction between genuine group insurance contracts and other collective insurance schemes. In Section 5, I will try to look into the distinction as seen through the lens of the recent ECJ rulings, so as to discern whether the earlier hidden differences between Member States in interpreting and applying EU Insurance Law and Regulation have now fully disappeared. My conclusion will be summarised in Section 6.

¹ See CASAREGIS, Josephi Laurentii Mariae: *Discursus legales de commercio*, Florence 1719, 45-47, who devoted one chapter of his treaty to the distinction between insurance (*contractum assecurationis*) and gambling (*contractum sponionis*) and also distinguished between insurance proper (*propria assecuratio*) and insurance in an improper sense, which was actually a gambling contract under the guise of insurance (*impropria assecuratio*).

² For instance, BOETIUS, Jan: *Der Garantievertrag*, Munich 1966, 47-57, *maxime* pp. 49 e 51-54.

³ See LIMA REGO, Margarida/CAMPOS CARVALHO, Joana: “Insurance in today’s sharing economy: new challenges ahead or a return to the origins of insurance?” in: MARANO, Pierpaolo/NOUSSIA, Kiryaki (eds.): *InsurTech: a legal and regulatory view*, AIDA Europe Research Series on Insurance Law and Regulation 1, Cham 2020, 27-47.

⁴ CLARKE, Malcolm A./BURLING, Julian M./PURVES, Robert L.: *The Law of Insurance Contracts*, 6th ed., London 2009, at p. 1-1. See also CLARKE, Malcolm A.: “The meaning of insurance: relativity in recent cases” in: *International Journal of Insurance Law* 7 (2000) 3-15.

II. Recent rulings by the ECJ

Two recent cases on this subject-matter concerned the reimbursement of assurance premiums paid under unit-linked group life assurance contracts.⁵ The ECJ examined Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (the ‘Insurance Mediation Directive’, or ‘IMD’), and also Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (the ‘Insurance Distribution Directive’, or ‘IDD’), which repealed and replaced it. The court also examined Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (the ‘Life Assurance Directive’), which has been repealed and replaced by 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 (the ‘Solvency II Directive’), and to Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the ‘Unfair Commercial Practices Directive’).

According to the ECJ,⁶ if various types or persons or institutions can distribute insurance products; if the principle of equal treatment between operators as well as the customer protection imperative both require that all those who render insurance mediation services to third parties for remuneration be covered by the IMD (Recitals 9 and 11); if such remuneration “may be pecuniary or take some other form of agreed economic benefit tied to performance” (Recital 11); if, for the purpose of the IMD, “‘insurance mediation’ means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim” (Article 2(3) of the IMD) and “‘insurance intermediary’ means any natural or legal person who, for remuneration, takes up or pursues insurance mediation” (Article 2(5) of the IMD); *it then follows that*, by proposing to a consumer that it joins a unit-linked group life assurance

⁵ Joined Cases C-143/20 and C-213/20, respectively *A v O* and *G.W. and E..S. v A. Towarzystwo Ubezpieczeń Życie S.A.*, originated in Poland. The Polish District Court for Warszawa-Wola, in Warsaw, requested a preliminary ruling under Article 267 TFEU which gave rise to the European Court of Justice ruling of 24 February 2022 (ECLI:EU:C:2022:118). Group insurance had also been touched upon in an earlier case, C-542/16, *Länsförsäkringar Sak Försäkringsaktiebolag v Dödsboet efter Ingvar Mattsson, Jan-Erik Strobel and Others v Länsförsäkringar Sak Försäkringsaktiebolag*, originated in Sweden. The Swedish Högsta domstolen requested a preliminary ruling under Article 267 TFEU which gave rise to the European Court of Justice ruling of 31 May 2018 (ECLI:EU:C:2018:369). According to that ruling, “the concept of ‘insurance mediation’ includes work preparatory to the conclusion of an insurance contract, even in the absence of any intention on the part of the insurance intermediary concerned to conclude a genuine insurance contract”. Also: “Financial advice relating to the placement of capital in the context of insurance mediation relating to the conclusion of a capital life assurance contract falls within the scope [of the IMD]”. See also Case C-349/96 *Card Protection Plan Ltd (CPP) v Commissioners of Customs & Excise*, originated in the United Kingdom. The House of Lords requested a preliminary ruling under then Article 177 of the EC Treaty which gave rise to the European Court of Justice ruling of 25 February 1999 (ECLI:EU:C:1999:93). In this case, a certain financial institution “offered credit card holders, against payment of a certain sum, a protection plan against financial loss and inconvenience resulting from the loss or theft of their cards and certain other objects, such as car keys, passports or insurance documents”. The ECJ held that “Article 13B(a) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment is to be interpreted as meaning that a taxable person, not being an insurer, who, in the context of a block policy of which he is the holder, procures for his customers, who are the insured, insurance cover from an insurer who assumes the risk covered, performs an insurance transaction within the meaning of that provision”.

⁶ Joined Cases C-143/20 and C-213/20 (n. 5 above).

contract, the corporate policyholder of that group contract carried out, for remuneration, an insurance mediation activity within the meaning of the IMD.

In that judgment,⁷ the ECJ also concluded that the declaration by which a consumer joins, or accedes to a unit-linked group contract concluded between an insurer and a corporate policyholder gives rise to an individual assurance contract between that insurer and that consumer. This conclusion leads the ECJ to conclude that this consumer should be recognized the same information rights as any other insurance policyholder, namely, in this context, those set forth in Article 36(1) of the Life Assurance Directive. Finally, the ECJ concluded that failure to communicate such information to a consumer acceding to a group unit-linked life assurance contract may constitute a misleading omission within the meaning of Article 7 of the Unfair Commercial Practices Directive.

Soon after, the ECJ had a chance to double down on this conclusion, also in the context of a unit-linked group life assurance contract.⁸ The ECJ ruled that “the drafting by an assurance undertaking of a standard group life assurance contract linked to an investment fund which does not enable a consumer who is acceding to that group contract on the basis of a proposal from a second undertaking, the policyholder, to understand the nature and structure of the assurance product offered and the risks associated with it may constitute an ‘unfair commercial practice’ within the meaning of that provision” [Article 3(1) of the Unfair Commercial Practices Directive], and that “that assurance undertaking must be held liable for that unfair commercial practice”.

In a third case, once again in the context of group life insurance but this time not involving a unit-linked product, the ECJ was asked to rule on some of the same provisions, also in connection with the Unfair Commercial Practices Directive.⁹ The case concerned the refusal by a Portuguese insurer to make loan repayments to a bank further to the permanent invalidity of its customer, as an insured person in the group policy that had been entered to by the bank in its capacity as both corporate policyholder and beneficiary, on account of the alleged nullity or inapplicability of the insurance contract between them.

The ECJ held that “a consumer must always be afforded the opportunity, before the conclusion of a contract, to become acquainted with all the terms that the latter contract contains”, and that “where a term of an insurance contract relating to the exclusion or limitation of cover against the insured risk, with which the consumer concerned could not have become acquainted prior to the conclusion of that contract, is found to be unfair by the national court, that court is required to exclude the application of that term in order that it may not produce binding effects with regard to that consumer”. In other words, it is for the insurer to communicate the contractual information to the corporate policyholder, formulating it in a clear, accurate and intelligible manner for consumers, with a view to its subsequent transmission to consumers during the procedure for accession to the group contract. The corporate policyholder, acting as an insurance intermediary, must communicate that contractual information to any consumer before the consumer adheres to that contract, together with any other details which may prove necessary. These details must be modulated according to the complexity of the contract and formulated clearly and accurately and in a manner intelligible to the consumer. Otherwise, the insurer will be barred from availing itself of such terms as against this consumer.

⁷ Joined Cases C-143/20 and C-213/20 (n. 5 above).

⁸ Case C-208/21, *K.D. v Towarzystwo Ubezpieczeń Ż S.A.*, also originated in Poland. Once again, the Polish District Court for Warszawa-Wola, in Warsaw, requested a preliminary ruling under Article 267 TFEU which gave rise to the European Court of Justice ruling of 2 February 2023 (ECLI:EU:C:2023:64).

⁹ Case C-263/22, *Ocidental – Companhia Portuguesa de Seguros de Vida, SA v LP*, originated in Portugal. The Portuguese Supreme Court of Justice (*Supremo Tribunal de Justiça*) requested a preliminary ruling under Article 267 TFEU which gave rise to the European Court of Justice ruling of 20 April 2023 (ECLI:EU:C:2023:311).

Finally, another recent case reached similar conclusions, albeit in the context of non-life insurance.¹⁰ The case directly concerned the interpretation of Article 2(3) and (5) of the IMD and of Article 2(1)(1), (3) and (8) of the IDD. TC Medical Air Ambulance Agency GmbH, the defendant in the main proceedings, provided its customers with the opportunity to receive the benefits of medical air ambulance services, if and when such needs were to arise. For that purpose, it entered into a group contract with an insurer, setting up the terms of coverage of the group members in the event of sickness or accidents abroad as well as for repatriation costs incurred abroad and in national territory. It then entrusted different advertising companies with the task of offering consumers, by way of door-to-door sales, membership of this collective insurance scheme in return for a fee. The defendant also contracted a company which, using its medical staff and an aircraft, provides transport and repatriation services in the event of sickness or accident abroad, and organizes a call centre service. Neither the defendant in the main proceedings nor the advertising or other service providers were authorized to carry out the activity of insurance mediation in Germany.

The German Federal Court of Justice (*Bundesgerichtshof*) asked the ECJ whether the concepts of ‘insurance intermediary’ and, therefore, also that of a ‘distributor of insurance products’ should be understood to encompass a legal person such as the defendant in the main proceedings, TC Medical Air Ambulance Agency GmbH. Given the timeline in the main proceedings, it should be noted that the question required examination in the light of both the IMD and the IDD.

The following Recitals of the IDD were directly quoted and relied upon by the ECJ:

(5) Various types of persons or institutions... can distribute insurance products. Equality of treatment between operators and customer protection requires that all those persons or institutions be covered by this Directive.

(6) Consumers should benefit from the same level of protection despite the differences between distribution channels. In order to guarantee that the same level of protection applies and that the consumer can benefit from comparable standards, in particular in the area of the disclosure of information, a level playing field between distributors is essential.

(7) The application of [the IMD] has shown that a number of provisions require further precision with a view to facilitating the exercise of insurance distribution and that the protection of consumers requires an extension of the scope of that Directive to all sales of insurance products [...].

[...]

(10) [...] It is appropriate [...] to strengthen the confidence of customers and to make regulatory treatment of the distribution of insurance products more uniform in order to ensure an adequate level of customer protection across the [European] Union. The level of consumer protection should be raised in relation to [the IMD] in order to reduce the need for varying national measures [...].

[...]

(16) This Directive should ensure that the same level of consumer protection applies and that all consumers can benefit from comparable standards. This Directive should promote a level playing field and competition on equal terms between intermediaries, whether or not they are tied to an insurance undertaking. There is a benefit to customers if insurance products are distributed through different channels and through intermediaries with different forms of cooperation with insurance undertakings, provided that they are required to apply similar rules on consumer protection. Such concerns should be taken into account by the Member States in the implementation of this Directive.

Other provisions were quoted, among which the following excerpts of Article 2(1) of the IDD:

(1) “insurance distribution” means the activities of advising on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in

¹⁰ Case C-633/20, *Bundesverband der Verbraucherzentralen und Verbraucherverbände - Verbraucherzentrale Bundesverband e.V. v TC Medical Air Ambulance Agency GmbH*, originated in Germany. The German Federal Court of Justice (*Bundesgerichtshof*) requested a preliminary ruling under Article 267 TFEU which gave rise to the European Court of Justice ruling of 29 September 2022 (ECLI:EU:C:2022:733).

the administration and performance of such contracts, in particular in the event of a claim, including the provision of information concerning one or more insurance contracts in accordance with criteria selected by customers through a website or other media and the compilation of an insurance product ranking list, including price and product comparison, or a discount on the price of an insurance contract, when the customer is able to directly or indirectly conclude an insurance contract using a website or other media;

[...]

(3) “insurance intermediary” means any natural or legal person, other than an insurance or reinsurance undertaking or their employees and other than an ancillary insurance intermediary, who, for remuneration, takes up or pursues the activity of insurance distribution;

[...]

(8) “insurance distributor” means any insurance intermediary, ancillary insurance intermediary or insurance undertaking;

(9) “remuneration” means any commission, fee, charge or other payment, including an economic benefit of any kind or any other financial or non-financial advantage or incentive offered or given in respect of insurance distribution activities;

The ECJ ruled that “Article 2(3) and (5) of [the IMD], and Article 2(1)(1), (3) and (8) of [the IDD], 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 which it receives from them, of a group insurance policy to which it 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”.

III. Different reactions among Member States

In some Member States, such as Italy or Portugal, these judgments were met almost with indifference, given that they merely confirmed what, in those jurisdictions, was already the generalized understanding of the scope and effect of the IMD and, subsequently, of the IDD. In both countries, such generalized understanding was prompted by local provisions which made it clear that the corporate policyholder of a group contract could simultaneously play the role of an insurance intermediary if its conduct should fall within the relevant definition, first of the IMD and, later on, of the IDD.

In Italy, Regulation no. 5 of 16 October 2006, issued by the Italian Insurance Regulator, then ISVAP – *Istituto per la Vigilanza sulle Assicurazioni Private e di Interesse Collettivo* – laid down the legal framework on insurance and reinsurance mediation as required by the IMD, furthering Title IX of the Code of Private Insurance approved by Legislative Degree no. 209 of 7 September 2005. According to Article 3(3) of this Regulation, “[t]he conclusion of insurance contracts or agreements in collective form on behalf of individual policyholders also falls within the scope of insurance mediation when the latter directly or indirectly bear all or part of the economic burden related to the payment of the premiums and the contracting party receives remuneration”.

The same exact provision can be found in Article 3(3) of Regulation no. 40 of 2 August 2018, issued by IVASS – *Istituto per la Vigilanza sulle Assicurazioni*,¹¹ which repealed Regulation no. 5 of 16 October 2006 in the context of the implementation of the IDD. Hence, in this regard, the substance of the ECJ rulings was expected and perfectly in keeping with what had up to then been the Italian interpretation of the IMD and, subsequently, of the IDD.

¹¹ ISVAP was replaced by IVASS by Law no. 135 2012 of 7 August.

A similar degree of indifference to the ECJ rulings was felt in Portugal, where Article 88(1) of the Insurance Contract Act approved by Decree-Law no. 72, of 16 April 2008, expressly stated that “[a]dhesion to a contributory group insurance policy where the insured person is a natural person is deemed to have taken place under the terms proposed if, 30 days after receipt of the adhesion statement by the policyholder who is also an insurance intermediary with representation powers, the insurer has not notified the applicant of the refusal or of the need to collect information essential to assessing the risk”. Article 89 made the situation even clearer, by adding that “[t]he adhesion statement to a contributory group insurance policy (...) must include all the terms that, in similar circumstances, should be included in an individual insurance contract”.

In other Member States, such as Germany or the Netherlands, what elsewhere appeared to be a somewhat unnecessary clarification would, however, come as a shock, the impact of the ECJ rulings, and particularly that of the non-life insurance case which originated in Germany, having been most intensely felt. These judgments uncovered what had previously been latent and yet very relevant practical differences in the interpretation, implementation and application of the IMD and, subsequently, also of the IDD throughout the European Union.

In Germany, the prevailing view had previously been that the corporate policyholder of a group insurance contract did not require a mediation license. The notion that the same entity could simultaneously play the role of policyholder of an insurance contract and of insurance intermediary in the conclusion of this same contract was, in this jurisdiction, overwhelmingly rejected, in keeping with the explanatory memorandum to Article 34(d) of the German Trade Regulation Act (*Gewerbeordnung*).¹²

That this should be so in the jurisdiction where, arguably, group insurance has had the greatest doctrinal development is perhaps not a coincidence. It is admittedly much more difficult to implement a set of rules when such implementation requires its reconciliation with a fully developed set of preexisting (potentially very different and even incompatible) rules, views or practices.

In the German legal system, group and collective insurance came to light by indirect legislative means, following a provision introduced by the reform of 19 July 1923 in the main statute regulating the activities of insurance undertakings: the *Versicherungsaufsichtsgesetz* (VAG)¹³. At the time, group insurance was still very much unknown to the German market, the German legislator having found its inspiration in American practice.¹⁴ In the wake of that reform, German-speaking legal authors initially took the lead in the early study and dissemination of group insurance.¹⁵ When the 29

¹² See, for instance, <https://www.nortonrosefulbright.com/en-it/knowledge/publications/cbb45957/group-insurance-policyholder-as-insurance-intermediary>; or <https://www.noerr.com/en/insights/bafin-notice-on-insurance-brokerage-by-group-insurance-policyholders> [last accesses 31.12.2024],

¹³ See PETERSEN, Andreas: “Begünstigungsverträge”, in: MANES, Alfred (ed.): *Versicherungsglossar*, Berlin, 1930, 298-299, at p. 298.

¹⁴ See BRAUN, Heinrich: “Gruppenlebensversicherung”, in: MANES, Alfred (ed.): *Versicherungsglossar*, Berlin 1930, 700-701, at p. 701. On the development of group insurance in the USA, see CRAWFORD, Earl T./HARLAN, Samuel P.: *The law of group insurance*, Rochester 1936, at pp. 1-4. It is unclear which class of insurance gave rise to the earliest modern group insurances, but it has been established that personal accident insurances were the first to reach the courts. The three decisions that are often identified as demonstrating the beginnings of group insurance are: *Enright v Standard Life & Accident Insurance Co.* (1892); *Carpenter v Chicago & Eastern Illinois Railroad Co.* (1898); and *Fidelity & Casualty Co. v Ballard & Ballard Co.* (1899). The first two cases concern personal accident insurance for a number of railway workers. They were all concluded by the respective employer.

¹⁵ See HUBRICH, Paul: *Die hauptsächlichen Formen der Gruppenlebensversicherung und das Verbot der Begünstigungsverträge*, Königsberg 1928; MEINOW, Franz: *Die volkswirtschaftliche Bedeutung der Gruppenversicherung*, Ohlau 1934; PROPPE, Joachim: *Rechtliche Fragen um die Gruppenversicherung*, Cologne 1936; TESDORPF, Hans Joachim: “Die rechtliche Beurteilung der Gruppenlebensversicherung” (1936), in: *Zeitschrift für die gesamte Versicherungswissenschaft* 36 (1936) 135-142; LIPPERT, Herbert:

September 2022 ECJ ruling came about, the German and the Dutch regulators immediately identified the dissonance and issued notices with the primary concern of clarifying its impact, respectively, in Germany and the Netherlands.

On 3 July 2023, the German Authority on Financial Markets (BaFin – *Bundesanstalt für Finanzdienstleistungsaufsicht*) issued a Supervisory Notice entitled “Effects of the ECJ ruling of 29 September 2022 (C-633/20) on the intermediary status of the policyholder of a group insurance contract to other group insurance constellations”¹⁶. This Notice attempted to reconcile the outcome of that judgment with preexisting doctrinal views on group insurance, updating such views in the light of that outcome. It thus began by referring to a well-known and widely disseminated doctrinal distinction between so-called genuine group insurance contracts (‘echte Gruppenversicherungsverträge’) and other group insurance constellations (‘andere Gruppenversicherungskonstellationen’). The following explanation was offered:

A genuine group insurance contract is a standardised insurance contract covering a group of persons. The individual group member can be included in this group insurance contract automatically – i.e. without a declaration of membership – or by means of a declaration of membership that may require acceptance, considering that ancillary declarations such as data protection declarations or health declarations do not constitute a declaration of membership. The criterion for the inclusion of the group member is the group membership. The group insurance contract provides insurance cover for members of the group or for the policyholder against a uniform risk that materialises in the group members with the provision that the insurance benefit is to be provided separately for each group member (HERDTER, Fabian: *Der Gruppenversicherungsvertrag - Grundlagen und ausgewählte*

“Gruppenversicherung”, in: LENCER, Rudolf/RIEBESSELL, Paul (eds.): *Deutsche Versicherungswirtschaft. Ein Unterrichts- und Nachschlagewerk*, II, Berlin 1936-1939, 225-233; KOOK, Heinrich: *Der Gruppenvertrag in der Kollektivlebensversicherung. Eine Untersuchung über den Rechtscharakter, den Aufbau und die rechtliche Ausgestaltung der wichtigsten Vertragsform in der Kollektivlebensversicherung mit einem anschliessenden kurzen Überblick über das ausländische Recht*, Berlin 1939; HEILMANN, Hans: “Die Gruppenlebensversicherung und der §159 VG” (1941), in: *Zeitschrift für das gesamte Handelsrecht und Konkursrecht* 108 (1941) 97-120; KUSTNER, Wolfram: “Ist die Gruppenlebensversicherung eine Versicherung für fremde Rechnung?”, in: *Das Versicherungsrecht* 5 (1954) 575-577; VON DER THUSEN, Ernst: “Der ‘unmittelbare Rechtsanspruch’ der Arbeitnehmer bei Gruppenversicherungsverträgen”, in: *Das Versicherungsrecht* 5 (1954) 155-157; “Ansprüche aus kollektiven Unfallversicherungen” in: KLINGMÜLLER, Ernst (ed.): *Rechtsfragen der Individualversicherung. Betrachtungen und Probleme in internationaler Sicht. Festgabe für Erich R. Prölss*, Karlsruhe 1957, pp. 256-265; EHRENZWEIG, Alert A.: “Rechtsgrundsätze des Gruppenversicherungsvertrages”, in: *Das Versicherungsrecht* 6 (1955) 196-199; MILLAUER, Horst: “Zum Begriff des Gruppenversicherungsvertrages”, in: *Das Versicherungsrecht* 8 (1957) 280-281; “Der Gruppenversicherungsvertrag. Ausgestaltungsmöglichkeiten – Versicherungsbeginn – Laufende Versicherung”, in: *Das Versicherungsrecht* 15 (1964) 1213-1217; “Nochmals: Begriff des Gruppenversicherungsvertrages”, in: *Das Versicherungsrecht* 17 (1966) 803-804; and *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe 1966; MAUCH, Rolf: *Der Kollektiv-Lebensversicherungsvertrag. Seine Rechtsnatur und seine Funktion in der schweizerischen Privatwirtschaft*, Aarau 1961; SCHWAN, Herbert: *Der Anspruch auf die Versicherungsleistung in der Gruppenunfallversicherung*, Cologne 1961; MAGNUSSON, Rolf: “Gruppenversicherung, insbesondere in der Lebensversicherung”, in: *Materialien des Zweiten Weltkongresses für Versicherungsrecht*, IX, Hamburg 1966, pp. 1-28; and WINTER, Gerrit: “Die Gruppenspitze in der Gruppen-Lebensversicherung”, in: *ZfV* 19 (1968) 25-29, 56-58, 89-90. In Switzerland, see ASCH, Hans: *Die Gruppenlebensversicherung mit besonderer Berücksichtigung der Schweiz*, Bern 1930; DÜBY, Oscar: *Die rechtliche Natur der Kollektivversicherung mit besonderer Berücksichtigung ihrer Stellung im schweizerischen VVG*, Bern 1930; ROTH, Markus: *Die Rechtliche Natur der Gruppenversicherung in der Schweiz*, Bern 1935; and GLATTLI, Heinrich: *Die Versicherung auf fremdes Leben unter besonderer Berücksichtigung der Gruppenversicherung*, Bern 1947.

¹⁶ The BaFin Regulatory Notice of 3 July 2023 is available here (in German): https://www.bafin.de/SharedDocs/Veroeffentlichungen/DE/Aufsichtsmittelung/2023/dl_2023_07_04_Aufsichtsmittelung_Gruppenversicherungen.pdf;jsessionid=0A814294DF5EDD50A80C28786315A053.internet011?blob=publicationFile&v=3 [last access 31.12.2024].

Problemfelder, Frankfurt a.M. 2010, p. 34). The key feature that distinguishes a genuine group insurance contract from similar contractual constellations is the unity [Einheitlichkeit] of the contract. Unity means that the group insurance contract is a single insurance contract with only policyholder as the head of the group.

This is to be distinguished from so-called co-operation or framework agreements [Kooperations- bzw. Rahmenverträge] that frequently occur in practice. This refers to the agreement between a professional group or a group of companies and an insurer on the content of insurance contracts that can be concluded individually between the insurer and the individual members of the group. In this case, the individual member also becomes the policyholder of the contract.¹⁷

BaFin then tried to situate the ECJ ruling by qualifying the case before the ECJ as a genuine group insurance contract:

For this purpose, the company concluded a genuine group insurance contract with a German insurance company with insurance cover for illness and accident when travelling abroad and for repatriation costs when travelling domestically and abroad. The policyholder and premium debtor of this group insurance was solely the company, whose customers were the insured persons. Claims were settled directly between the insurance company and the insured persons.¹⁸

BaFin concluded that the ECJ precedent only applied to genuine group insurance contracts where the following requirements were cumulatively fulfilled: (i) the policyholder is remunerated, in a very wide sense which includes economic benefits of any kind; (ii) membership of the group insurance contract is voluntary; and (iii) the insured persons are contractually granted the right to claim insurance benefits directly from the insurer.¹⁹

On 14 March 2024, the Dutch Authority on Financial Markets (AFM – *Autoriteit Financiële Markten*) also issued an Interpretative Notice with a similar purpose, attempting to explain the consequences of the ECJ ruling of 29 September 2022 to Dutch corporate policyholders of group insurance policies, and demanding compliance with the mediation licence requirement by 1 October 2025.²⁰

The AFM implicitly acknowledged that its prior views were previously not in line with the said ruling, namely when explicitly referring to its awareness “that its interpretation of this judgment by the European Court of Justice may have implications for market participants who do not currently have a licence for their (mediation) activities in relation to group insurance”.

The AFM also made reference to a key distinction between what it called ‘group contracts’ on the one hand, and ‘group insurance policies’, on the other hand. In spite of the differences in terminology, the distinction seems substantially to correspond to that alluded to by BaFin. According to AFM, a group contract does not constitute an insurance contract if it is “concluded between a group policyholder and an insurer for the benefit of third parties on the basis of which those third parties can obtain coverage at the (more) favourable terms specified in the group contract. A group policyholder arranges the (substantive) terms of insurance for a specific group of insured persons, who then make individual use of the agreed terms when taking out insurance cover”. According to AFM, the ECJ ruling concerned a group insurance policy. The same above mentioned three requirements were then referred to by AFM. However, unlike BaFin, which had only commented on the impact of the ruling on genuine group insurance contracts, AFM also advanced the view that activities carried out by policyholders of group contracts which do not constitute

¹⁷ Ibid, at pp. 2-3. Translated from the original in German.

¹⁸ Ibid, at p. 2. Translated from the original in German.

¹⁹ Ibid, at p. 3.

²⁰ See <https://www.afm.nl/~/profmedia/files/wet-regelgeving/beleidsuitingen/interpretaties/eng-interpretatie-groepsverzekeringen.pdf> [last access 31.12.2024].

insurance policies “can also qualify as insurance mediation within the meaning of the [Dutch] Financial Supervision Act”.

The German and the Dutch authorities, therefore, share the view that the ECJ ruling is a binding precedent only in cases which concern genuine group insurance contracts or policies. I will look further into the distinction before concluding whether the earlier hidden differences between Member States in interpreting and applying EU Insurance Law and Regulation have now fully disappeared.

IV. Genuine group insurance contracts as distinguished from other collective insurance schemes

In this Section, my starting point will be what seemed to both regulators to be the central distinction among collective insurance schemes: that which separated genuine insurance contracts from other collective insurance schemes. In this analytical exercise, I shall resort to my own characterization of this distinction, as put forward for the first time in 2010.²¹ Although my earlier work was meant primarily to characterize group insurance contracts and other types of collective insurance schemes in the Portuguese legal system, it was heavily influenced by the writings of German-based legal scholars. Therefore, it is by no means a coincidence that, at least in abstract, it seems to match the main German-based distinction between genuine group insurance contracts and other group constellations, namely those which consisted of a framework contract typically entered into by a group organiser followed by a succession of individual insurance contracts concluded by the insured persons themselves, or by the group organizer on behalf of the insured persons.²²

As I understand it, a genuine group insurance contract has the following nine characteristics: it must be (i) one contract; (ii) an insurance contract; (iii) concluded by a single policyholder; (iv) on behalf of several insured persons; (v) linked to the policyholder by something other than the group insurance contract; (vi) cumulatively covering (vii) homogeneous risks of all the insured persons; (viii) with perfect severability; and (ix) without a strong positive correlation between the risks of the insured persons.

I should elaborate on each one of these characteristics. Firstly, a group insurance contract (i) is one contract, not a constellation of contracts. Secondly, (ii) it is an insurance contract, that is to say, a contract whereby risks are covered in exchange for the payment of a premium, rather than a framework contract or any other ancillary instrument aimed at paving the way to the subsequent conclusion of one or more insurance contracts.

These two characteristics remove from the concept of genuine group insurance contract, as narrowly construed, a large number of collective insurance schemes that the insurance industry – as well as some judicial rulings and legal writings – often classify as group insurance, but which it is convenient to distinguish from group insurance in the strict sense, even though we may choose to place them under the broader umbrella of collective insurance schemes, or group insurance in a wide sense. Such other collective insurance schemes will typically consist of a framework group contract, followed by a succession of individual insurance contracts. But this not to say that they will all have the same structure and characteristics. In 1939, H. Kook had already put forward a

²¹ LIMA REGO, Margarida: *Contrato de Seguro e Terceiros. Estudo de Direito Civil*, Coimbra 2010. The main influence behind this classification was the seminal work by MILLAUER, Horst: *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe 1966, especially at pp. 5-15. I later published a more condensed version of my initial classification, in: LIMA REGO, Margarida (ed.): *Temas de Direito de Seguro*, Almedina 2012, pp. 299-328.

²² ‘Group organizer’ is to be preferred in this context, as, technically speaking, such role is not that of a policyholder. Also advocating for the use of this expression, see FRAS, Mariusz/OZGONINA, Oskar: “ECJ – group organizer as a distributor by the 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 e.V. v. TC Medical Air Ambulance Agency GmbH, ECLI:EU:C:2022:733”, in: *Wiadomości Ubezpieczeniowe* 1 (2023) 97-114.

tripartite classification of collective insurance schemes into three types: (i) the recommendation contract ('Empfehlungsvertrag'); (ii) the framework contract ('Rahmenvertrag'); and (iii) the group contract ('Gruppenvertrag'). The main difference between the first and the second categories was that in the first one, but not the second one, included stipulations as to the contents of the future individual insurance contracts.²³

Thirdly and fourthly, the genuine group insurance contract is typically concluded (iii) by a single policyholder, who enters into the contract (iv) on behalf of a group of third-party insured persons. The latter must be technically qualified as third parties in relation to that contract because they are not a party thereto. However, the contract will have been concluded *for* them, in the sense that they must be the subjects of the risk *covered* by the insurance – i.e. the insurance risk. This means that under the contract they will be granted insurance coverage and will, therefore, be recognized as holders of third-party contract rights, either from the contract's inception or, at least, upon the occurrence of the insured event. It is neither necessary nor sufficient that they should also bear the primary risk of the contract. In this sense, the contract known as *key-person insurance*²⁴, in which, for instance, a single corporate policyholder may insure itself against the risk of loss arising from the death or incapacity of employees that it considers as being essential to its business, should not be qualified as group insurance, as such employees are mere persons at risk, rather than proper insured persons.

Fifthly, (v) the insured persons should be linked to the corporate policyholder by a common feature that is different from their membership of the insured group.²⁵ This would seem to rule out the possibility of qualifying as a genuine group insurance contract any contract concluded on behalf of a number of people who have nothing in common with each other apart from having come together for the sole purpose of taking out insurance. This requirement is, however, not universal. Moreover, as has now become even clearer in the context of the recent rulings, one should not be forced to choose whether to qualify someone as a policyholder or as an insurance intermediary, since both roles can be attributed cumulatively to the same person in any given situation. However, if there is no common link between the participants, or between the participants and the policyholder, other than that resulting from the group insurance contract, it is submitted that the policyholder's role as an insurance distributor is even more salient than otherwise.

Sixthly, in genuine group insurance contracts, (vi) the coverage of the different insured risks is *cumulative*, rather than alternative. For this reason, by way of illustration, mandatory motor insurance relating to a single vehicle should not be qualified as group insurance, even though many people might be successively allowed to drive it, given that only one person at a time is able to drive the vehicle.

Seventhly, among insurance contracts that cover the risks of a group of insured persons, only those that cover (vii) *homogeneous* risks of the members of the group are genuine group insurance contracts. Neither the insurance industry nor doctrinal works treat as group insurance those contracts that cover heterogeneous risks of several insured persons – for example, a contract that

²³ Kook, Heinrich: *Der Gruppenvertrag in der Kollektivlebensversicherung. Eine Untersuchung über den Rechtscharakter, den Aufbau und die rechtliche Ausgestaltung der wichtigsten Vertragsform in der Kollektivlebensversicherung mit einem anschliessenden kurzen Überblick über das ausländische Recht*, Berlin 1939, at pp. 9-10 and 14-19.

²⁴ On the definition of key-person insurance, see <https://www.investopedia.com/terms/k/keypersoninsurance.asp> [last access 31.12.2024].

²⁵ See Article 1:201(7) of the PEICL. This requirement is made even clear, for instance, in Article 76 of the Portuguese Insurance Contract Act: "A group insurance contract covers the risks of a group of people linked to the policyholder by a bond other than that of insurance".

insures the different proprietary interests corresponding to several different kinds of rights *in rem* over a single moveable or immoveable property should not be qualified as group insurance.²⁶

Eighthly and ninthly, (viii) there must also be perfect severability of the risks covered as between the group members. For this reason, accident insurance of a group of persons travelling together should also not qualify as group insurance, because, if there is a road accident involving their common means of transportation, they will all suffer loss as a direct result of a single insured event.²⁷ Property insurance of all the contents of a warehouse is also not to be treated as group insurance, no matter how many different property owners are covered, since, in all likelihood, the occurrence of an incident, such as a fire or a flood, would affect all the insured property at once. This also explains why insurance contracts for families, no matter how large, have historically never been treated as group insurance.²⁸ It is possible to be even stricter, requiring (ix) the absence of a strong positive correlation between the risks of the various group members.

There is typically no numerical requirement for the qualification of a plurality of insureds as a group: it is enough that they form a group.²⁹ At the time of contracting, an insurance policy with a total of two insured persons seems to suffice. Nor will contracts initially concluded for larger groups lose their nature in the event of a group reduction – in this case, even if the group is reduced to a single active participant, and even if it temporarily loses all of its members, as long as a change in this situation is foreseen.

After examining the above mentioned nine characteristics of genuine group insurance contracts, it is also important to classify the various types of such contracts that exist on the market according to the different ways in which each insured person becomes covered by such insurance contracts. The inclusion of each insured person in the insured group may: (a) be automatic; or (b) require notice. When inclusion is automatic, notice thereof may not even exist, or it may correspond to an obligation on the part of the policyholder. Given the automatic effect of the inclusion, such notice would be merely declaratory.³⁰ These are the cases in which the insured persons are covered simply by the circumstance of their belonging to the insured group, as described in the contract. Those who do not belong to the group at the time of contracting will automatically become an insured person upon joining the group – if the group is open to new participants.³¹ When inclusion requires prior notice to the insurer, the policyholder's notice will have constitutive effects, coverage being extended to each one of the insured persons only after the insurer is notified thereof. Such notice may then: (b-i) correspond to a duty on the part of the policyholder towards the insurer; or (b-ii) the decision whether or not to include each new member of the insurable group

²⁶ See MILLAUER, Horst: *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe ²1966, p. 12; and BUCHNER, Franz/CUNTZ, Paul/FISCHER, Robert/MILLAUER, Horst: "Gruppenversicherung" in: FINKE, Eberhart (ed.): *Handwörterbuch des Versicherungswesens*, Darmstadt 1958, cc. 881-892, at c. 882.

²⁷ See SCHICKINGER, Walter F.: "Gruppenversicherung, insbesondere Gruppenlebensversicherung", in: FARNY, Dieter/HELTEN, Elmar/KOCH, Peter/SCHMIDT, Reiner (eds.): *Handwörterbuch der Versicherung*, Karlsruhe 1988, 239-248, at p. 241. See also WINTER, Gerrit: "Die Gruppenspitze in der Gruppen-Lebensversicherung" in: ZfV 19 (1968) 25-29, 56-58, 89-90, at p. 25.

²⁸ See BUCHNER, Franz/CUNTZ, Paul/FISCHER, Robert/MILLAUER, Horst: "Gruppenversicherung" in: FINKE, Eberhart (ed.): *Handwörterbuch des Versicherungswesens*, Darmstadt 1958, cc. 881-892, at cc. 882-883.

²⁹ In the US, the National Association of Insurance Commissioners's model state law on group insurance began by establishing a minimum number of group members. Initially 50, later 25, a few years later 10. The requirement was eventually abolished. See CRAWFORD, Muriel L.: *Life and health insurance law*, Atlanta ⁸1998, 371.

³⁰ See MAGNUSON, Rolf: "Gruppenversicherung, insbesondere in der Lebensversicherung", in: *Materialien des Zweiten Weltkongresses für Versicherungsrecht*, IX, Hamburg 1966, pp. 1-28, at pp. 4-5; and WIESER, Annemarie: *Gruppenversicherungen*, Wien 2006, at pp. 131-141.

³¹ BUCHNER, Franz/CUNTZ, Paul/FISCHER, Robert/MILLAUER, Horst: "Gruppenversicherung" in: FINKE, Eberhart (ed.): *Handwörterbuch des Versicherungswesens*, Darmstadt 1958, cc. 881-892, at cc. 881-882, also distinguish between group insurance with and without the entry of new participants.

in the insurance can be left at the discretion of the policyholder.³² In either case, the notice may be (1) sufficient; or (2) still require the insurer's acceptance, which acceptance may correspond (α) to a duty of the insurer; or (β) to a discretionary act of the insurer.³³

V. The distinction as seen through the lens of the ECJ rulings

Having now dissected the distinction between genuine group insurance contracts and other collective insurance schemes, a distinction which – admittedly – often comes in very handy as a tool for rigorous analysis, especially when sifting through the myriad of different existing contractual constellations so as better to understand which (insurance) contract law set of rules to apply in each case, I should add, at this point, that I do not find the distinction nearly as useful in the context of insurance distribution, when applying EU Law. And, as it turns out, neither did the ECJ.

Indeed, the German and the Dutch regulators' stance that, when applying the ECJ ruling of 29 September 2022, the point of departure and main relevant distinction to be considered was that between genuine group insurance contracts and other contractual insurance constellations appears to be in stark contrast with the explicit views of the ECJ:

It is immaterial in that regard, as the German Government and the European Commission have pointed out, in particular, that the legal person carrying out an activity such as that at issue in the main proceedings does not seek the conclusion of insurance contracts by which policyholders intend to obtain insurance cover from an insurer in return for the payment of premiums, but voluntary membership on the part of its own customers, in return for a payment made to it, of a group insurance policy to which it subscribed previously with an insurer for the purposes of supplying those customers with such coverage. Such an activity is comparable to the paid activity of an insurance agent or a distributor of insurance products which seeks the conclusion, by policyholders, of insurance contracts with an insurer whose object is to cover certain risks in return for the payment of an insurance premium.

Similarly, the fact that the legal person engaging in an activity such as that at issue in the main proceedings is itself a party, as policyholder to the group insurance policy which it intends to encourage its customers to join, is not decisive.³⁴

The ECJ could hardly have been clearer: whether one's activities consist of encouraging others to enter into multiple insurance contracts in what would look more like a typical framework contract followed by a plurality of individual insurance contracts, or rather join the insured group of a preexisting singular group insurance contract is, in a word, "immaterial". And whether or not the person carrying out the activities is a contracting party itself is, in two words, "not decisive". In other words, in the context of the IMD and of the MDD, these are pointless legal technicalities. What matters to the court is, very clearly, that such activities are all economically equivalent, or, in the words of the court, "comparable in nature"³⁵. Hence, in order to ensure equal treatment to all the different types of insurance distributors as well as enhance consumer protection in the field of

³² See WINTER, Gerrit: "Die Gruppenspitze in der Gruppen-Lebensversicherung" in: *ZfV* 19 (1968) 25-29, 56-58, 89-90, at p. 27,

³³ See WIESER, Annemarie: *Gruppenversicherungen*, Wien 2006, at pp. 136-141, in the wake of MILLAUER, Horst: *Rechtsgrundsätze der Gruppenversicherung*, Karlsruhe ²1966; MÖLLER, Hans: "Rechtsgrundsätze der Gefolgschaftsversicherung", in: *NeumZ* 62 (1939) 730-734, at p. 731, also distinguished group insurance according to whether it was optional or compulsory for the insurer or the subscriber to be included. It should be noted that this distinction has nothing to do with the distinction of French origin between 'compulsory membership insurance' and 'optional membership insurance'. See *below* Section V.

³⁴ Case C-633/20, *Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V. v TC Medical Air Ambulance Agency GmbH* (ECLI:EU:C:2022:733), paras. 45-46.

³⁵ *ibid*, para. 55.

insurance, all those carrying out such activities must be seen as falling within the scope of the IMD and, subsequently, of the IDD.³⁶ If this was already the case when the IMD was in force, this understanding would become even harder to contest after its replacement by the IDD:

One of the objectives of the IDD was to guarantee an effective protection of customers across all financial sectors and to guarantee that the same level of protection applies regardless of the channel through which customers buy an insurance product. This explains why the IDD covers the distribution of not only non-life and life products, reinsurance products, but also insurance-based investment products (IBIPs). This also explains why the IDD applies to insurance distributors (when the IMD applied only to insurance intermediaries). Based on the new definition of the insurance distributor, the IDD encompasses a larger number of firms than the IMD.³⁷

When looking into the treatment of group insurance contracts and other collective insurance schemes through this predominantly economic lens, it seems very hard to even put forward the view that a legal person wishing to procure the adhesion of multiple customers to collective insurance schemes for remuneration need only assume the (formal) position of corporate policyholder in such a collective insurance scheme so as to shield itself entirely from the application of all IMD and IDD licensing requirements, as applied to insurance distributors. That the ECJ would resort to such economic lens should not come as a surprise, given that this is precisely the type of reasoning that we often find in the context of EU Law. By way of illustration, one can think of the definition of the relevant market for the purpose of applying EU Competition Law: a relevant product market comprises all those products and/or services which are found to be economically interchangeable or substitutable by the consumer by reason of their characteristics, their prices and their intended use.³⁸

Nonetheless, if the distinction between genuine group insurance contracts and other collective insurance schemes had been an essential part of the court's reasoning, it is submitted that the ECJ would most probably disagree with the qualification of the scheme under scrutiny as a genuine group insurance contract. Due to its alleged irrelevance to the decision, the ECJ did not offer any qualification of its own on 29 September 2022. However, the ECJ had been much clearer at least on two different prior occasions, both already mentioned above, and both concerning insurance-based investment products:

As regards (...) the applicability of such a concept to the actions of an assurance undertaking in relation to the accession of consumers to a unit-linked group contract, the Court has already held, first of all, that the declaration by which a consumer accedes to such a group contract concluded between an assurance undertaking and an undertaking which is the policyholder gives rise to an individual assurance contract between that assurance undertaking and that consumer. By proposing to that consumer to accede to the group contract, the undertaking which is the policyholder carries out, for remuneration, an insurance mediation activity within the meaning of [the IMD].³⁹

The ECJ goes on to conclude that, due to their role as policyholders of an individual insurance contract, consumers in that position have a right to receive all the information that the law requires to be communicated to policyholders before the conclusion of the contract,⁴⁰ and that it is “for the

³⁶ *ibid*, paras. 55-58.

³⁷ DE MAESSCHALCK, Nic : “The Insurance Distribution Directive: What Does It Change for Intermediaries and for Others?” in: MARANO, Pierpaolo/SIRI, Michele (eds.): *Insurance Regulation in the European Union. Solvency II and Beyond*, Cham 2017, pp. 59-77, at p. 63.

³⁸ See Commission Notice on the definition of relevant market for the purposes of Community competition law (97/C372/03).

³⁹ Case C-208/21, *K.D. v Towarzystwo Ubezpieczeń Ż S.A.* (ECLI:EU:C:2023:64), para. 54. The ECJ referred to joined Cases C-143/20 and C-213/20, respectively *A v O* and *G.W. and E..S. v A. Towarzystwo Ubezpieczeń Życie S.A* (ECLI:EU:C:2022:118), paras. 81, 87 and 88.

⁴⁰ *ibid*, para. 55.

assurance undertaking to communicate the contractual information to the policyholder undertaking, formulating it in a clear, accurate and intelligible manner for consumers, with a view to its subsequent transmission to consumers during the procedure for accession to a unit-linked group contract”⁴¹.

For the purpose of determining whether certain activities should qualify as insurance distribution, much closer to the mark than the distinction between genuine group insurance contracts and other collective insurance schemes is that which was resorted to by the Italian and the Portuguese legislators. In Italy, as mentioned above, according to Article 3(3) of IVASS Regulation no. 40 of 2 August 2018, “[t]he conclusion of insurance contracts or agreements in collective form on behalf of individual policyholders also falls within the scope of insurance mediation when the latter directly or indirectly bear all or part of the economic burden related to the payment of the premiums and the contracting party receives remuneration”.

According to Article 77 of the Portuguese Insurance Contract Act:

- 1 - Group insurance can be contributory or non-contributory.
- 2 - Group insurance is said to be contributory when the insurance contract results in the insured bearing, in whole or in part, the payment of the amount corresponding to the premium owed by the policyholder.
- 3 - In contributory insurance, it can be agreed that the insured pays their share of the premium directly to the insurer.

This classification is much closer to the mark in that, in non-contributory group insurance contracts, the corporate policyholder is typically not remunerated, as the burden of paying the insurance premium falls entirely on its own pocket. Incidentally, non-contributory group insurance contracts are also much more likely to correspond to genuine group insurance contracts, given that in such contracts it is the corporate policyholder who bears the cost of the insurance premium. However, it should be noted that the group insurance will only qualify as contributory to the extent that the group member’s obligation to pay the premium is somehow reflected in the wording of the contract between the insurer and the group organiser. Those schemes where, unbeknownst to the insurer, the policyholder somehow passes on to the group members the financial burden of the insurance, in whole or in part, do not qualify as contributory group insurance.

The universe of contributory group insurance contracts roughly corresponds to that of the group insurance contracts that cumulatively meet the three criteria pinpointed by the ECJ: (i) the group organizer is typically remunerated, although in theory it would not be impossible to conceive a case where no such remuneration would occur; (ii) membership of the group insurance contract is, by definition, always voluntary, given that no one can be forced into an onerous insurance scheme without their consent; and (iii) the insured persons are contractually granted the right to claim insurance benefits directly from the insurer, as that is what they are paying for.

Another popular distinction is that between ‘compulsory membership’ group insurance and ‘optional membership’ group insurance. This distinction has a strong bearing in France, and a literal foundation, albeit relatively recent, in the French *Code des Assurances*: Article L.141-4 of the *Code des Assurances*, after enshrining the rule that the group member can withdraw from the scheme following changes to the contract, specifies that this option does not apply “where the relationship between the policyholder and the insured makes membership of the contract compulsory”. A superficial reading of the relevant legal provisions might suggest that the only type of collective insurance scheme that is legally admissible would be that of the framework contract entered into between the insurer and a corporate policyholder, followed by several individual insurance

⁴¹ *ibid*, para. 57.

contracts concluded between the insurer and each of the participants.⁴² The law even provides that, in its dealings with the participants, the corporate policyholder acts in the capacity as a representative of the insurer.⁴³ However, both the French courts and French doctrinal works distinguish between two broad categories of collective insurance schemes: (i) those of ‘compulsory membership’ (“assurances de groupe à adhésion obligatoire”); and (ii) those of ‘optional membership’ (“assurances de groupe à adhésion facultative”).⁴⁴

In French legal writings, we often find statements to the effect that the distinction between the categories depends on whether or not the members of the group are under an ‘obligation to join it’. However, this is a somewhat unfortunate designation, since, as some authors correctly point out, in so-called ‘compulsory membership’ group insurance no act of adhesion by group members actually takes place, there being no ‘obligation’ or ‘promise’ that one could ‘perform’ so as to join the group. The expression simply means that, when one becomes a member of the insurable group, that, in itself, is enough automatically to confer on the member the protection of the collective insurance taken out by the policyholder for the benefit of all group members. Hence, in such cases there is no distinction between the insurable group and the insured group. Only in so-called ‘optional membership’ insurance would there be what could be described as a genuine act of adhesion on the part of the insured person, without which they would not be covered by the group insurance.⁴⁵

While there is always a basic contract between the policyholder and the insurer, the arrangements for membership vary considerably from one type of contract to another. Schematically, in the field of compulsory membership contracts for supplementary social protection, there is no individual membership as such by the members. Their membership of the insured group is sufficient to confer on them the status of insured persons. On the other hand, in the field of optional membership contracts, there is genuine individual membership by the members, who fill in an individual membership form.⁴⁶

When reading French doctrinal works, it becomes clearer that, in ‘optional membership’ insurance schemes, the contract concluded between the policyholder and the insurer does not confer on the

⁴² Indeed, this idea appears to be in line with earlier references to group insurance in France. See, for instance, PICARD, Maurice/ BESSON, André: *Les assurances terrestres*, I, originally 1938, Paris ⁵1982, 722-726.

⁴³ See Article L. 141-6 of the *Code des Assurances* (introduced in 1994). LAMBERT-FAIVRE, Yvonne: *Droit des assurances*, Paris 1998 ¹⁰709, remarks that, with the introduction of this representation rule, the legal reference to the stipulation for the benefit of a third party in Article L. 112 of the same Code, has become useless for explaining the relationship between the corporate policyholder and the group member in group life insurance. NICOLAS, Véronique: *Essai d'une nouvelle analyse du contrat d'assurance*, Paris 1996, pp. 211-213 and 222-224, argues that the reference to the ‘membership’ of a group of people in this provision means that they cannot be considered third parties, but rather parties to the insurance contract. She adds that French case law has already affirmed this, particularly in the context of insurance taken out by employers for their employees. The only cases in which the author admits the existence of a third-party stipulation in group insurance concluded by an employer are those in which the employer alone negotiates with the insurer and is responsible for the payment of the full premium – the qualification as third parties of group members who bear, in whole or in part, the payment of insurance premiums is, thus, not accepted.

⁴⁴ This provision is the result of a law reform dating 31 December 1989. See BERDOT, François: "L'assurance de groupe après les réformes législatives du 31 décembre 1989", in : *Revue Générale des Assurances Terrestres* 61 (1990) 775-794, at pp. 777-778. See also BIGOT, Jean : *Traité de droit des assurances*, III, Paris 2002, 479; and LAMBERT-FAIVRE, Yvonne: *Droit des assurances*, Paris ¹⁰1998, 706-720. Although this terminology is of French origin, see, however, WIESER, Annemarie: *Gruppenversicherungen*, Wien 2006, 131-141, who also distinguishes between ‘compulsory group insurance’ (“Zwangsgruppenversicherung”), in which entry into and exit from the insurance is automatic, as a result of entry into and exit from the group, and ‘group insurance with registration’ (“Gruppenversicherung mit Anmeldung”), in which entry into the insurance requires the adhesion of the group member, and participation is constitutive - this is distinct from the merely declarative participation that exists in some automatic insurances.

⁴⁵ In this sense BIGOT, Jean, cit. *supra* n. 44, pp. 493-494.

⁴⁶ BIGOT, Jean (dir.) : *Traité de droit des assurances*, III, Paris, 2002, p. 493.

participants the status of insured persons, it being necessary, firstly, for them to complete and submit an individual membership form and, secondly, for the insurer to accept their individual applications for membership, which are, therefore, functionally assimilated to an offer to contract. Once accepted, these contracts between the insurer and the individual members are then the true insurance contracts, the former being merely a framework contract concluded with a view to contractually defining the legal and technical characteristics of the insurance product that will be offered for subscription to the members of the group, thereby facilitating the subsequent adhesion of a number of persons to this collective insurance scheme. Because no risks are covered under the framework agreement, it does not qualify as an insurance contract.⁴⁷

Differently, in ‘compulsory membership’ insurance, when concluding the group insurance contract with the policyholder, the insurer agrees to cover the risks of the participants, there being no need for them to adhere thereto, nor, often, to even offer their consent. No individual insurance contracts are concluded between the insurer and each of the participants. The rights of the participants are those conferred on them by the third-party stipulation in the group insurance contract. Only the mechanism of the third-party agreement makes it possible to explain why the insured persons, who are third parties to the group insurance contract, acquire that status and the right to require the insured person to perform contractual benefits.⁴⁸ Some even compare this to the insurance of a flock of sheep by its owner.⁴⁹ It would seem, then, that, notwithstanding the different terminology, the distinction between in ‘compulsory membership’ insurance and ‘optional membership’ insurance corresponds to that between genuine group insurance contracts and other group insurance constellations.

Reference to this distinction can also be found in the PEICL, in Article 1:201(8) and (9) and then throughout Part Six. There is some terminological fluctuation. In English, the PEICL contrast ‘accessory group insurance’ with ‘elective group insurance’, there being no reference to the supposed obligatory nature of the former. Most other languages offer direct translations of the English version of the distinction. So, for instance, the German and the Italian versions respectively refer to ‘Akzessorische Gruppenversicherung’, which is contrasted with ‘Freiwillige Gruppenversicherung’; and to ‘Assicurazione di gruppo accessoria’, which is contrasted with ‘Assicurazione di gruppo volontaria’. In French, nonetheless, the expressions are consistent with those traditionally used in France: respectively, ‘assurance de groupe obligatoire’ and ‘assurance de groupe facultative’.

Despite these differences, the concepts seem to be the same as those originally developed in France: the first corresponds to group insurance “under which group members are automatically insured by belonging to the group and without being able to refuse the insurance”, whilst in the second “group members are insured as a result of personal application or because they have not refused the insurance”.

Finally, Article 18:301 of the PEICL determines that “[e]lective group insurance is deemed to be a combination of a framework contract between the insurer and the group organiser and individual insurance contracts concluded within such a framework by the insurer and the group members”. This would lead us to conclude that, despite the somewhat different definitions, this distinction is at least presumed to match that between genuine group insurance and other collective insurance schemes.

In genuine group insurance contracts, the members of the group must remain, at all times, third-party insured persons. If, by joining the group insurance, they become contracting parties, then they should be qualified as policyholders in their own individual insurance contracts, in which

⁴⁷ BIGOT, Jean (dir.) : *Traité de droit des assurances*, III, Paris, 2002, p. 494.

⁴⁸ BIGOT, Jean (dir.) : *Traité de droit des assurances*, III, Paris, 2002, pp. 497-498.

⁴⁹ KULLMANN, Jérôme: “Les mécanismes juridiques fondamentaux des assurances collectives”, in: *Revue Générale du Droit des Assurances* (1998) 521-530, at p. 528.

case the group organiser will have been deemed to have entered into a framework contract, rather than into an insurance contract.⁵⁰ Regardless of whether they qualify as policyholders or as third parties, group members will always be qualified as insured persons. As mentioned above, when they only play the role of persons at risk, the contract in question might be qualified as key person insurance, but it is by no means a collective insurance scheme.

From a substantive perspective, it is difficult to accept that group members who have issued contractual statements confirming their willingness to join the group and, even more significantly, who have undertaken to pay all or even only part of the insurance premium, would qualify simply as third parties, rather than as policyholders of their own individual insurance contract. Even in cases where this commitment is made only to the group organiser, the latter then undertaking to pay the premium to the insurer, rigorous analysis of their conduct will most likely lead to the conclusion that, at least in the vast majority of cases, they will have adhered to a contract in the capacity as contracting parties, the schemes under scrutiny will qualify as instances of framework contracts followed by a succession of individual insurance contracts concluded by the participants themselves, or by the policyholder on behalf of the participants; in the very least, we would be dealing with a single group contract with a multitude of contracting parties. In such cases, the corporate policyholder's duties towards the insurer are typically of a purely administrative nature, in the sense that they relate to its role as manager of the insurance scheme. And, economically, the group organiser typically retains a portion of the premium as its remuneration for this organisational effort. This reasoning led me to conclude, back in 2010 and in the context of the Portuguese legal system, that their role was, in substance, that of an insurance intermediary, even if formally the contract terms often made use of genuine group insurance terminology, referring to the group organiser as the policyholder and to the group member as insured persons.⁵¹

The most challenging cases that I was confronted with in my earlier analysis of different collective insurance schemes were those in which the group members intervened in the process in such a way as to make it very difficult to answer the question whether, in practice, they should qualify as contracting parties or rather as third parties. Characteristic of these challenging sets of factual circumstances are those cases where group members are asked to fill in and submit a form containing an individual statement conveying relevant information on the risk and consenting to their membership of the insured group.⁵²

⁵⁰ See APPLEMAN, John D./HOLMES, Eric M.: *Appleman on Insurance Law & Practice*, New York 21996, § 181.01 at p. 4, on the concept of group insurance in the USA. The existence of a single contract covering a plurality of insured persons is deemed essential. However, the requirement is sometimes interpreted with some generosity. This book draws attention to *Time Insurance Co. v Sams* (1988), in which the court rejected the qualification as group insurance of a health insurance policy taken out by the employees of a particular clinic, on the grounds that the insurance cover required individual subscription, although it was taken out simultaneously by several employees, and that the premiums were paid by the insured persons out of their wages, even though the conditions had been negotiated in advance by the clinic. The contract was treated as an instance of individual insurance.

⁵¹ See LIMA REGO, Margarida: *Contrato de Seguro e Terceiros. Estudo de Direito Civil*, Coimbra 2010, 821. In Spain, reaching a similar conclusion, see TIRADO SUAREZ, Francisco Javier: *El seguro*, III, *Los seguros de personas*, Madrid 2006, at p. 35.

⁵² An example of such a case can be found in a judgment of the Portuguese Supreme Court of Justice of 10 May 2007 (Salvador da Costa) (ECLI:PT:STJ:2007:07B1277.CC), available at www.dgsi.pt [last access 31.12.2024]. The case concerned a group life insurance policy taken out by the railway workers' union for the benefit of all its members between the age of majority and retirement age, covering the eventualities of death or total and permanent invalidity. A more thorough analysis of this and other examples taken from judicial decisions can be found in LIMA REGO, Margarida: *Contrato de Seguro e terceiros. Estudo de direito civil*, Coimbra 2010, pp. 825-834.

VI. Conclusion

We have come full circle, back to the seminal distinction between genuine group insurance contracts and other collective insurance schemes. However, what is most striking, as we reach the end of this reflection, is that, whilst conceptually we have found different variations of the same distinction in all the national legal systems that we have looked into, their application has led to very different results, the German and the Dutch regulators having expressed the view that, in the ECJ ruling of 29 September 2022, involving TC Medical Air Ambulance Agency GmbH, the latter had entered into a genuine group insurance contract with the insurer in the capacity as policyholder, the group members being mere third-party insured persons in that scheme. Both, the provisions of the PEICL mentioned above, and the prior rulings of the ECJ on group insurance very clearly point us in the opposite direction. This is an indication that earlier hidden differences among Member States in the interpretation and application of EU Insurance Law and Regulation concerning group insurance and, more widely, collective insurance schemes may have been attenuated as a result of the recent ECJ rulings, but they have clearly not disappeared. It remains to be seen whether, or to what extent such remaining differences matter, that is to say, whether they will continue to lead to different practical results in the interpretation and application of EU Insurance Law and Regulation.

Product oversight and governance (POG) and the principle of value for money: between the case law of the European Court of Justice and the sector-specific regulatory framework

Francesco Petrosino (Freie Universität Berlin/ Università di Trento)

I. Subject and scope of the research: an introduction.

The subject of this research will focus on the peculiar set of organizational and conduct rules that affect insurance law and have been developed within European institutions and sector-specific supervisory authorities.

The reference primarily lies with the so-called product oversight and governance (POG), which in insurance law is appreciated as a regulatory rule for internal organization and the contract itself. However, this study will also turn towards the analysis of a principle that – thanks to the significant intervention of the European regulator (EIOPA), which has helped to define its essential features – has enriched the meaning and functions of product oversight and governance: the so-called value for money.¹

However, it is important to specify the methodological reference on which the work is based. The attention that will be devoted to organizational rules and those more strictly contractual, subject to European insurance regulation and legislation, can only be justified in light of the growing interest that the Court of Justice of the European Union has shown in Insurance based investment products – known with the acronym of IBIPs –, defined by art. 2 par. 1 (17) of the (EU) 2016/97 Directive (from now on IDD) as those products “which have a maturity or surrender value and where that maturity or surrender value and where that maturity or surrender value is wholly or partially exposed, directly or indirectly, to market fluctuations”².

¹ Although the meaning and objectives of value for money will be addressed later, it is worth specifying some key elements right from the start. Value for money is closely related to the procedures of product governance, particularly those concerning the creation of IBIPs (Insurance-Based Investment Products). The European Insurance Authority (EIOPA) considers “that unit-linked products offer value for money when costs and charges are proportionate to the benefits (i.e. investment performance, guarantees, coverage and services) to the identified target market as well as reasonable, taking into account the expenses born by the providers”. In practice, finally, value for money (VFM) materializes in a necessary process of setting the right price, where, in fact, EIOPA specifies that “manufacturers should be able to present a structured pricing process as part of their POG documentation to provided competent authorities”. See EIOPA: Supervisory Statement. On assessment of value for money of unit-linked insurance products under product oversight and governance, 30 November 2021, 5.

² It is important to remember, for the purpose of determining the nature of IBIPs, that the same art. 2 par. 1 point 17, letter b, specifies that it does not include “life insurance contracts where the benefits under the contract are payable only on death or in respect of incapacity due to injury, sickness or disability”. Moreover, the notion of Insurance Based Investment Products is taken not only from the Insurance Distribution Directive but also from art. 4 (1) (2) of Regulation 1286/2014/EU. In this sense, it is emphasized that, despite the ECJ defining these products as insurance contracts, they have nevertheless been included within the so-called Priips Regulation, which governs the consumer protection regime regarding financial products offered by intermediaries (banking, financial, insurance). Evidently, in these products, there will be the so-called biometric risk and consequently an indemnity obligation on the part of the insurer. However, the latter will be heavily conditioned in its quantum by the underlying financial in which the company decides to transfer a portion of the premium. Moreover, European institutions, precisely in view of the entry into force of the Priips Regulation, had previously included IBIPs in the so-called packaged retail investment and insurance-based investment products. Specifically, reference can be made to EU Commission staff working documents, the first entitled “Accompanying the communication from the Commission to the EU Parliament and the Council. Packaged retail investment products. Executive Summary of the Impact Assessment Report”, COM (2009), 204 final, SEC (2009) 556, p. 2 and the second referring to Commission staff working document executive summary for the impact assessment. Accompanying the document proposal for a regulation of the European Parliament and of the Council on Key information documents for the investment

Concretely, Insurance Based Investment Products include unit-linked and index-linked policies, as well as capitalization contracts. They are defined as “insurance” by doctrine³ and – as will be better explained later (see below par. II) – also and above all by European case law and it will be precisely the European Court of Justice’s perspective that will be privileged in these pages. Namely, that which, with reference to contractual qualification, identifies IBIPs as insurance contracts, particularly as life insurance.⁴

Although many legal scholars and the jurisprudence of the European Union are unanimous in recognizing the insurance nature of these products, such recognition has not always been fully accepted by the doctrine. Therefore, even though the insurance contractual component is now confirmed – also to comply with specialized regulations – it is important to remember that it has been at the centre of intense debate.⁵

And where the Court specifies the predominant insurance nature of IBIPs, it consequently imposes that these products be governed by *ad hoc* rules. That is, by prescriptions that, due to the particular composition of the contracts considered, ensure consumer protection and market stability needs.

Therefore, the POG regime – intended to inform the creation of fairly priced contracts, that is, those with a fair value, based on the innovations introduced by the so-called value for money principle – assumes significant importance.

It in fact (see below par. IV-V) influences the company's choices, consequently its internal organization, and finally, also impacts the contract. But precisely in light of these considerations, related to the specificity of the regulatory regime of IBIPs, the position of the ECJ should not be considered in isolation. Instead, it should be read within a broader systemic framework that shares common ground with the regulatory policy of EIOPA and the sector-specific EU legislator.

Based on these methodological premises, therefore, this study will delve into the regulations – such as the POG which in the insurance sector assumes its own specific meaning – and the principles exclusively designed for the insurance sector.

So, after studying the relationship between the contractual nature specified by EU case law and the specialized regulations designed for insurance contracts (including IBIPs), a final consideration is in order and it pertains to the role and functions of the ECJ with reference to its bond with European sectorial agencies and Institutions.

products/*SWD/2012/0188final*/, 1. The clarification provided by ROKAS, Ioannis/SIAFARIKA, Athina: “The Notion of Insurance-Based Investments Products. A cross-sectorial Legal Approach in Europe”, in: MARANO, Pierpaolo/ROKAS, Ioannis (eds.): *Distribution of Insurance-Based Investment Products*, Cham 2019, 9-11, 13-15, is certainly useful for having a clear definition of IBIPs and understanding the distinctions from other insurance products.

³ To be more precise, the doctrine that has been elaborated on the legal (contractual) classification of IBIPs has specified that these are contracts based on the scheme of life insurance, onto which a significant financial or investment component is grafted. In this sense, see MARANO, Pierpaolo/SIRI, Michele: “Cross-Border Insurance Groups: Towards a Comprehensive Supervision Under Solvency II”, in: *The Geneva Papers* 43 (2018) 608; NOUSSIA, Kyriaki/SIRI, Michele: “The Legal Regime and Relevant Standards”, in: MARANO, Pierpaolo/ROKAS, Ioannis (eds.): *Distribution of Insurance-Based Investment Products*, Cham 2019, 28; ALEXANDER, Kern/MADDERS, Vivienne: “Financial Market Regulation in the Internal Market”, in: AMTENBRINK, Fabian/HERRMANN, Christoph (eds.): *The EU Law of Economic and Monetary Union*, Oxford 2020, 1099.

⁴ And, on the contrary, not financial products: this means that IBIPs do not fall within the contractual type of the investment contract, nor are they subject to the regulatory regime of MiFID I (Directive 2004/39/EU) and MiFID II (Directive 2014/65/EU).

⁵ Among the authors who have raised more than a few doubts about the insurance nature of these products, see STELLA RICHTER JR., Mario: “Obbligo di restituire e obbligo di gestire nell’attività finanziaria: alla ricerca di una disciplina degli “ibridi” bancari e assicurativi”, in: *Banca, impresa, società* 3 (2002) 500; RIVA, Ilaria: “La natura delle polizze vita c.d. linked tra diritto interno e diritto sovranazionale”, in: *Assicurazioni* 1 (2020) 194.

Furthermore, it concerns whether and how it contributes not only to the implementation of the European internal market but also to providing its own contribution, in this case, in relation to insurance distribution, to the realization of the much-promoted Capital Markets Union.

In conclusion, drawing initially from the decisions of the ECJ, one cannot but notice the realization of an integrated sectoral regulatory strategy where judicial power, with reference to mixed insurance/financial cause contracts, seems to harmonize correctly with regulatory provisions and regulator indications.

It will therefore be in light of such similar methodological and substantive preconditions that the regulatory regime provided by the EU, in insurance sector, can be correctly appreciated.

II. A preliminary clarification: the position of the ECJ on the qualification of index and unit linked contracts and of capitalization contracts

The analysis of ECJ precedents, along with the reading of the Advocate General's Conclusions, represents a fundamental interpretative support to fully understand the scope of the organizational and contractual obligations adopted at the regulatory and legislative levels.

In this sense, the European judge has embraced a clear interpretative line, emerged in disputes concerning, on one hand, the informational obligations in life insurance contracts, and on the other hand, the additional requirements needed in insurance mediation. In some rulings, moreover, the issue of the insurance identification of products is pivotal to understanding which regulatory regime, with respect to pre-contractual information, should be applied.

With regard to the informational package to be provided to the insured before the conclusion of life insurance, the Court had already in 2011 focused on analysing IBIP contractual qualification with the judgement in *Gonzalez Alonso v. Nationale Nederlanden Vida Cía de Seguros y Reaseguros SAE* (judgement of March 1, 2012, C-166/11, ECLI:EU:C:2012:119).

The prejudicial question concerned the correct implementation of Art. 3(2)(d) of Directive 85/577/EEC and, in particular, whether the provision, which excluded the resolution regime applicable to contracts negotiated with consumers away from commercial premises, could be applied in the case of so-called unit-linked contracts.

The identification of the insurance contractual structure has proven pivotal for the applicable regulations and the Court, first based on market practice and then on regulatory provisions, has expressed itself clearly. On the one hand, it argues that unit-linked or linked to investment funds “are common in insurance law”⁶. On the other hand, it states that Directive 79/267/EEC, in art. 1 (1) (a) and Annex I, had already encompassed unit-linked products as insurance contracts, in the absence of other provisions to the contrary.⁷

Subsequently, the Court expressed itself with another ruling, case *Länsförsäkringar Sak Försäkringsaktiebolag and others* (Judgement of May, 31, 2018, C-542/16, ECLI:EU:C:2018:369). Although concerning consumer protection in insurance mediation, once again, the Court's legal reasoning could not omit a discussion on the insurance component of mixed products.

The prejudicial question at issue here – that is, for the purposes of the contractual nature of insurance/financial products – is the second raised by the Swedish Supreme Court (Högsta domstolen) which has referred the case to the ECJ for a preliminary ruling to determine whether Directive 2002/92/EEC on insurance mediation also applies when the advisory service is provided with reference to a capitalization contract.⁸

⁶ Point 29, C-166/11, ECLI:EU:C:2012:119.

⁷ Point 30 and 31 C-166/11 should be read in combination.

⁸ More precisely, the question posed by the Swedish Supreme Court is as follows “[...] the Högsta domstolen (Supreme Court) decided to refer the following questions to the Court for a preliminary ruling: [...] (2) (a) Does Directive 2002/92 govern advice, economic or other, given in connection with insurance mediation but which as such does not concern the actual signing or continuation of an insurance contract? In that regard, what

In the absence of a definition of the insurance contract type in Directive 2002/92/EEC, the ECJ specifies what the insurance contract is. More precisely, it outlines structure of the insurance contract, identifying its object, that is, the mutual performances of the parties: the payment of the premium against the guaranteed compensation when the event representing the previously insured risk occurs.⁹

The Luxembourg judge argues that in the product under consideration, both of the aforementioned performances are found; therefore, the capitalization contract is indeed an insurance because the premium-compensation reciprocity is present.¹⁰ This is a decisive point in the reasoning on the contract, its object, but above all on its legal qualification. Indeed, the Court primarily questions whether the advice regarding an IBIP can be provided in accordance with the provisions of the Directive on insurance mediation.

In answering this question positively – recalling the informational duties provided for in art. 12 (2) and (3) of Directive 2002/92/EEC and Chapter III of the same, amended by MiFID II (Directive 2014/65/EU) and implying additional requirements for consumer protection¹¹ – the judge emphasizes what the examined product consists of. Therefore, if there is an investment element, whose underlying asset varies with market performance, it cannot be forgotten that the other – necessary – component is a life insurance contract.¹²

In complement to the contractual framework, regarding decision C-542/16, attention should be given to the Advocate General's Opinions, which identify capitalization contracts, grouped under Regulation (EU) 1286/2014, within the broader category of insurance-based investment products as genuine insurance contracts. Campos Sanchez Bordona's reconstruction is indeed based on solid theoretical foundations that, first and foremost, identify the contract legal qualification consisting in a life-insurance.

Right from the start, the Opinions, in section 2 which is aptly titled “The development of the legal rules applicable to unit-linked life assurance contracts in EU law”, specify that this product consists of “a form of life assurance”, which has become very widespread due to globalized and thus interconnected markets.¹³

Point 79 of the Opinions then outlines the contractual dynamics and, above all, the operation of the insurer. In concrete terms, the consumer pays a periodic premium, precisely and in advance calculated by the actuarial office, which the undertaking allocates to technical reserves or own funds.

However, these Opinions also specify the characteristic elements of these so-called hybrid contracts:¹⁴ the necessary presence of a financial profile,¹⁵ consisting of an underlying asset that

does apply, in particular, as regards advice concerning the placing of capital in the context of capital life assurance? (b) is advice such as that referred to in question 2 (a), where, by definition, it constitutes investment advice under Directive 2004/39, also or instead covered by the provisions of that directive? If such advice is also covered by Directive 2004/39, does one set of rules take precedence over the other?”, point 33, C-542/16, ECLI:EU:C:2018:369.

⁹ In this case, the Court of Justice – at point 50 – refers to some of its previous rulings, such as cases C-349/96 and 556/13, which identify what the insurance contract is. Indeed, the Court of Justice had expressed itself on the subject matter of the insurance contract also with other rulings preceding the one under discussion, such as C-240/99 and C-40-15; as well as subsequently with C-235/19.

¹⁰ In the point 51 of C-542/16 ECLI:EU:C:2018:369 clearly expressed profile.

¹¹ Point 55. On further requirements provided by MiFID II Directive see also point 67.

¹² Point 57 says “It follows from that definition that an insurance-based investment product, like the capital life assurance contract at issue in the main proceedings, involves an investment element which is subject to financial market developments”.

¹³ Point 78.

¹⁴ As defined in points 80 and 90 of the Opinions.

¹⁵ Point 80.

may be a share of a fund or an index, and the fact that it is the company that chooses how to invest a portion of what the customer pays, bearing the investment risk.

Finally, it is precisely thanks to the Opinions that the Advocate General has furthered the Court's harmonizing policy, reaffirming the insurance nature of capitalization products. At point 80, it is indeed specified that their contractual structure comprises a hybrid life-assurance-plus-investment product, therefore they cannot be solely considered as a form of investment product.

At the same time, however, the General Advocate highlighted their peculiar composition and how the presence of the financial element, in fact, requires specific regulations, in accordance with Recital 56 of the IDD, concerning informational obligations, advice, and limitations on intermediary compensation.¹⁶

At the conclusion of the brief overview on the ECJ rulings from which it is possible to grasp the insurance nature of IBIPs, it is worth making some considerations regarding the judgment of the Third Chamber dated 24 February, 2022, the joined cases C-143/20 and 213/20 (judgment of February, 24, 2023, C-143/20, C-213/20, ECLI:EU:C:2022:118).

This judgment, read together with the Advocate General Bobek's Opinions, appears even more significant than the previous ones, as it does not merely consider unit-linked policies as insurance contracts. The insurance qualification of such products, indeed, aligns with the Court's precedents, thus confirming the stringent pre-contractual disclosure obligations that insurers must adhere to.¹⁷ This becomes even more complex when the distributed contracts have a mixed nature, that is, when they involve a financial underlying.¹⁸

This judgment, however, merits attention for its focus on fund performances and how they impact the insured's returns. The emphasis on informational safeguards serves to remind readers that the financial component of insurance even determines the contractual object, specifically the

¹⁶ Point 87.

¹⁷ In accordance with art. 36 of Directive 2002/83/EC, insurance companies must provide information in a clear, precise, and understandable manner to the aforementioned consumers (point 90 of the judgement of 24.2.2023 C-143/20; 213/20 ECLI:EU:C:2022:118).

¹⁸ In this regard, it should be clarified that the Court is seized, in one of the questions referred for a preliminary ruling, with the following question, namely whether art. 36 of Directive 2002/83/EC, read in conjunction with its Annex III point A, a.12, should be interpreted to mean that the indications regarding the nature of the counterparty activities to be communicated to the consumer. If so, the referring judge asks whether they should include exhaustive information on the nature and extent of all risks associated with investing in the mentioned counterparty activities and, finally, whether they should include information identical to that which the issuer of the financial instruments composing the same counterparty activities has communicated to the insurance company, pursuant to art. 19 (3) of Directive 2004/39. Point 100 of the judgment C-143/20 and 213/20 proves to be valuable in this regard and specifies that In order to preserve the effectiveness of the obligation provided for in art. 36 (1) of Directive 2002/83, the information to be communicated to the consumer intending to enter into a contract must therefore include indications of the characteristics of those counterparty activities. And the indications regarding the characteristics of the counterparty activities must also be communicated in a clear, precise, and understandable manner (points 102 and 103), as confirmed, moreover, by the Advocate General's Opinions, at point 95. However, it should be noted that the Advocate General, regarding the communication of the essential elements of the counterparty activities, believes that these should meet the needs expressed by the consumer. Therefore, the Advocate General emphasizes at point 97 that “[...] compliance with the information disclosure obligation contained in art. 36 (1) of the Life Assurance Directive must be carried out on a case-by-case basis in the light of the particular factual circumstances, with account being taken of the balancing exercise [...]”. The same position regarding the informational obligations of the insurance company will be reiterated in the hearing of February 2, 2023 (C-208/21, K.D. v Towarzystwo Ubezpieczeń Ż S.A.), particularly at points 55-56.

insured's benefit.¹⁹ Indeed, the impact of the financial underlying is so significant that it affects not only the obligations but also the rights of the consumer.²⁰

This is a pivotal passage that elevates unit-linked policies to insurance contracts but requires a prior consideration of establishment of precise protections for the weaker party²¹ in the contract bond.

The considerations made in the course of judgment as well as in Opinions, if read in conjunction with EIOPA's more recent regulatory policy, cannot solely rely on informational duties. Rather, they require the implementation of internal corporate measures to ensure the creation of a product with fair value.²²

The brief jurisprudential review was therefore necessary to establish a key point: IBIPs are considered insurance products, that is, particular forms of life insurance integrated with financial returns dependent on external factors to the contract. Although the ECJ has recognized the adoption of insurance legislation, which imposes stringent informational obligations, the current IDD requires additional protection measures. These are embodied in the POG processes, inspired by the continuous pursuit of a balance between fair pricing and the profile of the insured. Ultimately, to the benefit that they can derive from the policy.

This means that the company must establish organizational instruments to control the individual steps related to the creation and distribution of the contract. Starting from the phase of its conception, to its continuous monitoring, to the periodic testing of the correspondence between its characteristics and the needs of the clientele.

Consequently, the proceduralization of the steps related to the “production” and placement entails that the insurance company elaborates a product – an insurance policy with a financial component – that compensates for losses resulting from the event constituting demographic risk, but, above all, guarantees the profit expectations of the non-professional policyholder.

This latter consideration allows us to specify that product oversight and governance, strongly focused on the fair value of the contract, assumes additional significance depending on the product being placed in the predetermined market.

In the case of an IBIP, indeed, the internal organizational structure must not simply ensure that the premium is consistent with the guaranteed risk. Rather, it should not be excessively high

¹⁹ Undoubtedly, the connection to the fund – or index – allows for determining the premium size.

It should be noted, however, that in insurance, be it damage or life, and especially in the case of mixed products, the insurer's performance – the compensation to the insured upon the occurrence of the life event – is conditioned by the particular type of transaction concluded, necessitating an adequate set of organizational, control, and accounting measures. The Advocate General appears to be aware of this aspect when he recalls that the insurer's obligation consists in “a new and independent assumption of risk in return for payment” (point 69). He particularly emphasizes the economic logic, the assumption of risk, and the establishment of a precise payment policy (point 70), which underlies the contractual formalization of the relationship.

²⁰ Below is the passage – in French, as there is no English version of the ruling – from point 98 of the judgement “En outre, ainsi qu'il a été observé au point 65 du présent arrêt, *ledit élément a un impact direct sur l'exécution des obligations et l'exercice des droits découlant dudit contrat. D'une part, outre le paiement des primes d'assurance, le consommateur qui y adhère supporte également les risques résultant de l'investissement de ces primes dans des instruments financiers. D'autre part, les évolutions de cet investissement affectent directement l'étendue des droits que ce consommateur tire du même contrat* et, notamment, la valeur de rachat de celui-ci en cas de résiliation” (emphasis added).

²¹ The Advocate General defined the insured involved in the insurance policy as the weaker party (please refer to point 33 of the Opinion).

²² Now, although in Advocate General Bobek's Opinions there is no reference to the adoption of organizational obligations aimed at creating a value product, the Advocate General describes the functioning of unit-linked policies. With reference to the so-called maturity guarantees, these must “set a minimum level to the value of the contract at maturity”. (point 36 of the Opinion).

compared to the expected gain from investing in fund units or market indices. It must remain at a level that is always lower than the expected financial outcome.

Conversely, the customer will have to bear an economic burden that primarily translates, in contractual terms, into a disproportion of benefits. Secondly, in the violation of fundamental rights, such as the right to be insured and the right to savings protection.

III. The essential contents of product oversight and governance in European insurance regulation

The reading of European case law on IBIPs has highlighted several aspects. Primarily that mixed policies are life insurance contracts and that, due to the financial component, they are subject to a specific regulatory regime supported by stringent information duties, both before and after the conclusion of the contract.

Secondly that their particular structure, which notably entails the so-called market risk²³ entirely borne by the policyholder, necessitates specific and additional protection. This protection is situated in the product design phase, as outlined in the rule of the so-called *product oversight and governance*.

Product oversight and governance is a rule that unfolds in several steps, provided for by the primary law of the Union – art. 25 of IDD, as well as Delegated Regulation (EU) 2017/2358 – and further detailed by EIOPA's acts.²⁴

Over the last decade, product oversight and governance has represented a clear regulatory choice, primarily by the European legislator, initially concerning investment services and activities, and subsequently also insurance distribution. With POG, the contrast against the mis-selling²⁵ of potentially harmful products has been conducted not solely through sometimes overly voluminous pre-contractual information. Rather, primarily through the strengthening of internal organization within companies, thus top management and control bodies,²⁶ by adopting traceable internal processes, they limited the investment risk, or at least the risk of receiving an unsuitable product for the clientele, through an *ex ante* approach. Based on the adoption of appropriate corporate

²³ The risk to which the policyholder is exposed, determined by the fluctuations in the financial references of the product, could even lead to an economic loss for the consumer. Consideration 2 of Regulation 2017/2358 speaks of “detriment risk”.

²⁴ The documents that describe and specify the different components of EIOPA are numerous. For convenience, please refer to the EIOPA acts mentioned in paragraph 3 and onwards, both in the footnotes and in the main body of the text, to obtain a precise overview of the sources.

²⁵ The meaning of mis-selling, in relation to insurance contracts and products within the business context in which this writing is situated, has been well captured by some authors. For instance, BLACK, Julia/NOBLES, Richard: “Personal Pensions Misselling: The Causes and Lessons of Regulatory Failure”, in: *Modern Law Review* 61 (1998) spec. 793. On the other hand, LIMA REGO, Margarida: “Product Oversight and Governance and customer demands and needs: contract law implications”, in: *Proceedings of the 19th Annual Conference of the Insurance Law Association of Serbia. Insurance law and practice-challenges, new technologies and corporate governance, AIDA Serbia* (2018) 3 ff., from a more contemporary perspective centered around the provisions of the IDD, identifies mis-selling as the deviation, fueled by inadequate reviewing and demand and needs tests, between the characteristics of the product and the target market where customers in need of that particular product are situated.

²⁶ On the role of a coherent internal organization within a company to ensure effective POG, see MARANO, Pierpaolo: “The ‘Mifidization’: The Sunset of Life Insurance in the EU Regulation on Insurance?”, in: *Liber Amicorum for Professor Ioannis Rokas*, 2016, 5, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2832952 [last access 21.08.2025]; MARANO, Pierpaolo: “The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Organisational Rules for Business Conduct”, in: MARANO, Pierpaolo/NOUSSIA, Kyriaki (eds.): *Insurance Distribution Directive*, Cham 2021, in part. 62-63; ZUNZUNEGUI, Fernando: “The financialisation of insurance distribution” in: *Revista del derecho del mercado financiero* 2 (2022) 10.

structures aimed at the “creation” of contracts that, from their inception, were compatible with a certain group of consumers. Therefore, it is not wrong to say that POG does not reduce transparency measures;²⁷ rather, it strengthens them by identifying a specific target market and, consequently, creating products in line with it.

The focal point of the renewed European policy regarding the intermediation of insurance products – inspired by the UK legal system, the first to detail a comprehensive system of product governance following the 2007 crisis²⁸ – is constituted by the so-called approval process.

The approval process, both for manufacturers and distributors, involves the implementation of procedures for the design, monitoring, and review, as well as the distribution of insurance

²⁷ In this regard, it is sufficient to read Recital 6 of the IDD directive, which specifies the need for a level playing field “in particular in the area of disclosure information”. The transparency obligations, within the scope of the IDD directive, are concentrated in Chapters V and VI, the latter relating to additional transparency requirements for insurance-based investment products.

More generally, on the contractual disclosure obligations related to the insurance contract, see the considerations of LOACKER, D. Leander: *Informed Insurance Choice?: The Insurer's Pre-Contractual Information Duties in General Consumer Insurance*, Cheltenham 2015, pp. 15 ff.; For the critical issues related to a full-disclosure approach in the insurance sector, see SCHWARZ, Daniel: “Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection”, in: *UCLA Law Review* 61 (2014) 394. On the coexistence with the new POG measures, see, among others, in a customer protection perspective DE MAESSCHALK, Nic: “The Insurance Distribution Directive: What Does it Change for Intermediaries and for Others” in: MARANO, Pierpaolo/SIRI, Michele (eds.): *Insurance Regulation in the European Union. Solvency II and Beyond*, Cham 2017, 65-67 and 69 ff.

²⁸ The first act through which the UK legislature changed the course of investment activity regulation was the HM Treasury, A New Approach to Financial Regulation. Summary of consultation and responses, November 2010, followed closely by the Discussion Paper, Product Intervention, DP 11/1, January 2011, from the Financial Securities Authority (FSA). This Paper represents a real turning point in terms of regulating the distribution of financial products and combating mis-selling. The new regulatory approach was intended to involve preventive intervention in the value chain (p. 16 and 18). The innovation of this shift also lies, while recognizing the importance of conduct rules at the point of sale, in determining ex ante the correct realization of products. Here is a significant passage: “While high standards at the point-of-sale are essential to help consumers buy the right products for their needs (and we will continue to supervise this), *firms' actions before the point-of-sale also have a significant influence*. The decisions firms make about the following can have a major impact on outcomes for the customer: *designing product features*; making reasonable assumptions about how the product will function under various conditions and keeping this under review; determining how a product will be managed; determining a strategy for marketing and distribution; and ongoing product monitoring” (emphasis added).

The same FSA will then translate into the FSA Handbook (with regard to the section ‘The Responsibilities of Providers and Distributors for the Fair Treatment of Customers’) to further specify the contents of product governance. At the same time, it should not be forgotten that well before the 2007 crisis, the FSA and the UK financial legislator had anticipated the demands, subsequently embraced worldwide, for greater protection of retail investors through the so-called Treating Customer Fairly Initiative (previously outlined in the FSA, The Responsibilities of Providers and Distributors for the Fair Treatment of Customers, Policy Statement 7/11, July 2007, later incorporated into the FCA Handbook in the Regulatory Guide titled as the 2011 Policy Statement). A precise description of the paradigm shift in UK legislation is provided by MOLONEY, Niamh: “The legacy effects of the financial crisis on regulatory design in the EU”, in: FERRAN, Eilis/MOLONEY, Niamh/HILL, Jennifer G./C. COFFEE JR., John (eds.): *The Regulatory Aftermath of the Global Financial Crisis*, Cambridge 2012, 187-194; SMITH, Herberth: “Financial Regulatory Developments”, in: *Law and Financial Markets Review* 5 (2011) 230-231. A significant emphasis on regulatory change is also provided by FERRAN, Eilis: “The Break-up of the Financial Services Authority”, in: *Oxford Journal of Legal Studies* 31 (2011) 478-479. With specific attention to the emergence of the rule from the English financial market to the European insurance market, see VELLISCIG, Lidia: “Season 3: Product Governance. Rethinking Retail Customer Protection in the EU Insurance Market”: in *Global Jurist* 3 (2018) 2-4.

products.²⁹ These steps are outlined in a written document, the product oversight and governance policy,³⁰ which is made available to the relevant personnel. However, from both an internal oversight perspective (control bodies) and a market standpoint (regulatory authorities), it allows for continuous assessment of choices regarding the development and placement of products.³¹ In this phase, a central moment involves the determination by insurance companies of the positive target market,³² corresponding to the target clientele. It must be identified in precise terms; therefore objectives, interests, and characteristics of the clients should be adequately considered.³³ Moreover, intermediaries must acquire a necessary level of available information regarding clients and their financial literacy.³⁴

At the same time – in line with a strengthened trend in the perspective of European reform for product mapping³⁵ – defining the market also involves studying the characteristics, risk profile, complexity,³⁶ and nature of the policies.

²⁹ Art. 25 (1) Directive (EU) 2016/97; art. 4 (1) Delegated Regulation (EU) 2017/2358.

³⁰ Art. 4 (2) Delegated Regulation (EU) 2017/2358.

³¹ In essence, the written policy is an efficient tool for monitoring the insurer's compliance with the POG regulation. This is because a written document is a means of recording that allows both the company's internal controls and the supervisory authority to carry out constant supervision and, if necessary, impose changes to the POG policy. This phenomenon, which consists of exercising a “double” supervision – internal, but also market-based – is known as meta-regulation, of which the POG is the highest expression in regulated financial markets. On this point, see CHEREDNYCHENKO, O. Olha: “Cooperative or competitive? Private regulators and public supervisors in the post-crisis European financial services landscape”, in: *Policy and Society* 35 (2016) 111; CHEREDNYCHENKO, O. Olha: “Public and private financial regulation in the EU: opposites or complements?”, in: Nicholas DORN (ed.): *Controlling Capital. Public and Private Regulation of Financial Markets*, Milton Park-New York 2016, 151; PERRONE, Andrea: “Servizi di investimento e tutela dell’investitore”, in: *Banca, borsa titoli di credito* 1 (2019) 7-9. On the link between POG policies and meta-regulation in insurance law, see MARANO, Pierpaolo: “The Contribution of Product Oversight and Governance (POG) to the Single Market: A Set of Organisational Rules for Business Conduct”, in: MARANO, Pierpaolo/NOUSSIA, Kyriaki (eds.): *Insurance Distribution Directive*, Cham 2021, 62.

³² Art. 25(1)(3) Directive (EU) 2016/97.

³³ Artt. 4 (3) lett. a), l) and 5 (3) Delegated Regulation (EU) 2017/2358.

³⁴ Art. 5 (3) Delegated Regulation (EU) 2017/2358.

³⁵ This refers to the initiative conducted by the European Commission, which, starting from May 24, 2023, formulated two reform directives to implement the so-called Retail Investment Package. These directives consist of the adoption of the Omnibus Directive Proposal (aimed at amending parts of MiFID II, IDD, UCITS, AIFMD, and Solvency II regulations) and changes to the PRIIPs Directive. Among the stated objectives of the project is also to ensure that “Client profiling and product governance obligations should be supported by comprehensive measures on product mapping. A suggestion, in this respect, is to create rules developing more objective and accessible methodologies for product mapping”. For further insights on the topic, refer to ANNUNZIATA, Filippo: “Retail Investment Strategy. How to boost retail investors’ participation in financial markets”, Study requested by the ECON Committee, Luxembourg, June 2023, in part. 34-37.

³⁶ In-depth analysis of the features, complexity, and risk profile of products by sector operators is also emphasized by EIOPA: Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, 18 March 2016, EIOPA-BoS-16-071, 1.14-1.15.

Indeed, furthermore, the approval process and the determination of the target market respectively imply that the client's sustainability objectives³⁷ and sustainability factors³⁸ are adequately considered in the product design.³⁹

Based on the same features, relating to both the clients and the product, manufacturers also identify customers who fall into the so-called negative target market, those to whom the contract cannot be distributed as it does not meet their profile. It cannot be denied that the specification of the negative target market – although not excluded for life and non-life products – was designed for IBIPs,⁴⁰ which are considered, indeed, in Recital 56 of the IDD, as “a possible alternative” or “in substitution” for investment products subject to MiFID II.⁴¹

Distributors must adhere to the distribution choices elaborated upstream by the manufacturers.⁴² However, the Delegated Regulation (EU) 2017/2358 does not prevent them – in line with MiFID II regime⁴³ – from placing products with clients who do not belong to the positive target market,⁴⁴ although in a completely exceptional manner, that is, when such a choice is justified based on the needs and requirements of the clients.

A paramount element in product engineering is then constituted by product testing.

In accordance with art. 6 of POG Delegated Regulation, manufacturers must “test” contracts intended for distribution and this means that they must assess and subsequently monitor whether the policies meet the end consumers' needs, objectives, including those related to sustainability,⁴⁵ and characteristics throughout their entire lifespan. With reference to the IBIPs, the correspondence between the consumer and the product must be substantiated by the use of scenario analyses that timely intercept the variables affecting contractual adequacy.⁴⁶

³⁷ See art. 4, par. 1, lett. a) of Delegated Regulation (EU) 2017/2358 as amended by Delegated Regulation 2021/1257, which modifies Delegated Regulations (EU) 2017/2358 and 2017/2359 with regard to the integration of sustainability factors, sustainability risks, and sustainability preferences into the product governance and control requirements for insurance companies and insurance product distributors, as well as into the conduct rules and investment advice for insurance-based investment products.

³⁸ See art. 5 par. (1) (2) of Delegated Regulation (EU) 2017/2358 as amended by Delegated Regulation 2021/1257.

³⁹ With reference to the integration of product governance through sustainability factors and preferences, DELLA TOMMASINA, Luca: “Insurance Industry and Sustainability Preferences: Contracts and Products”, in: SPATARO, Luca/QUIRICI, Maria Cristina/IERMANO, Gabriella (eds.): *ESG Integration and SRI Strategies in the EU. Challenges and Opportunities for Sustainable Development*, Cham 2023, 141 ff.; CORVESE, Ciro: “The Assessment of Sustainability in Insurance Activity: Corporate and Products Governance. The Perspective of European Union and the Effects on Italian Insurance Regulation”, in: *Italian Law Journal* 1-2 (2024) 588-596.

⁴⁰ Art. 5 (2) Delegated Regulation (EU) 2017/2358.

⁴¹ This is what can be deduced from EIOPA: Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, EIOPA-17/049 1 February 2017, 12.

⁴² Art. 10 (4) Delegated Regulation (EU) 2017/2358.

⁴³ In point 52 of Guidelines on MiFID II product governance requirements, 05/02/2018, ESMA 35-43-620, it is specified that distribution to the negative target market can be justified for diversification and hedging reasons. Point 70 states that the justification for this deviation should be based on individual facts of the case and the reasons have to be documented. Point 74 reminds that decisions regarding distribution to the negative target market must nevertheless be communicated to the manufacturer.

⁴⁴ The reference is to Recital 9 of Delegated Regulation (EU) 2017/2358. The condition under which products can be placed outside the target market is that “[...] provided that the individual assessment at the point of sale justifies the conclusion that those products correspond to the demands and needs of those customers and, where applicable, that insurance-based investment products are suitable or appropriate for the customer”.

⁴⁵ Art. 6 Delegated Regulation (EU) 2017/2358 as amended by Delegated Regulation 2021/1257.

⁴⁶ Recital 8 and art. 6 Delegated Regulation (EU) 2017/2358.

More generally, it is the manufacturer's responsibility to establish in advance the criteria and procedures by which the analysis will be conducted. The high proceduralization of this phase takes on a specific meaning for potential liabilities:⁴⁷ the introduction into the market of products that have not passed testing is not permitted by the Union legislator (art. 6 (2) of Delegated Regulation (EU) 2017/2358).

In its terminal phase, POG is enriched with a profile of no lesser value compared to the preceding ones, and indeed, one that repeats periodically. The reference is to the product monitoring and review, as established by art. 25(4) of the IDD and art. 7 of Delegated Regulation (EU) 2017/2358. It is interrelated with product testing, as it requires events that could impact the construction of a contract conforming to the insured's profile to be intercepted.⁴⁸ Manufacturers will ultimately have to adopt "appropriate action"⁴⁹ to mitigate the negative effects on clients, providing timely information to both customers and distributors.

In order for the POG to function correctly and for the development of the potential target market not to be wasted, a final consideration must be given to the moment of distribution.

Where production and distribution are managed separately, the distributor is subject to specific obligations under the so-called distribution contract.⁵⁰ Based on the accurate acquisition of information from the producer,⁵¹ the downstream distribution strategy must be consistent with the upstream's one⁵² and subject to constant review.⁵³ Only in this way can the POG policy be fully ensured, along with customer protection and consequent market stability.

IV. POG and business internal organization

The discussion on POG which in this contribution draws inspiration from the precise characterization of IBIPs provided by the ECJ, begins with a clear political trend by the European legislator. That is, to aim, in the regulation of economic, legal, and social phenomena, to establish a uniform (and unifying) regulatory framework. This is especially true when considering regulated financial markets, including the insurance market.

In this sense, POG fully embodies the renewed trend in European financial legislation and regulation. A new approach that, aiming for ever greater client protection through the

⁴⁷ MARANO, Pierpaolo: "The Product Oversight and Governance: Standards and Liabilities", in: MARANO, Pierpaolo/ROKAS, Ioannis (eds.): *Distribution of Insurance-Based Investment Products*, Cham 2019, 80, emphasizes the potential liability of the manufacturer, both in the event of authorizing the distribution of a product that has not passed a test and in cases where the test has been deliberately manipulated.

⁴⁸ Art. 7 (1) Delegated Regulation (EU) 2017/2358.

⁴⁹ Art. 7 (3) Delegated Regulation (EU) 2017/2358.

⁵⁰ The reference to the "distribution contract" can be found in EIOPA's approach to the supervision of product oversight and governance, EIOPA 2020, 14. This is a contract through which the manufacturer and distributor regulate their respective duties. In terms of supervision, it is an important document. It allows the Authority to evaluate the distributor's strategy and understand the correctness of internal processes, to assess the manufacturers' sanctioning mechanisms, and to sanction any conflicts of interest. See also Recital 4 of the Delegated Regulation (EU) 2017/2358.

⁵¹ In accordance with Final Report on Public Consultation on Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, 6 April 2016, EIOPA-BoS-16-071, 10 "From EIOPA's perspective, obtaining all relevant information on the product is a necessary prerequisite for providing the distribution activities in the best interest of the customers". Regarding the information flow between the manufacturer and the distributor, one should also refer to art. 25 (1) (5) Directive (EU) 2016/97 and 10 (1) Delegated Regulation (EU) 2017/2358. The combined provisions of the two regulations imply that the manufacturer must provide all necessary information to the distributor, who must then use this information to distribute the policies to the target market.

⁵² Art. 10 (4) Delegated Regulation (EU) 2017/2358.

⁵³ Art. 10 (6) Delegated Regulation (EU) 2017/2358.

establishment of stringent conduct rules, has emphasized the centrality of undertaking organizational rules.⁵⁴

With specific attention to the insurance sector, therefore, product oversight and governance must also be examined through the interpretative structure provided by Directive 2009/138/EU (so called Solvency II), concerning the access to and pursuit of insurance and reinsurance activities. A similar connection between Solvency II, particularly between the first two pillars – quantitative and qualitative – and contractual design is intuitively evident: the placement of products with the corresponding clientele requires an adequate and coordinated corporate organization. Consequently, in light of efficient internal procedures, capital requirements will directly benefit from this synergy, ensuring that insurance services are guaranteed.

In the aforementioned context, EIOPA has attempted to provide more certain interpretative guidance. This is particularly in reference to art. 41 (3) and (4) of Solvency II, which prescribes the adoption of “written policies” aimed at ensuring the “continuity and regularity in the performance of their activities”.

The interpretation provided by the European insurance authority merely specifies that product design requires “organizational arrangements” which are “all within the system of governance of the insurance undertaking”⁵⁵; therefore, they are interrelated with the corporate governance provisions set out in Solvency II.⁵⁶

The effort of the sectoral regulator was then limited to anticipating – without providing more specific indications on the allocation of functions among the various corporate bodies – what was ultimately established by the delegated POG legislation.⁵⁷ That is, the manufacturers' body or structure identified for the development of product design must, on the one hand, establish, implement, and review the approval process, while, on the other hand, they must operate in accordance with the positive POG regime.⁵⁸

Upon first reading, the provisions regarding insurance distribution might seem overly vague, when, in reality, they should be interpreted within the context of the minimum harmonization perspective established by the IDD regulations.⁵⁹ This guarantees greater discretion to the national

⁵⁴ The trend in which systemic objectives, particularly consumer protection, of the Union's financial legislation were initially ensured through a stronger system of conduct rules of a contractual nature, and then converged towards the implementation of internal organizational rules within the enterprise, is well highlighted by MEZZANOTTE, Francesco: “Regulation of Business-Clients Relationships through ‘Organizational Law’”, in: *European Review of Contract Law* 2 (2017) 148-149; CHEREDNYCHENKO, O. Olha: “Two Sides of the Same Coin: EU Financial Regulation and Private Law”, in: *European Business Organization Law Review* 22 (2021) 153.

⁵⁵ See EIOPA's Final Report on Public Consultation on Preparatory Guidelines on product oversight and governance arrangements by insurance undertakings and insurance distributors, EIOPA-BoS-16-071, 6 April 2016, in particular Annex I – Preparatory Guidelines, 1.8, 1.9, 16.

⁵⁶ Ibid.: 1.10, 16, EIOPA specifies that “[...] the product oversight and governance arrangements have their foundation in Solvency II as well as in the IDD [...]”.

⁵⁷ Art. 4(4) lect. a)-b) Delegated Regulation (EU) 2017/2358.

⁵⁸ In practice, EIOPA has confined itself to specifying that the administrative, management, and supervisory bodies are responsible for the adoption, development, and reviewing of the POG policy. See particularly EIOPA *ibid.*: 1.13, 1.51, then at section 2, chapter 1 (Preparatory Guidelines for insurance undertakings and insurance intermediaries which manufacture insurance products for sale to customers) Guideline 1 and finally at Annex III (Feedback statement to the first Public Consultation on the proposal for Preparatory Guidelines on product oversight & governance arrangements by insurance undertakings), focused on role of administrative, management and supervisory body; but also EIOPA's Final Report on Consultation Paper no. 16/006 on Technical Advice on possible delegated acts concerning the Insurance Distribution Directive, EIOPA-17/049, 1 February 2017, 35, 45.

⁵⁹ For an overview of the minimum harmonization policy promoted by the IDD, see HOFFMANN, Annette/NEUMANN, K. Julia/POOSER, David: “Plea for Uniform Regulation and Challenges of Implementing the New Insurance Distribution Directive”, in: *The Geneva Papers* 43 (2018) 743, 747, 757, 761, 763.

legislator in structuring organizational processes,⁶⁰ without conflicting with the broader harmonization approach, although not explicitly stated, of Solvency II.⁶¹

Therefore, a mature and comprehensive evaluation of the POG, in the context of the relationship between these sets of regulations, can only lead to two fundamental conclusions.

The first conclusion is that the POG policy does not simply add to the other policies prescribed by Solvency II. Rather, it becomes an integral part of the insurance company's corporate governance model, involving various phases of the internal business structure, inspired by the principle of sound and prudent management of the intermediary.⁶² It will be adopted by the board of directors, which therefore makes decisions regarding product design and is subsequently reviewed by the supervisory bodies.⁶³

The second one concerns the relationship between insurance activity, considered as the undertaking's organization, and the contract.

The approval process, in fact, is deeply inspired by foundational values of the IDD – protection of insureds and market stability –, especially when the distribution involves IBIPs, for which the legislation also imposes additional obligations on intermediaries.

Thus, POG requirements first inspire the top management's decisions and, consequently, organizational measures are reflected in the contract. In concrete terms, the manufacturer, and subsequently the distributor, must create a product consistent with the insured's risk profile. This is particularly relevant in the case of mixed products, including their expected future performance. The insurance company must provide a product whose costs for the insured do not exceed the benefits, that is, the amount of the indemnity or, in the case of an IBIP, the gain derived from the underlying financial asset. In summary, the POG rules require manufacturers to consider the value for customers in their products.⁶⁴

V. POG and the conforming impact on contract: the principle of value for money. Definition and content

The focus on POG policies, with attention to their impact on the contract, requires further analysis related to the obligation of intermediaries to create a product aligned with the consumer. This manufacturer task is based on the principle of the so-called *value for money*, which, in a reformist perspective of the IDD, must structurally inspire the individual constituent moments of product oversight and governance.⁶⁵

⁶⁰ EIOPA's Final Report on Consultation Paper no. 16/006, 63, specifies that even if manufacturer's administrative, management or supervisory body is ultimately responsible for POG arrangements "as a matter of principle, the manufacturer's administrative, management or supervisory body may delegate the task which would not alter its ultimate responsibility for the product oversight and governance arrangement".

⁶¹ Although the text of the directive does not specify the chosen level of harmonization, it is evident that the regulatory path selected aims for a maximum harmonization framework. In this sense, see DREHER, Meinrad: *Treatises on Solvency II*, Berlin-Heidelberg 2015, 6-10; conversely, regarding governance and risk management, SIRI, Michele: "Corporate Governance of Insurance Firms After Solvency II", in: MARANO, Pierpaolo/SIRI, Michele (eds.): *Insurance Regulation in the European Union. Solvency II and Beyond*, Cham 2017, 133.

⁶² In the sense that POG policies are fully integrated in insurance corporate governance see above, p. 8.

⁶³ SIRI, Michele: "Corporate governance of insurance firms after Solvency II", in: *ICIR Working Paper Series 27* (2017) 27-29, where the author emphasizes the aspect of the administrative board's responsibility in the implementation of POG policies; MARANO, Pierpaolo: "The Product Oversight and Governance: Standards and Liabilities" 75.

⁶⁴ MARANO, Pierpaolo: "The Contribution", 57.

⁶⁵ In this regard, see EIOPA: Final Report on Technical Advice to the European Commission Regarding Certain Aspects Relating to Retail Investor Protection, EIOPA-BoS-22/244, 29 April 2022, pp. 104-105. In point 200, EIOPA suggests an amendment to art. 25 of the IDD with reference to the approval process. Subsequently,

The reference to a *de jure condendo* visual of the insurance distribution regulation implies a current gap in the IDD, as well as in the delegated regulation. EIOPA, on the other hand, has provided valuable guidance in this regard to the legislator and market participants – undertakings, distributors, Member States insurance authorities – to adequately enrich and monitor the POG obligations.

And it is precisely EIOPA that defines the boundaries of the principle, limiting them to the application scope of IBIPs. The European authority, in fact, specifies in the Supervisory Statement of November 30, 2021, that unit-linked products offer value for money when costs are *proportionate* to the benefits. These benefits are identified in the positive investment outcomes and, more generally, in the coverage performance guaranteed to the client.⁶⁶

The contribution of sectoral regulation leads to the conclusion that the value for money clause was developed to inspire the creation of an “economically sustainable” product. This is why, in relation to hybrid contracts, which are more complex than life or non-life insurance, it is argued that IBIPs “create value” or rather, they provide added value, meaning genuine utility for the end consumer:⁶⁷ net of loadings, the mixed insurance policy must ensure a minimum profit margin for the participants of a previously identified market.

Before assessing the impact that value for money will have throughout the entire life cycle of the product, one aspect needs to be clarified regarding the mixed insurance-financial contract type. The relationship between costs and utility for the policyholder is even more relevant from the perspective of consumer protection. Unit-linked, index-linked policies, and capitalization contracts are complex products due to their financial component, which is difficult for retail clients to understand.⁶⁸ In other words, IBIPs are inherently complex, and furthermore, for certain types, there are additional challenges related to their long-term nature, the recommending holding period, and the impossibility of consumer intervention.⁶⁹

From an initial overview of value for money, one point in particular appears significant, closely linked to the concept of complexity of the insurance-financial contract. A composite concept, which concerns the difficulty of describing the operation of the financial components of the policy, often dependent on the performance of underlying funds or certain events or conditions. This results in increased costs for the consumer in exchange for business performance that is not always clearly understandable.⁷⁰

EIOPA suggests amendments to the Delegated Regulation on POG, according to which the complexity of the product and its cost-efficiency – fundamental elements of value for money – must be considered in the implementation of the POG policy.

⁶⁶ EIOPA: Supervisory Statement on assessment of value for money of unit-linked insurance products under product oversight and governance, EIOPA(2021), point 3.2., 5.

⁶⁷ EIOPA: Eioipa’s approach to supervision of product oversight and governance, 2020, 12-14.

⁶⁸ This aspect of the complexity of IBIPs is well understood by EIOPA: Consultation Paper. Advice to the European Commission regarding certain aspects relating to retail investor protection, BoS-22-020, 28 January 2022, in part. pp. 70-74.

⁶⁹ EIOPA: Ibid., 71.; Id.: Final Report on technical advice to the European Commission regarding certain aspects relating to retail investor protection, EIOPA-BoS-22/244, 29 April 2022, 91.

⁷⁰ EIOPA: Ibid., 99, In particular, it is point 184 that describes the elements determining the complexity of such products. This specific passage reads as follows: “The main features and issues [...] in relation to complexity include: *The way performance of complex products is calculated is difficult to understand; for example, in many instances performance depends on two or more funds with different characteristics, making it difficult for a consumer to understand the different risks;* Some products contain complex contractual phrasing/uncommon features making the surrender value/death benefit difficult to understand because the payment is often subjected to specific conditions, which, however, are not clearly explained and/or which are uncommon and difficult for consumers to understand;* For some products there is limited clarity on the investment objectives and risks and there are explicit and implicit charges at the fund level making it difficult to understand the overall costs involved;* Some products include a very high number of additional insurance

Consequently, these issues related to complexity generate risks that impact the customer's position. A conduct risk arises from the behaviour of the intermediary who, when dealing with a non-professional counterparty, might not adequately design the product, thereby engaging in an unfair commercial practice.

At the same time, a true value for money risk cannot be excluded, as a direct effect of the unfair conduct of the manufacturer and the distributor. This risk involves distributing a product where the cost level exceeds the performance of the insurance for the customer. Practically, the product does not represent a fair value concerning the needs, objectives, and characteristics of the policyholder.⁷¹ The risks associated with the sale of such products have necessitated a reconsideration of POG. It must be significantly strengthened, with specific attention to market targeting and product testing and the terms of complexity and specificity, or rather “granularity”, of the markets will be the foundational drivers of the reform initiative.

VI. Rethinking POG in light of the value for money of complex products: EIOPA's guidance

Value for money gains new centrality in POG dynamics, and its impact is tangible both in defining the target market – and the negative target market – and, especially, in product testing.

First and foremost, the target market must be set based on a new criterion, that of product complexity,⁷² considered alongside the granularity of the identified market area.⁷³

Indeed, at an earlier stage, a detailed pricing process must be adequately documented – and therefore fully integrated into the recording of the POG policy – as an essential precondition for assessing the consistency of value for money.

The contract pricing phase requires that costs and loadings be quantified and eliminated when not justified.⁷⁴ It deals with a step which truly reflects the forward-looking trend of the integration envisioned by the value for money principle.

Thus, the manufacturer must adequately price the policy, which requires evaluating the costs as well as the service – and the benefits – derived from it and only in this way can the product be fairly priced.⁷⁵

protection options and/or many underlying investments options increasing the degree of complexity; Some products have complex features such as loyalty bonuses, maturity bonuses, bonuses which kick in when certain events occur and/or certain conditions are met, leading to cumbersome and non-linear structures such that the policyholder may not adequately understand the product;* In many instances, the limited exposure to market trends offered by some products is subjected to certain conditions which may not materialize and this could be misunderstood by retail consumers leading to a mis-match between actual returns and expected returns”

⁷¹ EIOPA: Supervisory Statement on assessment of value for money..., 4, point 2.6.

⁷² EIOPA: Final Report on technical advice to the European Commission regarding certain aspects relating to retail investors, EIOPA-BoS- 22/244, 29 April 2022, 96, point 173, underscores the central role of complexity, which, in the implementation of value for money, must always be considered in connection with the cost-efficiency of the product. Furthermore, it should be noted that, according to EIOPA (Supervisory Statement on assessment of value for money..., points 3.18-3.26), it is the manufacturer who must provide an assessment of the product's complexity. On one hand, this is because the company makes decisions regarding the distribution strategy and understands the nature of the product better than any other actor. On the other hand, it is through the complexity information provided by the manufacturer that the supervisory authority can exercise its powers in the event of deficient POG.

⁷³ EIOPA: Approach to the supervision..., 10; Id.: Supervisory Statement on assessment of value for money, 6.

⁷⁴ EIOPA: Supervisory Statement on assessment of value for money..., 5, 3.2, 3.3.

⁷⁵ Even though the preferred perspective is that of sectoral authority supervision, the determination of a fair price is once again supported by EIOPA: Approach to the supervision..., in particular p. 13; Id.: Supervisory Statement on assessment of value for money..., 6, 3.7, 3.10.

In a perspective that aims at the continuous alignment between fair value and consumer profiles, the product testing must be reshaped. In a significant move, EIOPA, in its Consultation Paper of January 28, 2022, addresses the issue of product cost-efficiency within the scope of consumer protection. It argues for the need to precisely evaluate the impact of costs on the distribution strategy and this means that during product testing, a “linkage between the definition of costs and the service provided in relation to such costs”⁷⁶ must be included and this correlation must always be guided by the principle of proportionality.⁷⁷

In reinforcing the POG policy, with the aim of determining *fair value* in the product price, a leading role must ultimately be reserved for the so-called profitability test.

This is a further articulation, driven by the value for money clause, which shapes the entire POG process – hence top-level decisions and ultimately the contract – according to a consumer-centric approach. The profitability test is not limited solely to verifying a correct balance between costs and contractual benefits for the policyholder. Furthermore, it allows for determining whether the investment strategy and, more broadly, the functioning of the product correspond to satisfactory performance for the clientele.⁷⁸

The guarantee of *product fairness*⁷⁹ has also necessitated that the profitability test be inspired by objective indicators.⁸⁰ These not only allow for understanding whether the product generates value but also enable the company to operate in compliance with solvency criteria and facilitate the oversight of the authority.

Moreover, value for money asserts itself, in an ongoing perspective, even in the review phase. Therefore, manufacturers and distributors must ensure that the contract remains consistent with the needs, objectives, and characteristics of the consumer even in the face of events that materially affect the main characteristics, as well as risk coverage and guarantees.⁸¹

EIOPA's contribution with regard to value for money, more precisely, the integration of this principle into product oversight and governance (POG) procedures, has undoubtedly been highly

⁷⁶ EIOPA: Consultation Paper. Advice to the European Commission regarding certain aspects relating to retail investor protection, BoS-22-020, 28 January 2022, 84, 213. At point 214, the objective pursued with this linkage is specified. In particular, it states: “The objective of creating this linkage would be that supervisors could then more closely compare costs and assess whether costs are due and proportional as stated in EIOPA’s supervisory statement on value for money. In particular, EIOPA sees the importance of, for at least products showing a medium to high degree of complexity, requiring the manufacturer to clearly identify and ‘single out’: Distribution costs [...] Administrative costs”.

⁷⁷ EIOPA: *Ibid.*, 85, point 215.

⁷⁸ The innovation introduced to the POG policy through the profitability test has been endorsed by EIOPA: Methodology to assess value for money in the unit-linked market, EIOPA-BoS-22/482, 31 October 2022, in part. p. 11-14.

⁷⁹ The profile of product fairness is accurately captured by EIOPA: Approach to the supervision..., 15 as the European regulator specifies that POG process has to be “customer-centric” and to “test the value which products bring to the target market, balancing profitability aspects with fairness and with the services and benefits offered, whilst taking into account that *products need to be sustainable also from a pricing perspective*” (emphasis added).

⁸⁰ Set by EIOPA: Methodology, 14 ff., and consist of indicators to assess, at different points in time, the policy value in case of surrender, i.e. “surrender value”; indicators to assess, at different points in time, the policy value in case that the biometric event insured is triggered, i.e. to test the “Biometric risk benefit” against the total amount of premium paid and jointly the amount of costs paid on the total premium paid in these events; additional indicators to improve the quantitative analysis.

⁸¹ EIOPA: Supervisory Statement on assessment on value for money..., 8. With regard to unit-linked products, EIOPA specifies that, in relation to product reviewing, the net performance of the fund after costs should be compared with market returns. Actively managed funds should reflect the needs, objectives, and characteristics of the target market, and manufacturers should assess whether their outperformance compensates for the higher costs of active management.

significant. Value for money, as developed in light of EIOPA's guidelines, has had a profound impact not only on the individual stages within the POG policy but also on the contract itself, particularly in terms of the contractual obligations of the parties involved.

Specifically, thanks to this general clause inspired by the principles of proportionality and contractual balance, the soft law of the European sectorial authority inevitably allows for shaping the payment of the premium and the disbursement of indemnities upon the occurrence of the insured event.

On the one hand, therefore, it does not seem entirely incorrect to consider the value for money clause as a tool of contractual hetero-integration carried out by an administrative authority,⁸² capable even of modifying the content of the policy. Thus, value for money seems to aim at a contract where a balance is achieved between the mutual benefits and costs derived from it.

The attainment of this objective can be pursued on the one hand through the establishment of a fair price⁸³ which reflects consumers' needs and is concretely realized in the payment of a premium proportional to the services provided by the insurer.

On the other hand, it is important to remember that, despite the protection of the insured (or the prospective insured), the insurer operates a business that must be guided by business viability principle. This allows the company to strengthen its financial stability, thereby creating own funds and technical reserves necessary to offer services that are attentive to customer care while maintaining adequate financial robustness. Therefore, the distribution policy must not only adequately consider the profile of the target customer for whom the product is intended but must also be economically sustainable for the insurer within a medium to long-term operational horizon.

VII. Sectoral conduct of business rules, market implications, and the role of the ECJ: some points for reflection

The description of the POG procedures, integrated with the principle of so-called value for money, allows for some concluding considerations.

These reflections are particularly directed towards the rulings of the Court, which are inevitably influenced by the set of rules brought by the current European regulatory framework that was not yet in force when the judges in Luxembourg made their decisions, not even in the case of the joined cases C-143/20 and 213/20.

An essential preface concerns some data related to European Union private law that was developed in the rulings analysed previously.

The first point is that, apart from residual doubts arising from a careful reading of Union jurisprudence,⁸⁴ the Court of Justice is unequivocal on the contractual classification of IBIPs: they are insurance contracts.

⁸² BERTI DE MARINIS, Giovanni: "Governo del prodotto e conformazione dei contratti di assicurazione", in: *Assicurazioni* 3 (2023) 427-428. Even with reference to the impact of EIOPA's policies on the pre-contractual phase and transparency obligations, see instead KOVÁTS, Surd: "The role of EIOPA in consumer protection", in: *Law and Financial Markets Review* 7 (2013) 292-293.

⁸³ More generally on the theory of the fair price, see GORDLEY, James: "Equality in Exchange", in: *California Law Review* 69 (1981) 1587 ff.; GORDLEY, James: *Foundations of Private Law: Property, Tort, Contract, Unjust Enrichment*, Oxford 2007, 361 ff. In this case, it would be preferable to consider the fair price as the result of a normative criterion established either at the legislative level or, as in the case of European insurance law, through acts issued by supervisory authorities that influence the formation of the price of a good or service as determined by the interaction of supply and demand. On this approach, see PERRONE, Andrea: "The Just Price Doctrine and Contemporary Contract Law: Some Introductory Remark", in: *Orizzonti del diritto commerciale* 1 (2013) 11.

⁸⁴ It should be noted that in some cases the ECJ has used the term "financial products" in reference to both life insurance and group life insurance contracts. In the first case, with the decision *Walter Endress v. Allianz*

The second point, consequentially, concerns the specialist regulation that must be adopted to ensure full pre-contractual protection of policyholders.

These aspects initially indicate that the ECJ undoubtedly plays a decisive role in the integration of European (contract) private law.⁸⁵ In fact, the Court ensures its uniform application across the Member States through the preliminary ruling procedure, which allows for a fruitful dialogue between the European and national courts.⁸⁶

From the perspective of economic law, a further and even more significant moment will be that of the applicable private law remedies, especially when the violation concerns conduct or organizational rules. As the most renowned doctrine teaches, it is in the relationship between specialist regulations and private law remedies that the regulatory function of private law can be appreciated.⁸⁷

However, perhaps an additional meaning of the judgements examined within the context of insurance law, potentially even more relevant, can be captured from a broader viewpoint.

The insurance nature of IBIPs and the imposition of precise rules for intermediaries take on a different, even more significant value for consumers – and for market stability – in light of the current regulatory structure. This is, the normative structure formed by the POG rules, increasingly enriched by value for money principles. This regulatory system is not so far removed from that in the investment services and activities sector; if anything, it is inspired by the same systemic objectives.

Lebensversicherungs AG (C-209/12), the use of the term “financial product” appears to generate some interpretative doubts. A different stance is expressed by Advocate General Bobek in the conclusions of the joint cases C-143/20 and C-213/20. The judgment, in fact, focused on the informational obligations related to group life insurance linked to investment funds.

The Advocate General defines such contracts as “legally complex financial products” and, in truth, it should be noted that, while respecting the interpretative trend of the ECJ precedents, he seems to fully grasp the function – the *causa contractus* – of the products, especially when he specifies that “However, many life assurance products or contracts are designed and sold purely as personal financial investment instruments or instruments that offer many similar elements. Often, they are marketed as a method of saving for retirement. Such is the case with unit-linked assurance policies”.

In this latter case, therefore, the effort of the Advocate General to understand the operation and functionality of these products should be appreciated.

⁸⁵ Although with the necessary and critical clarifications, see VAN GERVEN, Walter: “ECJ case-law as a means of unification of private law?”, in: *European Review of Private Law* 2 (1997) 293 ff.; MATTLI, Walter/SLAUGHTER, Anne-Marie: “Revisiting the European Court of Justice”, in: *International Organization* 52 (1998) 177 ff.; with reference to the harmonization of contract law, pp. 301 ff.; On the role of the ECJ, in the perspective of the constitutionalization and social impact of private (economic) law, MICKLITZ, Hans Wolfgang: “The Constitutional Transformation of Private Law Pillars through the CJEU”, in: COLLINS, Hugh (ed.): *European Contract Law and The Charter of Fundamental Rights*, Cambridge 2017, 53-56, 71 ff.

⁸⁶ In general, on the dialogue between courts, with specific reference to the preliminary ruling provided for by art. 267 TFEU and its harmonizing scope, HESSELINK, Martijn Willem: “A Toolbox for European Judges”, in: *European Law Journal* 4 (2011) 446-447; DAWSON, Mark: “The political face of judicial activism: Europe’s law-political imbalance”, in: DAWSON, Mark/DE WITTE, Bruno/MUIR, Elise: *Judicial activism at the European Court of Justice*, Northampton 2013, 19; TRIDIMAS, Takis: “The ECJ and the National Courts: Dialogue, Cooperation, and Instability”, in: ARNULL, Anthony/CHALMERS, Damian (eds.): *The Oxford Handbook of European Union Law*, Oxford 2015, 403.

⁸⁷ MICKLITZ, Hans Wolfgang: “The Visible Hand of European Regulatory Private Law – The Transformation of European Private Law from Autonomy to Functionalism in Competition and Regulation”, in: *Yearbook of European Law* 1 (2009) 3 ff.; with a focus on this remedies’ function in the field of European financial law see MICKLITZ, Hans Wolfgang: “The Public and the Private-European Regulatory Private Law and Financial Services”, in: *European Review of Contract Law* 10 (2014) 473; ANDENAS, Mads/ DELLA NEGRA, Federico: “Between Contract Law and Financial Regulation: Towards the Europeanisation of General Contract Law”, in: *European Business Law Review* 4 (2017) 499.

It is in light of these concluding considerations that both the decisions from which this work emerged and the position of the ECJ financial architecture must be interpreted. The implementation, even at the judicial level, of the POG's behavioural and organizational safeguards is indeed a sign of a clear intent. The Court must be placed within a normative system that does not merely aim to achieve the goal, as established by the founding Treaties, of creating a single market for goods and services.⁸⁸ Nor should the analysis be reduced to the creation of a mere “single insurance market”, which has already been pushed by some commentators.⁸⁹

If anything, the contribution of European case law to the harmonizing intent of Union law must enhance the creation of a common space for the movement of services and goods, ensuring market access for all EU consumers while at the same time achieving the protection of the most vulnerable individuals within a stable and efficient systemic context.⁹⁰

Concretely, it would not be entirely far-fetched to consider that the ECJ could have a proactive role in implementing the Capital Markets Union policy supported by the European Commission. This policy also identifies private insurance as a gateway to the capital market for both SMEs and retail consumers.⁹¹

In this sense, therefore, the Court's decisions can take on a different meaning, enriched by new insurance regulations – non-existent at the time the decisions were made – which possess certain “sectoral” characteristics and peculiarities, as clearly exemplified by value for money. Fundamentally, the ECJ judgements share many common elements which are the necessary condition for creating a harmonized context not only at the market level but also at regulatory one. In this regard, and thus also thanks to the contribution of the ECJ, it seems more preferable than ever to correctly interpret the strictly sectors division that exists in European financial regulation. Additionally, regulatory platforms made up of common rules, such as those of the POG, if properly adopted, could serve as an efficient tool for cross-sectoral regulation.

After all, it is precisely the ID Directive that, if needed, provides interpretative support for this purpose. That is, for the objective of creating a system of rules aimed at achieving a common capital market, which, while critically reassessing the “silo” division,⁹² remains aware of the diversity of products from which a correct modulation of standards and common rules derives.

Indeed, Recital 10 states that, following the financial turmoil of recent years, it is necessary to ensure “effective consumer protection across all financial sectors”. Although it is only a recital, it

⁸⁸ This is emphasized, even if in a general perspective and not only focused on insurance or financial market, among others, by LAGRANGE, Maurice: “The Court of Justice as a Factor in European Integration”, in: *American Journal of Comparative Law* 14 (1967) 723; DE WAELE, Henri: “The Role of European Court of Justice in the Integration Process: A Contemporary and Normative Assessment”, in: *Hanse Law Review* 6 (2010) 6; in part also HORSLEY, Thomas: “Reflections on the role of Court of Justice as the ‘motor’ of European integration: legal limits to judicial lawmaking”, in: *Common Market Law Review* 50 (2013) 941-42, 44.

⁸⁹ BOLEAT, Mark: “The European Single Insurance Market”, in: *The Geneva Papers on Risk and Insurance* 20 (1995) 45 ff.

⁹⁰ BASEDOW, Jürgen: “The Court of Justice and Private Law: Vacillations, General Principles and the Architecture of the European Judiciary”, in: *European Review of Private Law* 3 (2010) 450; CAFAGGI, Fabrizio/LAW, Stephanie: “Judicial dialogue in European private law: introductory remarks”, in: CAFAGGI, Fabrizio/LAW, Stephanie (eds.): *Judicial cooperation in European private law*, Cheltenham 2017, 18, which, in general terms, recall the role of the ECJ as a market policy maker.

⁹¹ European Commission, Green Paper, Building a Capital Markets Union, {SWD(2015) 13 final}, Brussels, 18.2.2015 COM(2015) 63 final, 16-17.

⁹² ANNUNZIATA, Filippo: “MiFID II as a Template. Towards a General Charter for the Protection of Investors and Customers of Financial Products and Services in EU Financial Law”, in: D’AMBROSIO, Raffaele/MONTEMAGGI, Stefano (eds.): *Private and Public Enforcement of EU Investor Protection Regulation. Conference papers. Quaderni di ricerca giuridica della Banca d’Italia*, 4 October 2019, Roma, 40, 48, The author identifies in the POG a rule that, being common to the individual regulated financial sectors, could allow for a reconsideration of the sometimes rigid and inefficient “silo” regulatory division.

outlines the programmatic lines underlying the Union's financial policy, which the Court must consider when called upon to decide.

The legislator, in fact, first recalls the specificity of the insurance regime, emphasizing the need to strengthen consumer protection and make the regulation of the distribution of various insurance products more uniform. In this regard, the level of consumer protection must be increased “in relation to Directive 2002/92/EU”, based on the “specific nature of insurance contracts in comparison to investment products regulated under Directive 2014/65/EU”.

However, in a perspective of unification of the Union's regulatory framework, the same provision also recalls that “The distribution of insurance contracts, including insurance-based investment products, should therefore be regulated under this Directive and be aligned with Directive 2014/65/EU”.

Lastly, the rulings of the Court of Justice must also be interpreted in light of the latest European initiative, namely the so-called Retail Investment Strategy. This Strategy is reflected in the proposal to amend directives related to the protection of retail investors (2009/65/EC, 2009/138/EC, 2011/61/EU, 2014/65/EU, and (EU) 2016/97). Such a reform aims to amend the European regulatory landscape governing investment services and activities – also encompassing the insurance sector – by further enhancing product governance through the value-for-money principle.⁹³

The reform initiative undertaken by the European Parliament and the Council strengthens the organizational and conduct rules framework, fostering constructive dialogue between sectoral operators and supervisory authorities.

Under the proposed regime, supervisory authorities will not only oversee firms' compliance with substantive rules. Initially, Recital 13 of the Proposal and subsequently art. 1, introducing par. 8 of art. 25 of the IDD Directive, clarify that EIOPA must establish benchmarks based on data concerning the costs and performance of investment products.⁹⁴ Manufacturers and distributors are required to consider these benchmarks in their pricing processes and if a product's costs and performance do not align with the benchmark, it cannot be marketed to retail investors.

EIOPA, by encouraging insurers to develop "balanced" products, indirectly shapes contractual content while also regulating market pricing, thereby addressing consumer protection and systemic stability from a dual perspective.

In conclusion, European case law must adequately consider the regulatory environment of the sector, including its ongoing reforms, with the aim of promoting and consolidating a broader project of harmonizing conduct and organizational obligations across regulated financial sectors. The rulings of the Court thus represent a valuable component of a broader European political design, enabling the proper implementation and enforcement of shared rules across individual financial sectors, including product oversight and governance.

⁹³ In this sense, Recital 10 of the Omnibus Directive is particularly clear, specifying that, in order for products to offer retail investors a good cost-benefit ratio, Member States should ensure that firms authorized under Directive 2014/65/EU or Directive (EU) 2016/97 to manufacture or distribute investment products have clear pricing processes. These processes must allow for the precise identification and quantification of all costs charged to retail investors and should be designed to ensure that the costs and charges associated with investment products or their distribution are justified and proportionate to the characteristics, objectives, strategy, and expected performance of the product.

⁹⁴ In fact, in the insurance sector, the focus on value for money and the development of objective metrics dates back to 2020 and, more recently, has been further advanced through the Methodology on Value for Money Benchmarks, EIOPA-BoS-24-332, Consumer Protection Department, adopted on August 27, 2024.

The link between Directive 2005/29/EC and the information duties of intermediaries

Sara Landini (Università di Firenze)

I. Information duties and consumer behaviours

A study on UK consumers, conducted by the Office of Fair Trading (OFT) and published in February 2011, found that consumers rarely read contracts in full before entering into them. Thus, they are usually unaware of some of the terms to which they are agreeing. Consumers can also make mistakes in interpreting terms and conditions that they are unaware of.

Moreover, the study considers some other factors that are related to contracts:

- Lengthy boilerplate clauses are often in fine print and written in technical and complicated legal language;
- Access to the full terms may be difficult or impossible before acceptance. Often the document being signed is not the full contract;
- There may be social pressure to sign. For instance, the salesperson may imply that the customer is being unreasonable if he/she reads the terms. If the purchaser is at the front of a queue there could be additional pressure to sign quickly. Sometimes suppliers give customers a gift (also a small one), which socially obliges the customer to be co-operative and to conclude the transaction.
- Information asymmetry can be another disadvantage for consumers. Firms usually know the distribution of tastes across consumers and the prices they are willing to pay. At the same time, individual consumers are unaware of this distribution. In a market with such information asymmetry, a firm is able to maximize its profits by setting a high price for a product with a high rating considering that consumers, who have no information on what the right or fair price would be, will buy it in any case. As one author has noted:

Consumer policy increasingly places emphasis on the role of information in allowing consumers to protect themselves and promoting a competitive economy. Increasing the information available to consumers is undoubtedly beneficial, but this article cautions that the limitations of consumer protection through information also have to be recognized. In particular, emphasis is placed on the insights provided by behavioral economics which suggests that consumers may not always respond to information provided as rationally as traditional economic models sometimes assume. One implication of this is that the way information rules are framed needs to be revisited. Other consumer policy approaches (altering the default rules, using bans and regulations, and risk sharing) need to be considered alongside a strategy of information provision. To analyze which approach should be adopted or to find the appropriate balance between different approaches requires policy makers to engage more fully with the legal and consumer policy research community.⁹⁵

Many consumer purchases are problematic when conditions are involved, whether they are in writing or in complex oral terms. Personal and social conditions also play a relevant role. Younger people are more likely to have problems with their contracts, while older consumers may use prior

⁹⁵ HOWELLS, Geraint: "The Potential and Limits of Consumers empowerment of Information", in: *Journal of Law and Society* 32 (2005) 349 ff. See also GRUNDMANN, Stefan/KERBER, Wolfgang/WEATHERILL, Stephen: *Party Autonomy and the Role of Information in the Internal Market*, Berlin-New York 2001; WEATHERILL, Stephen: "The Role of the Informed Consumer in European Community Law", in: *Consumer Law Journal* (1994) 49; SCHWARTZ, Alan/WILDE, Louis L: "Intervening in Markets on the Basis of Imperfect Information: a Legal and Economic Analysis", in *University of Pennsylvania Law Review* (1979) 630-638; WHITFORD, William: "The Functions of Disclosure Regulation in Consumer Transaction", in: *Wisconsin Law Review* (1973) 400; SUNSTEIN, Cass/THALER, Richard: "Libertarian Paternalism is not an Oxymoron", in *University of Chicago Law Review* (2003) 1159; BECHER, Samuel: "Asymmetric Information in consumer Contracts: the challenge that is yet to be met", in: *American Business Law Journal* (2008), p. 45.

experience and knowledge as a source of understanding. On the other hand, the increased use of technology has in some cases inverted the conditions mentioned above: young people, in fact, are usually more informed about e-commerce and possible unfair commercial practices on the web.

Consumers with higher incomes and in higher social classes, and consumers who have received a higher level of education report more problems. This may be because they are accustomed to negotiating terms more carefully to secure an advantage for themselves.

Moreover, the purchase method is itself significant, as a transaction can be conducted face-to-face, over the phone, or via the Internet. The purchase method can influence consumers' understanding of the terms and conditions. This may depend on the different nature and degree of interaction between the parties to the contract, the accessibility and presentation of the terms and conditions, the timing of when information is presented, or the time available to assess information and make a decision.⁹⁶

All these factors can have a more important impact on consumer behaviour in the case of complex contracts, such as insurance contracts.

Different regulatory frameworks have been established to govern this area and problems of overlap can arise. We are going to consider the Unfair Commercial Practices Directive and the rules of contracts under the Insurance Distribution Directive.

II. Unfair Commercial Practices Directive and Insurance Distribution Directive

Directive 2005/29/EC on unfair commercial practices distinguishes two categories of commercial practices that are unfair if they induce the average consumer to make a purchase decision that he/she would not otherwise have taken: deceptive commercial practices (which involve misleading actions or omissions) and aggressive commercial practices.⁹⁷

This is legislation which, according to Article 3 of the Directive, applies to unfair business-to-consumer commercial practices carried out before, during and after a commercial transaction relating to a product, as well as to unfair commercial practices engaged in by businesses vis-à-vis micro-enterprises.

Based on Article 5(1) of the Directive, unfair commercial practices are prohibited. They are defined as practices contrary to standards of professional diligence, and which involve false information or are capable of distorting, to an appreciable extent, the economic behaviour, in relation to the product, of the average consumer whom they reach or to whom they are directed or of the average member of a group if the commercial practice is directed to a specific group of consumers.

We would like to note, moreover, that a commercial practice is considered misleading if it contains untruthful information or—even if the information is factually correct—in any way, even in its overall presentation, is capable of misleading the average consumer regarding one or more of the following elements (as per the Directive) and, in any case, induces him/her or is likely to induce him/her to take a transactional decision that he/she would not have otherwise taken:

a) the existence or nature of the product;

⁹⁶ VISCUSI, Kip W: "Individual Rationality, Hazard Warnings and the Foundations of Tort Law", in: *Rutgers Law Review* (1996) 661–665; BAINBRIDGE, Stephan: "Mandatory Disclosure: A Behavioral Analysis", in: *University of Cincinnati Law Review* (2000) 102; HANSON, Jon/KYSAR, Douglas A.: "Taking Behaviouralism Seriously: The Problem of Market Manipulation", in: *New York University Law Review* (1999) 630.

⁹⁷ VAN BOOM, Willem H.: "Unfair Commercial Practices" (2015) <https://ssrn.com/abstract=2709911> [or <http://dx.doi.org/10.2139/ssrn.2709911> [last accessed: 26.08.2025]; MICKLITZ, Hans Wolfgang: "Unfair commercial practices and European private law", in: Christian TWIGG-FLESNER (ed.): *The Cambridge Companion to European Union Private Law*, Cambridge 2010, 229-242.

- b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
- c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product;
- d) the price or the manner in which the price is calculated or the existence of a specific price advantage;
- e) the need for a service, part, replacement or repair;
- f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions;
- g) the consumer's rights, including the right to replacement or reimbursement (...) (under Article 11 of the Unfair Commercial Practices Directive as amended in 2019).

A commercial practice is also considered misleading if, in the specific case, taking into account all the characteristics and circumstances of the case, it induces or is capable of inducing the average consumer to take a transactional decision which he/she would not have otherwise taken and involves:

- a) any product marketing activity, including illicit comparative advertising, that causes confusion with the products, brands, company name and other distinctive signs of a competitor;
- b) failure by the trader to comply with the commitments contained in the codes of conduct that it has undertaken to abide by, where it is a firm and verifiable commitment, and the trader indicates in a commercial practice that it is bound by the code.

A commercial practice is considered unfair if, with regard to products likely to endanger the health and safety of consumers, the trader fails to inform them accordingly, thereby inducing consumers to neglect the normal rules of prudence and vigilance.

Article 7 addresses misleading omissions, which occur where the commercial practice omits relevant information which the average consumer needs, in the given context, to make an informed transactional decision and thereby induces or is capable of inducing the average consumer to take a decision that he/she would not have otherwise taken. This legislative provision, as we will see, is of particular interest in the present case.

A commercial practice is also considered a misleading omission when a trader conceals relevant information in relation to the product or service or presents it in an obscure, incomprehensible, ambiguous or untimely manner and also where the means of communication used for the commercial practice imposes restrictions in terms of space or time; in deciding whether there has been an omission of information, account will be taken of those restrictions and of any measures taken by the trader to make the information available to consumers by other means.

The prohibited conduct includes aggressive commercial practices.

Based on Article 8, a commercial practice is considered aggressive if, in the concrete case concerned, taking into account all its characteristics and circumstances, through harassment, coercion, including the use of physical force or undue influence, it limits or is capable of considerably limiting the freedom of choice or behaviour of the average consumer in relation to the product and, therefore, induces him/her or is capable of inducing him/her to take a transactional decision that he/she would not have otherwise taken.

III. IDD and the information duties of intermediaries

Information in the distribution of insurance products is regulated at European level considering the possibility of distributing products under the principle of freedom to provide services and freedom of establishment as laid down by Articles 56 and 49 of the Treaty on the Functioning of the European Union.⁹⁸

The IDD (Insurance Distribution Directive) is the new European regulation (Directive (EU) 2016/97) on insurance distribution, which came into force on 1 October 2018 and applies to all non-life and pure risk insurance, and insurance-based savings, investment and retirement planning products.

Article 20 of the IDD in particular provides that, in relation to the distribution of non-life insurance products, the information must be provided by means of a standardized insurance product information document, made available on paper or other durable medium.

This is new legislation aimed at satisfying the need to simplify the pre-contractual information of non-life policies taking into account the new regulatory framework resulting from the consolidation of European rules regarding the IPID (Insurance Product Information Document), the definitive outline of which was published in the Official Journal of the European Union on 12 August 2017 according to Commission Implementing Regulation (EU) 2017/1469 of 11 August 2017.

Customer consultancy based on the “know your customer” rule is made central to the distribution activity, the objective being to meet his/her interests in the most “adequate” way.

Before concluding a contract, the distributor is required to: a) acquire from the customer any information useful for identifying the customer’s demands and needs, in order to evaluate the adequacy of the contract offered; and b) provide the customer with objective information about the insurance product in an understandable form in order to enable him/her to make an informed decision.

If advice is offered before the conclusion of a contract, the distributor of insurance products must provide the customer with a personalized recommendation explaining the reasons why a particular contract is considered most suitable for satisfying his/her demands and needs.

This rule is closely linked to the rule on product governance, which sees a close interaction between intermediaries and companies in the interest of the customer, and which we will talk about in the following pages with reference to the obligations imposed on companies.

Another major innovation in the realm of insurance product placement concerns the transition from fiduciary duties to the suitability rule, i.e., the transition from the obligations that arise from the fiduciary relationship between the intermediary and/or insurer and the customer in the distribution of the product, a relationship which, by law, includes information and consultancy obligations. The aim is to ensure that the customer is provided with a product that meets his/her needs, and the obligation to do so necessarily sees an interaction between the insurer and the intermediary in product governance. The concept of product governance is introduced by MiFID II and is laid down in a set of provisions aimed at requiring intermediaries to adopt an organizational structure and rules of conduct relating to the creation, offering and distribution of financial products to investors.

We are thus witnessing a change in the methods provided by law for the protection of investors: no longer protection exclusively through the regulation of transparency and information in the marketing of products and in the content of contracts; MiFID introduced a new general principle according to which, in the provision of services, intermediaries are always required to act in such a way as to best serve the interests of their customers.

⁹⁸ LANDINI, Sara: “Transparency in the Insurance Contract Law of Italy”, in: NOUSSIA, Kyriaki/MARANO, Pierpaolo (eds.): *Transparency in insurance contract law*, Cham 2020.

Investor protection is not limited to the imposition of rules regarding the intermediary-investor relationship; rather, it has in principle been incorporated into the organizational structure of intermediaries, who have had a series of constraints imposed on them, aimed at ensuring that investor protection becomes part of their compliance model.

Investor protection, in terms of product governance, means that intermediaries must consider the centrality of the interest of the potential customer-investor along the entire value chain of the financial product, from its creation to its distribution.

In the light of this dynamic, specific to financial products, the IDD also has implications for insurance intermediaries (or perhaps it is better to say “distributors”) when we are talking about the obligation of adequacy and implementation of the “best interest of the customer”. Product governance, which in the insurance market was considered more the responsibility of the insurer, shifts the responsibility to the intermediary; however, this imposes new governance obligations on insurance companies when it comes to managing their relationships with agents according to new synergies between insurers and intermediaries, with a clear customer care focus, which leads us to reflect on the very boundaries of responsibility and co-responsibility of insurance companies with respect to the actions or behaviour of their agents.

IV. The Competition and Market Authority responds by highlighting the complementarity between its interventions and those of the Insurance Market Supervisory Authority

The problem of an overlap between the interventions of the Competition and Market Supervisory Authority (in Italy AGCM) and the Insurance Market Supervisory Authority (in Italy IVASS) has been considered recently in Italy in a case concerning loss adjustment in respect of motor insurance.

In its decision in proceeding PS11909, the Competition and Market Supervisory Authority clarified that the existing sector legislation was aimed at ensuring the correctness and transparency of the loss adjustment procedure through access to preliminary files and the transparency of the reasons underlying the determination of compensation in respect of a claim or its denial, as well as the existence of certain timeframes for the settlement of damages; it therefore appears complementary with respect to the regulation of unfair commercial practices.

In the present case, the risk of a violation of the *ne bis in idem* principle must also be excluded, contrary to what the insurance company involved claimed.

In fact, the AGCM highlighted the different function of the two public enforcement interventions, which relate to cases of different scope and are characterized by different objectives. Whereas, indeed, the intervention of IVASS concerns an individual case and appears aimed at protecting the satisfaction of the interests of the individual applicant, the assessment by the AGCM of incorrect conduct pursuant to Article 27 of the Consumer Code (Legislative Decree 2006 of 2005) presupposes the existence of conduct characterized by abstract and potential repeatability and is aimed at protecting the market from the adoption of incorrect behaviour by insurance companies and intermediaries.

The rules on correctness and transparency in the insurance relationship, also including secondary rules of the sector, are another thing. They regard correct expression of the customer's negotiating autonomy and exercise of actions in the settlement of claims (performance of the contract) and in particular the negotiating choices (whether to accept the proposal or not) and procedural choices (whether to appeal to a judge or not). Where relevant at a market level and therefore not relating to a single isolated relationship, these aspects will concern AGCM, as they have an impact on competition in the market. Moreover, this is highlighted in the motivation for the measures as noted above.

The same applies for the pre-contractual phase where, alongside the competence of IVASS in relation to sector regulations regarding obligations of transparency and adequacy of the products present on the market (information documents, product governance), we have the competence of

AGCM with reference to practices (present in the market) in respect of commercial documentation addressed to the community of users and containing misleading affirmations inconsistent with the content of the general terms and conditions and information documents.

In this case as well, there may be two complementary interventions: that of AGCM in connection with misleading commercial practices and that of IVASS regarding the delivery of pre-contractual documentation not compliant with the provisions of the law, which, since the introduction of Directive 97/2016 IDD, have laid down stringent documentary obligations oriented towards standardized and concise documentation.

There is also private enforcement to consider, which has seen application in a recent Supreme Court of Cassation judgment (Order No. 23073/2022). In the case concerned, the Supreme Court ruled that the insurance company bore an obligation to pay out an amount equal to the invested capital in the case of index-linked policies due to contradictions between the information provided by the intermediary and what was contained in an attractive summary in the brochure.

Also of particular interest with respect to the proceedings in question is IVASS's opinion in respect of the reticence shown in the loss adjustment phase when it comes to providing information to the consumer on the reasons for the compensation proposal.

In providing a positive opinion on the measures, IVASS has highlighted the need to improve clarity in the explanation of the reasons for rejection of an offer.

VI. Private Enforcement

As highlighted in Directive 2014/104/EU, “the practical effect of the prohibitions laid down requires that anyone – be they an individual, including consumers and undertakings, or a public authority – can claim compensation before national courts for the harm caused to them by an infringement of those provisions.” For this reason, it is important to consider all the different private enforcement tools and try to remove the obstacles to their effective functioning.

Private law is brought into play on the initiative of individuals who exercise the rights recognized by law. Being closer to the source of a problem, individuals are better able to represent the violation of the interests at stake according to the logic underlying the principle of subsidiarity.⁹⁹ The principle of subsidiarity states that a larger and higher body, such as a government, should not exercise functions that can be carried out efficiently by a smaller one, such as an individual or a private group, acting independently.

Therefore, private enforcement assumes relevance not only beyond the restricted sector of competition law, but also beyond the scope of Community law. Notwithstanding all the national rules designed to protect general interests and supported under public law (through criminal sanctions or administrative sanctions), individual rights, exercised according to the rules of private law, are able to strengthen the effectiveness of the latter. Moreover, the instruments of private law show greater “flexibility” when it comes to evaluating concrete cases and therefore a better correspondence to the function of violated rules.

We can mention different instruments of private enforcement of the provisions containing rules of conduct tied to market regulation:

1. Civil liability and particularly precontractual liability in case of violation of rules of conduct (i.e., duties of information, transparency, and consulting in financial intermediation). Parties are free to negotiate a contract, and they are not liable for failure to reach an agreement with the other party,

⁹⁹ BUSCH, Danny: “The Private Law Effect of MiFID I and MiFID II”, in: BUSCH, Danny/FERRARINI, Guido (eds.): *Regulation of the EU Financial Markets. MiFID II & MiFIR*, Oxford 2017; ANDENAS, Mads/DELLA NEGRA, Federico: “Between Contract Law and Financial Regulation: towards the Europeanisation of general contract law”, in: *European Business Law Review* (2017); SVETIEV, Yane/OTTOW, Annetje: “Financial Supervision in the Interstices Between Private and Public Law”, in: *European Review of Contract Law* 10 (2014).

but they do have to negotiate in good faith: a party who breaks off contract negotiations in bad faith is liable for the losses caused to the other party (“culpa in contrahendo”). A party is in bad faith when it enters into or continues negotiations while intending not to reach an agreement with the other party and leaving the other party under the justified assumption that a contract will be concluded. The same applies if a party insists on contract terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, provided that there is some demonstrable advantage to be gained for that party by avoiding the envisaged transaction;

2. Nullity for violation of mandatory rules and particularly nullity of a contract concluded in violation of the abovementioned rules of conduct.

We can use the term nullity or voidness of the contract to indicate a state of invalidity of the agreement. When an agreement is enforceable by law, it becomes a contract. Void contracts and voidable contracts are quite commonly misconstrued as being the same thing, but they are legally different.

A void contract means a contract which lacks enforceability under the law, whereas a voidable contract means a contract where one party has the right to decide whether to enforce the contract or not. Nullity has a very strong impact because it serves to remove an invalid contract from the market. But the nullity of a contract can be of no interest to a customer who wished to conclude the contract with fairer conditions. In this case only civil liability could represent an instrument for pursuing the customer’s interest.

3. Voidability due to deceit, that is, the intentional act of misleading a person of ordinary prudence by giving false impressions and/or information. In this case, however, the subjectivity of the condition of misrepresentation results in a difficulty in establishing proof unless the existence of the misrepresentation is presumed automatically whenever rules of conduct aimed at ensuring the counterparty’s knowledge and awareness when making contractual choices are violated.

4. Combination of invalidity and liability. A person whose conduct has determined the invalidity of a contract can be held liable towards a counterparty who has in good faith trusted in the conclusion of a valid contract in accordance with his/her expectations.

5. Termination for non-fulfilment of the contract. We have a breach of contract when we have an unjustifiable failure to perform the terms of a contract, or interference with the performance of the contractual obligations. In this case the other party can act to obtain judicial termination of the contract and claim damages.

Respect for the rules of conduct can be considered as part of the obligation of the contractual relationship. Thus, their violation is a breach of contract. Yet, this solution, like nullity, may not be satisfactory for consumers who actually wanted to conclude the contract.

6. Moreover, we have to consider the importance of injunction as a possible instrument of private enforcement. An injunction, in legal terms, is an order given by a court to one or more of the parties in a civil trial to refrain from doing (so-called prohibitory or preventive injunctions), or to do some specified acts (so-called mandatory injunctions). The purpose of an injunction is usually to protect against the situations in which further specific acts, or the failure to perform such acts, would cause irreparable harm to one of the parties.

Given the importance of private enforcement, it is necessary to consider the constraints on the implementation of the various remedies under private law.

Actions to obtain compensation for damages or a declaration of invalidity of a contract find a limit due to problems of access to justice. Especially when the damage is minor, the consumer may not have sufficient interest in acting. The uncertainty of winning the litigation can also represent a disincentive to bring action before a court. In this case, the promotion of private law tools for resolving disputes and greater ease of access to arbitration procedures embedded within national supervisory authorities can provide a solution to the problem.

Schriften des Italienzentrums der Freien Universität Berlin
Herausgeber: Prof. Dr. Bernhard Huss
Editorische Betreuung: Sabine Greiner

Freie Universität Berlin
Italienzentrum
Geschäftsführung
Habelschwerdter Allee 45
D-14195 Berlin