The Notion of “Employee” in the IDD: A Harmonized Interpretation Based on the EU Law

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1 Introduction

The general aim of the European Union’s (“EU”) regulations, regardless of their level, is to harmonize certain aspects of public and private relationships. Since EU directives are supposed to be implemented to the national laws of the EU Member States, the notions used in directives, if not explained in the directive itself, can cause interpretation problems. This may apply, in particular, when certain notions have well recognized meanings under national legislation, or in the case of gold-plating regulations, introduced by a Member State.

This chapter is devoted to the interpretation of the concept of an “employee of insurance undertaking”, which was used in the Directive on insurance distribution,¹ adopted in 2016 (“IDD”). It deals with the problem of the concept of an employee of an insurance undertaking in terms of the type of legal relationship and the scope of activities that are allowed to be performed only by such employees.

The intention of the authors of this chapter is to demonstrate that, in accordance with the previous case law of the European Court of Justice/Court of Justice of the European Union, the concepts contained in EU directives should be interpreted in accordance with EU law, taking into account its autonomy and its aim

¹Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) text with EEA relevance (O.J. L 26, 2.2.2016, pp. 19–59).

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(harmonization of legal systems of Member States). However, a simple translation of a particular term used in an EU directive into the language of a Member State may give rise to an incentive for that term to be interpreted in the context of a local legal system. As such approach may seem to be natural at first sight, it may lead to results rather unexpected by a European lawmaker.

When analysing the definition of an “employee”, the risks related to the interpretation of this concept have been pointed out, using the example of the IDD implementation into Polish law in this respect. As regards the scope of activities that may be performed only by such employee, it has been attempted, in particular, to distinguish those activities that may constitute distribution activities, within the meaning of the IDD, by way of using rational criteria, including the risk of causing loss to a customer, if an activity is performed in an unprofessional or unfair manner. Since a clear indication of those activities, which are subject to the IDD’s requirements, is fundamental from the point of view of legal certainty as a condition for the development of insurance market, the authors expect that relevant authorities of the European Union Member States will adopt a similar interpretation which will, in turn, be translated into appropriate jurisprudence.

2 Brief Historical Background

The development of the European insurance regulations in the period of its 50 years of history has followed certain defined paths. As regards insurance undertakings, the European lawmaker has concentrated on the issues related to management of insurance activities, prudential regulation, and the enhancement of a single market within the Community.² The latter aim, understood as facilitating effective exercise of freedom of establishment and freedom to provide services, almost at the same time, had served as the basis for the introduction of the first European regulation regarding the activities of insurance intermediaries as very important market players responsible for the delivery of insurance products to customers.³

The protection of customers’ interests has always been the most important objective of those regulations. The facilitation of financial and organisational position of insurance undertakings enhances public trust to insurance providers as

²Please see three generations of insurance directives, starting with the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (O.J. L 228, 16.8.1973, pp. 3–19) and the First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (O.J. L 63, 13.3.1979, pp. 1–18).

³Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (O.J. L 26, 31.1.1977, pp. 14–19).

reputable debtors under insurance contracts. The possession of adequate capital and organisational resources by insurance undertakings is, therefore, the basic condition for effectively safeguarding the policyholders’ interest. On the other hand, easy access to the whole European market also serves the interest of customers as it allows for a wider selection of insurance products and providers of insurance coverage, enabling the customers to meet their insurance-related expectations for competitive prices. The activities of insurance intermediaries are crucial from that point of view as they make it possible to connect insurance undertakings and entities interested in insurance services, without the need to establish separate sale structures by insurance undertakings.

However, the legal instruments aimed at the implementation of the protection of customers’ interests have been limited, as the insurance private law, in particular insurance contracts, remain (with certain exceptions⁴) the sole competency of the Member States of the European Union and, consequently, local regulations. By the same token, the process of offering insurance product and concluding an insurance contract had for many years fallen beyond the scope of legal regulations at the European level. The European lawmaker introduced certain (but still very basic) information obligation of insurance undertakings in relation to life insurance.⁵ The sales of insurance products (as a part of financial market) using the means of distance communication had followed a separate path and also remained limited to particular issues only (information obligations and a right to withdrawal from the contract), comprising only the protection of consumers (non-professionals) as a particular group of customers.⁶

The Directive on insurance mediation⁷ (“**IMD**”), adopted in 2002, had been the first step as regards the introduction of a complex regulation in relation to the process of offering and concluding insurance contracts. It comprised provisions related to professional requirements of insurance intermediaries and an enforcement mechanism of those requirements,⁸ the intermediaries’ liability towards their customers (including the protection of cash flows between a customer and an intermediary), as

⁴E.g. Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (O.J. L 185, 4.7.1987, pp. 77–80) currently repealed 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 (Solvency II) (O.J. L 335, 17.12.2009, pp. 1–155).

⁵See regulation introduces by Article. 31 of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (OJ L 360, 9.12.1992, pp. 1–27).

⁶Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, pp. 16–24).

⁷Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (O.J. L 9, 15.1.2003, pp. 3–10).

⁸Article 3 par. 3 of the IMD: “*Member States shall ensure that registration of insurance intermediaries - including tied ones - and reinsurance intermediaries is made subject to the fulfilment of the professional requirements laid down in Article 4.*”

well as information obligation of insurance intermediaries. The declared aim of the IMD was the “*completion of the single market for financial services and (...) the enhancement of customer protection*”.⁹

After the implementation of the IMD it became clear that there was a need of further development of the European legislation covering the interactions between customers and providers of insurance products from the legal side. In 2010 the Committee of European Insurance and Occupational Pension Supervisors¹⁰ (“CEIOPS”) published the CEIOPS Advice to the European Commission on the revision of the Insurance Mediation Directive (2002/92/EC) (“CEIOPS Advice”), comprising a broad analysis of the regulatory framework of insurance mediation, and recommended possible legislative steps. In particular, it deliberated the future scope of a new regulation (at that time called the “IMD2”), by stating that: “*The majority of Members support the inclusion of direct sales by insurance undertakings in the scope of IMD2. The main rationale for their inclusion is to ensure consumer protection. Members are in favour of a “level playing-field” in this respect. Members regard the protection afforded to consumers should be the same regardless of the sales channel through which they choose to purchase their insurance. Members were unanimous in their view that employees of insurance undertakings should not be registered under IMD2.*”¹¹

Consequently, the final effect of review of the IMD resulted in including “direct sales” of insurance products by insurance undertakings into the scope of the new regulation—the IDD. According to recital 6 of the IDD, “*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.*” The equal treatment of sales channels has also been confirmed in recital 7 (second sentence) of the IDD: “*Insurance undertakings which sell insurance products directly should be brought within the scope of this Directive on a similar basis to insurance agents and brokers.*” Moreover, the European lawmaker has emphasized that “*There is a benefit to consumers 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.*”¹²

⁹Recital 8 of the IMD.

¹⁰Ref: CEIOPS CCP-59/10, <https://register.eiopa.europa.eu/CEIOPS-Archive/Documents/Advices/20101111-CEIOPS-Advice-on-IMD-Revision.pdf> (last access: 29.05.2020).

¹¹CEIOPS Advice, p. 23.

¹²Recital 16, second and third sentence of the IDD.

3 Application of the IDD to Employees of Insurance Undertakings

It is clear that the intention of the IDD was to improve the requirements towards insurance intermediaries and to extend those requirements also towards insurance undertakings that perform direct sales of the insurance products. There is no doubt that there are substantial differences as regards the distribution of insurance products performed by intermediaries and by insurance undertakings themselves. Those differences result from the specific nature of each insurance undertaking and its business, as well as its status of a regulated entity under legal provisions concerning the conduct of insurance business. The complexity of the core activity of an insurance undertaking (including not only the sales, but also the whole process of “manufacturing” of insurance products and their governance at the level of a risk borne by an insurance undertaking and at the level of individual insurance contracts), as well as the regulatory requirements related to that activity, result in interactions between different legal regimes applicable to a given insurance undertaking. The number of legal regimes and their interactions sometimes may lead to legal uncertainty in the context of the provisions of the IDD. One of the examples is the exact identification of the activities subject to the legal rules on insurance distribution and the manner of application of those rules.

The notion “*insurance distributor*” under the IDD is understood as “*any insurance intermediary, ancillary insurance intermediary or insurance undertaking*”.¹³ An “insurance undertaking” has been defined as “*an undertaking as defined in Article 13 point 1 of Directive 2009/138/EC of the European Parliament and of the Council*”.¹⁴

Although the insurance undertaking itself is an insurance distributor, as a corporate entity it operates in the insurance market through natural persons duly authorized to perform activities with legal effect for the insurance undertaking. The regulatory requirements regarding insurance undertakings may apply in three different dimensions: the legal obligations may be imposed towards the insurance undertaking itself, its governing bodies (such as members of the management board, or its shareholders), or the staff of an insurance undertaking at the operational level. The IDD applied a mix of all the three dimensions. Therefore, the provisions of the IDD refer to an insurance undertaking as an entity (e.g. the obligations related to product oversight and governance), but also include certain rules directly addressed to its management board (directors), and its employees.

According to Article 10 § 1 of the IDD “*Home Member States shall ensure that insurance and reinsurance distributors and employees of insurance and reinsurance undertakings carrying out insurance or reinsurance distribution activities possess appropriate knowledge and ability in order to complete their tasks and perform their*

¹³Article 2 § 1 point 8 of the IDD.

¹⁴Article 2 § 1 point 6 of the IDD.

duties adequately.” The same rule applies to continuing professional training and development requirements in order to maintain an adequate level of performance.¹⁵ Moreover, according to the IDD “*Member States need not apply the requirements referred to in paragraph 1 and in the first subparagraph of this paragraph to all the natural persons working in an insurance or reinsurance undertaking, or insurance or reinsurance intermediary, who pursue the activity of insurance or reinsurance distribution, but Member States shall ensure that the relevant persons within the management structure of such undertakings who are responsible for distribution in respect of insurance and reinsurance products and all other persons directly involved in insurance or reinsurance distribution demonstrate the knowledge and ability necessary for the performance of their duties.*”¹⁶ Similar rules have been laid down in the IDD as regards the requirement of good repute.¹⁷

The regulatory requirements applicable to the key persons (mainly management) of an insurance undertaking constitute a solution that has already been broadly used in the provisions of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance¹⁸ (“**Solvency II Directive**”). It should be noted here that imposing obligations on other personnel members of the insurance undertaking constituted a new approach. This may be explained by a different object of regulations: as Solvency II Directive is concentrated on prudential governance of insurance undertakings in order to facilitate their financial solvency, the IDD focuses on the environment of direct interactions between insurance distributors and customers. In the case of insurance distributors, the focus on the aforementioned interactions requires the lawmaker to impose a regulatory burden directly on the persons involved in relations with customers, due to the fact that the actions undertaken by such persons constitute a key risk factor to the detriment of the interest of the customers.

It should be clearly pointed out that—although not directly specified in the provisions of the IDD—the insurance undertaking takes full responsibility for any actions undertaken by its employees, involved in insurance distribution activity. The insurance undertaking is the insurance distributor and any action undertaken by its employee related to the distribution of insurance products is to be treated as an action undertaken by the insurance undertaking itself. It applies to both the liability for losses suffered by customers under private law regime, and the administrative liability connected with possible supervisory sanctions under public law.

The application of the regulatory requirements to employees of insurance undertakings requires identification of a definition of an “employee of the insurance

¹⁵Article 10 § 2 first subparagraph of the IDD.

¹⁶Article 10 § 2 fifth subparagraph of the IDD.

¹⁷Article 10 § 3 of the IDD.

¹⁸Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (O.J. L 335, 17.12.2009, pp. 1–155).

undertaking” and the identification of activities of the employee carrying out insurance distribution activity that fall within the scope of the IDD.

4 Defining an “Employee of the Insurance Undertaking”: Contractual Relations

The IDD does not provide for a definition of an “employee of the insurance undertaking”. What is more, there is no provision which would contain a reference to national legislation as regards the understanding of that notion.

The notion of an “employee” with reference to insurance undertakings¹⁹ appears in a number of provisions of the IDD: simply as “*their (insurance undertakings) employees*”,²⁰ “*employees of insurance and reinsurance undertakings carrying out insurance or reinsurance distribution activities*”,²¹ “*employees of insurance or reinsurance undertakings who are engaged in insurance or reinsurance distribution*”.²²

Moreover, the IDD mentions also “*natural persons working in an insurance undertaking*”,²³ “*staff directly involved in insurance distribution*”²⁴ and “*natural persons not directly involved in insurance distribution*”²⁵ (the latter to apply to all kinds of insurance distributors). Those notions demonstrate that the IDD is not fully consistent as regards its wording.

Since the IDD does not differentiate between the above meanings or provide any legal reasons to differentiate between the above notions, one should assume that an “employee” means the same as (or at least is included in the scope of the meaning of) a “*natural person working in*” or the “*staff*” or “*natural persons*” and that the “*employee of insurance undertaking*” should be understood as a natural person who works for an insurance undertaking.

The IDD remains silent as regards the type of a legal relation between the insurance undertaking and the “employee”. The identification of the type of an “employment” relationship seems to be relevant since it may be an invitation to an excessively narrow, or expanded, interpretation, especially in view of the national

¹⁹The IDD mentions also “employees of insurance and reinsurance intermediaries” (art. 10 § 2 of the IDD) and “employees of insurance distributors” (art. 10 § 3 second subparagraph, art. 17 § 3 of the IDD), therefore some issues deliberated in this article may have relevance also to employees of all kinds of insurance distributors, however issues related to employees of insurance companies are the most complicated from legal point of view.

²⁰Article 2 § 1 point 3, art. 3 § 1 second subparagraph, art. 10 § 2 first and second subparagraph, art. 19 § 4 of the IDD.

²¹Article 10 § 1 of the IDD.

²²Article 10 § 2 subpar. of the IDD.

²³Art. 10 par. 2 subpar. fifth, art. 10 par. 3 subpar. third of the IDD.

²⁴Art. 10 par. 3 subpar. third of the IDD.

²⁵Art. 10 par. 3 subpar. third of the IDD.

legislations of the EU Member States. It is also of utmost importance from the point of view of the management of human resources of insurance undertakings as they are subject to rules of a free market economy and should be allowed to make use of work of natural persons under different types of legal relations (allowed by national legislations).

The IDD neither provides for an exact definition of an “employee”, nor allows to define it by national legislation, or to interpret in accordance with national legislation of the EU Member States. Consequently, a widely accepted approach in the European case law that prohibits the pursuit of the meaning of a given notion in the provisions of a national legislation should be applied. Such an approach has a very long history and is well based in the legal system of the European Union. It has been stated in the grounds of a judgement of the European Court of Justice (the “**Court**”) of 18.01.1984 Ekro²⁶: *“The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.”* In many judgments that have been adopted after the cited case, the same conclusion has been repeated as the basic principle of interpretation of European law.²⁷

The autonomy of understanding of notions used in the provisions of European law is fundamental for its uniform application in all Member States. If a national authority, or a national court refers to the national legislation in order to determine the understanding of a given notion, there would be a risk of different interpretations of the provision of European law among individual Member States. This would result in a different application of those provisions, putting into question the idea of adopting such regulations, in particular as regards the facilitation of freedom of establishment and freedom to provide services, which are usually based on mutual recognition of national regimes related to particular types of economic activity. Therefore, as the consequence of the autonomy of European law, the concept of autonomic meanings of notions, independent from national legal systems, used in the provisions of the European law, has been established by the Court.

Therefore, the notion of an “employee” under the IDD cannot be explained by a simple reference to national legislations, in particular national labour (employment) law.²⁸ To be more specific, it would be against the principle recognized by the Court

²⁶Case 327/82.

²⁷As examples see Cases: C-287/98, C-467/08.

²⁸Please see the Explanatory Statement to the Polish Act on Insurance Distribution that simply translates the word “employee” into Polish and referred to the employee in the meaning of the Polish Labour Code. The Polish Act on Insurance Distribution itself does not provide for any definition of an employee, but the justification to the draft act includes an improper assumption that the “employee of an insurance undertaking” shall be regarded an “employee” in the meaning of the Polish Labour Code.

to limit the notion of an “employee” only to persons employed on the basis of a contract of employment as understood in the national law, and to exclude persons providing work under other types of contract (usually civil law contracts). A common, European, meaning of an “employee” should be sought instead, taking into account the context of the provisions and the purpose of the IDD.

The EU lawmaker’s intention, as expressed in the IDD, was the sole enhancement of the protection of customers in the process of distribution of insurance products. In other words, the concept of the IDD was to introduce the rules providing conditions aimed at preventing the situations that can be detrimental for the interests of customers. In order to achieve it, the lawmaker imposed certain obligations, that need to be fulfilled during the process of insurance distribution by insurance undertakings and, consequently, by natural persons acting on behalf of such insurance undertakings. Those obligation include, among other things, the provision of information about the distributor and the product offered, the performance of an analysis of demands and needs of the customer. The fulfilment of those obligations must be performed with the application of professional knowledge, and the distributors in question are obliged to act honestly and fairly, bearing in mind the best interest of customers as the ultimate condition.²⁹ Such expectations of the EU lawmaker may be achieved if the persons acting on behalf of an insurance undertaking are of good repute and have sufficient professional qualifications, as well as if there are adequate control mechanisms in place within the insurance undertaking that allow to identify, mitigate or counteract any risks related to the actions undertaken by such persons. It is also clear that full responsibility for any consequences of the distribution acts rests within the insurance undertaking, in particular as regards any losses suffered by a customer.

Taking the above into account, it seems clear that the type of a contract between the insurance undertaking (acting as an insurance distributor) and the natural persons conducting insurance distribution activities on behalf of an insurance undertaking need to be regarded as irrelevant from the point of view of the purposes of the IDD. The “employee” may meet the requirements of professional knowledge and good repute, irrespective of the nature of a contractual relation with the insurance undertaking. If such nature of the contract or the applicable contractual provisions do not exclude the effective control of an insurance undertaking over the distribution activity of the “employee” (in order to manage risks related to insurance distribution), it is difficult to find, on the basis of the IDD provisions, legal arguments that would require a differentiation between various types of contracts allowed by the national legislation of the EU Member States or, in particular, recognize a contract other than a contract of employment (in particular, various civil law contracts) as not allowed under the IDD.

The above conclusion seems to be supported by those provisions of the IDD which do not refer to an “employee” but—having undoubtedly the same intention—to “natural persons working”, or the “staff”. Such an approach makes it possible to

²⁹Article 17 § 1 of the IDD.

maintain that there has been no intention of a narrow approach towards a type of a legal relation between an employee and an insurance undertaking.

It should, therefore, be underlined that when the IDD refers to the “*employees of insurance undertakings*”, it does not impose an obligation to limit the possible contractual relation between the employee and insurance undertaking, exclusively to a contract of employment. Other types of contracts are also allowed, as far as they do not preclude an effective fulfilment of requirements provided for in the IDD.

The above conclusion seems to be coherent with the understanding of an “*employee*” under other legal regulations of European law. The extensive interpretation of the notion “*worker*” (as an equivalent of an “*employee*”) has been adopted under art. 39 of the Treaty establishing the European Community. As stated in the grounds of the judgment of the Court dated 17.07.2008 Raccanelli:³⁰ “(. . .) *it must be noted that the Court has consistently held that the concept of ‘worker’ within the meaning of Article 39 EC has a specific Community meaning and must not be interpreted narrowly. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a ‘worker’.* The essential feature of an employment relationship is, according to that case-law, that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration (see, in particular, Case 66/85 Lawrie-Blum [1986] ECR 2121, paragraphs 16 and 17; Case C-138/02 Collins [2004] ECR I-2703, paragraph 26; and Case C-456/02 Trojani [2004] ECR I-7573, paragraph 15).” It is worth noticing that the factor of a “*direction of another person*” may be connected with the contractual possibility of control, allowing the insurance undertaking to verify, if the activities of the employee are compliant with the requirements of the IDD. Therefore, the concept of “*employment*” elaborated by the Court in the Raccanelli case seems to fit into the purposes of the IDD, as leaves the “*employer*” (being the insurance undertaking) the possibility to influence the actions of the “*employee*” in order to manage the risks related to insurance distribution.

In light of the conclusion drawn, it should be underlined that defining “*employee*” under the IDD still may raise doubts in various national approaches transposing the IDD. For example, the Polish Act on Insurance Distribution³¹ (the “*AID*”) does refer to an “*employee conducting distribution activity in the insurance undertaking*” but does not provide a definition of such “*employee*”, neither by defining this notion in the glossary of the AID nor by a reference to any legal act, such as the Polish Labour Code³² (the “*PLC*”). The mere lack of the definition should not constitute a problem since the pro-EU interpretation should be applied. However, the explanatory statement to the draft AID that constitutes a legal requirement before any legal act is adopted by the Polish Parliament, included a reference to the PLC exactly and only in terms of the “*employee conducting distribution activity in the insurance*

³⁰Case C-94/07.

³¹Act dated 15 December 2017 on insurance distribution (uniform text: J.L. 2019 item 1881).

³²Act dated 27 June 1974 Labour Code (uniform text: J.L. 2019 item 1040, as amended).

undertaking”. Evidently, the explanatory statement to the draft act (i.e. the bill) does not constitute legal provisions or any official or binding interpretation but may be, and often is, an indicator of the approach of the Polish lawmaker. Since the explanatory statement cannot be changed after the law has been passed and the statement itself should provide a lead to the interpretation of the provisions of the act, some representatives of the Polish legal doctrine tend to follow the assumption that the notion of an “employee” in the meaning of AID is the same as in the PLC. Such an approach, in the opinion of the authors of this chapter, for the reasons already presented, should be regarded as incorrect and may cause unnecessary interpretation problems.³³

An entirely different approach is exemplified by the UK Financial Conduct Authority, which seems to apply an extensive understanding of the definition of an “employee”. According to Chapter 28 the FCA’s Handbook “*Insurance distribution: specific knowledge, ability and good repute requirements*”, in relation to minimum knowledge, ability and good repute requirements for carrying out insurance distribution activities, the ‘employee’ in the said chapter: (1) is not restricted to an individual working under a contract of employment; and (2) includes (without limitation) any natural or legal person whose services are placed at the disposal of the firm, under an arrangement between the firm and a third party; and (3) also includes appointed representatives and their employees.³⁴ The same, extensive, approach is used in Chapter 4.2³⁵ of the FCA Handbook.

The conclusion is that the IDD does not force insurance undertakings to use employees only on the basis of contracts of employment. In order to perform distribution activities, insurance undertakings may make use of the employees under different types of contracts (also a variety of civil law contracts). There may appear a question on a grey area between an employee representing the insurance undertaking and natural persons being an insurance intermediary (or ancillary insurance intermediary) acting on behalf of the insurance undertaking. The answer lies within the legal definition of an insurance intermediary³⁶ (and an ancillary insurance intermediary³⁷) under the IDD. That definition refers to a “*natural or legal person, who, for remuneration, takes up or pursues the activity of insurance distribution*”. The specific nature of services of an insurance intermediary (an ancillary insurance intermediary) is that an intermediary “*takes up or pursues the activity of insurance distribution*” which means that it has a status of a legally independent entrepreneur.

³³Unfortunately, the Polish Financial Supervisory Authority has not presented its official standpoint so far.

³⁴SYSC 28.1.

³⁵In TC 4.2 ‘employee’: (1) is not restricted to an individual working under a contract of employment; and (2) includes (without limitation) any natural or legal person whose services are placed at the disposal of the firm, under an arrangement between the firm and a third party; and (3) also includes appointed representatives and their employees. <https://www.handbook.fca.org.uk/handbook/TC/4/2.html#> (last access 29.05.2020).

³⁶Article 2 § 1 point 3 of the IDD.

³⁷Article 2 § 1 point 4 of the IDD.

The activity of insurance intermediary is therefore conducted somehow independently (from the insurance company) and at the economic risk of the intermediary, while an employee acts under the direction and control of the employer, the latter bearing the economic risk of the activity conducted with use of employees.

5 Scope of Distribution Activities Performed by Employees of Insurance Undertakings

Another part of the discussed definition of the “employee of insurance undertaking” is the determination, as precisely as possible, of the scope of distribution activities that—when performed—make the employee in question subject to the regime of the IDD.

Several provisions of the IDD contain clear and unambiguous regulations that only an employee (directly) involved into distribution activity is the addressee of the obligations imposed in the IDD (and consequently in the national legislation implementing the IDD).

A definition of “*insurance distribution*” provided in Article 2 sec. 1 (1) of the IDD indicates that: “*insurance distribution means the activities on, proposing, or carrying out other work preparatory to the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim (. . .)*”.

The wide definition of “*insurance distribution*” is then limited by Article 2 sec. 2 of the IDD, which excludes the following activities from its scope:

- a) the provision of information on an incidental basis in the context of another professional activity where:
 - (i) the provider does not take any additional steps to assist in concluding or performing an insurance contract;
 - (ii) the purpose of that activity is not to assist the customer in concluding or performing a reinsurance contract;
- b) the management of claims of an insurance undertaking or of a reinsurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims;
- c) the mere provision of data and information on potential policyholders to insurance intermediaries, reinsurance intermediaries, insurance undertakings or reinsurance undertakings where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract;
- d) the mere provision of information about insurance or reinsurance products, an insurance intermediary, a reinsurance intermediary, and insurance undertaking or a reinsurance undertaking to potential policyholders where the provider does not take any additional steps to assist in the conclusion of an insurance or reinsurance contract.

The starting point for the interpretative considerations on what activities carried out by an employee of an insurance undertaking can be classified as distribution

activities should be the purpose of the IDD. We need to, therefore, return to recital 7³⁸ (second sentence) and recital 6³⁹ (first sentence) of the IDD. Additionally, a concept of distribution activities should be interpreted on the basis of the criteria quite similar to those previously applied to insurance mediation in the IMD, as the concept of the IDD is to introduce equal treatment of mediation and direct sales. In the IMD,⁴⁰ mediation activities have been defined as “*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*”. On the grounds of this definition, IDD exemplified that the distribution activities are the acts initiating the first contact with the customer but preceding the proposal to use the insurance service. Thus, in the classification of an employee’s activity in an insurance undertaking, it is possible to rely on an assessment of those activities through the prism of the activities of a competent insurance intermediary. As such, distribution activities of an insurance undertaking correspond to the activities of the insurance intermediary as to its subject-matter, and they differ mainly as regards the entity which carries out those activities.

On the basis of recital 32 of the IDD,⁴¹ one should assume that distribution activities should, in principle, relate to substantive transactions relating to the preparation, conclusion of an insurance contract or the performance thereof, that is to say, those areas of activity which are most relevant and necessary for the insurance contract to be concluded, or performed.

The analysis of recital 28 of the IDD should lead to the same conclusion: “*It is important to guarantee a high level of professionalism and competence among (...) the employees of insurance and reinsurance undertakings who are involved in activities preparatory to, during and after the sales of insurance and reinsurance policies. Therefore, the professional knowledge of intermediaries and ancillary insurance intermediaries and of the employees of insurance and reinsurance undertakings needs to match the level of complexity of those activities (...).*”

It should be noted that a similar classification was made before the introduction of the IDD (indeed, with regard to the facts before the introduction of the IMD) for the purposes of tax regulation in the case-law of the Court. The Court, in the grounds for

³⁸ “Insurance undertakings which sell insurance products directly should be brought within the scope of this Directive on a similar basis to insurance agents and brokers”.

³⁹ “Consumers should benefit from the same level of protection despite the differences between distribution channels”.

⁴⁰ Article 2 (3) (first sentence) of the IMD.

⁴¹ “Member States should not need to consider as relevant persons those managers or employees not directly involved in the distribution of insurance or reinsurance products. Concerning insurance and reinsurance intermediaries and undertakings, all employees directly involved in the distribution activity should be expected to possess an appropriate level of knowledge and competence, with certain exceptions, such as for those who are devoted solely to administrative tasks (...).”

the judgment of 3 March 2005—Arthur Andersen⁴² stated, with regard to the activities relating to “*handling insurance applications, assessing the risks to be insured, determining whether a medical examination is required, deciding whether to accept the risk where such an examination is deemed unnecessary, issuing, managing and rescinding insurance policies and making amendments to contracts and modifying premiums, receiving premiums, managing claims, setting and paying commission for insurance agents and maintaining contact with them, handling aspects relating to reinsurance and supplying information to insured parties and insurance agents and to other interested parties, such as the tax authorities*” and that “*although they contribute to the essence of the activities of an insurance company, (...) they do not constitute services that typify an insurance agent either*”. Consequently, the Court has held that “*‘back office’ activities, consisting in rendering services, for payment, to an insurance undertaking do not constitute the performance of services relating to insurance transactions carried out by an insurance broker or an insurance agent within the meaning of that provision.*” That judgment concerns tax law, which enjoys a specific terminological autonomy, but in the context of the legal considerations, the Court also took into account the relevant European rules on insurance mediation⁴³ on measures to facilitate the effective attainment of freedom of establishment and freedom to provide services in relation to the activities of insurance agents and brokers, which defined intermediation in a manner very similar to the one specified in the IMD (and, possibly, similar to the definition of insurance distribution under the IDD). Consequently, the view that a number of activities connected with ensuring the operations of an insurance undertaking, including a possibility of concluding and performing insurance contracts, but not directly linked to the offering of insurance cover to customers and the conclusion and performance of insurance contracts, should not be classified as distribution activities.

Since the objectives of introducing the IDD was to protect the interests of customers, it should be underlined that the key manifestations of the activity of the insurance distributor are related to interactions with the customer. An example of such interaction is the client’s demands and needs analysis, or a proposal to conclude an insurance contract on such basis (Article 20 (1) of the IDD). Such activity is, naturally, manifested in a number of detailed activities (e.g. asking questions about the customer’s needs, serving the necessary documents, clarifying their content, receiving information about the insured risk). On a contrary, it is difficult to imagine acts which would form part of a legally defined insurance distribution and which would not involve a (direct or indirect) contact with the customer. Even if certain activities are carried out internally at the distributor concerned (e.g. an estimate of the value of the subject-matter of the insurance), such activity should be regarded as having no practical significance as a manifestation of the distribution of insurance until the result is presented to the customer. Consequently, it must be assumed that

⁴²Case C-472/03.

⁴³Council Directive 77/92/EEC of 13 December 1976.

only those activities which may affect the interests of customers by shaping the area of their rights or obligations, or affecting their conduct, must be regarded as the distribution of insurance.

The abovementioned interaction with the customer should not cover all possible acts performed by way of a direct contact with the customer. Firstly, simple technical or representation activities may be carried out by way of a direct contact with the customer which may not be classified as a part of a set of insurance distribution designations. Secondly, it may be that a person who does not actually carry out the activity (including insurance distribution) is directly in contact with the customer, but merely provides the customer with certain information without affecting its content.

The previously mentioned recital 7 of the IDD provides that “(. . .) *the protection of consumers requires an extension of the scope of that Directive to all sales of insurance products. Insurance undertakings which sell insurance products directly should be brought within the scope of this Directive on a similar basis to insurance agents and brokers.*”

Consequently, the extension to insurance undertakings as insurance distributors of requirements which, before the entry into force of the IDD, had been applicable only to insurance intermediaries, is explained precisely by the need to protect the interests of customers.

The essential requirements referred to the above regulations concern the organisation and functioning of insurance distributors, in particular the integrity and professional knowledge of the persons carrying out distribution activities.⁴⁴

Consequently, distribution of insurance should be regarded only as such activity in which the criteria of fairness and professional knowledge must be met, as conditions for effective consumer protection. This means that the distribution of insurance is the activity in which the failure to comply with the aforementioned criteria may jeopardise the effective protection of consumers. In other words, insurance distribution includes those activities, whose flawed (unprofessional, unfair) performance is likely to harm the interests of customers.

On the other hand, the manifestations of the activity of the persons employed in an insurance undertaking, which are not required to comply with the requirements relating to integrity and professional knowledge should not be regarded as distribution activities. This will include, for example, the activities of a technical nature, e.g. the mere service of a document or the provision of information which is not substantively relevant to the interests of the customer. The activities which fall within the scope of the exemption covered by Article 87 sec. 2 point (c) of the IDD should not be regarded as distribution activities, either. In such a case, there is only a preliminary association between the parties to a potential insurance contract in the future, in particular, an initial interest on the part of the customer as regards a mere possibility of obtaining insurance cover. Since the specification may, or may not, take place in the later stages of the distribution process, the mere invocation of

⁴⁴Article 10 of the IDD.

interest has not apparently been regarded by the European legislation as an act to be carried out by a person with verified professional knowledge of insurance products.

Consequently, technical activities should not be classified as distribution activities, if they consist of entering contracts in the register, commissioning or printing of letters, addressing or dispatching them, registering declarations, the physical service of letters, etc.

In this context, the concept of the ‘*assistance in the administration of contracts*’, which forms part of the definition of insurance distribution, should not be read as the performance of technical activities, but as the activities of a substantive nature affecting the performance of insurance contracts, including those affecting the decision-making process of the customer.

The separation of the “administration of contracts” from the technical activities of an employee conducting distribution activities in an insurance undertaking should always be clearly specified. By way of an example, the delivery of the general conditions of insurance can be regarded as a purely technical act (if physically delivered by a courier) but in itself (delivery, or lack of delivery) directly affects the insurance undertaking’s liability and thus affects the conclusion or performance of an insurance contract. Failure to deliver the general conditions of insurance will most likely be the liability of an employee of the insurance undertaking involved in the preparation of the procedures for service of documents or a substantive review of the proper performance of that obligation or an insurance undertaking employee performing a distribution activity directly, which included the delivery of the general conditions of insurance to the customer.

Another problematic issue as regards the identification of an employee conducting distribution activity in an insurance undertaking is the fact that the distribution of insurance products is a complex activity and the customer-related documentation can be developed in several stages and by different persons in a given insurance undertaking. In particular, it may be the case that one person develops a draft content of the information provided to the customer or the statement made to such customer, while another person approves the prepared content, reviewing it once more as a person authorized to represent the insurance distributor, and consequently bears organisational and substantive responsibility for the information or the declaration made.

The IDD rules do not address such a situation; they merely provide that the Member States do not have to apply the requirements regarding the integrity and professional knowledge to “*all the natural persons working in an insurance or reinsurance undertaking, or insurance or reinsurance intermediary, who pursue the activity of insurance or reinsurance distribution, but Member States shall ensure that the relevant persons within the management structure of such undertakings who are responsible for distribution in respect of insurance and reinsurance products and all other persons directly involved in insurance or reinsurance distribution*

*demonstrate the knowledge and ability necessary for the performance of their duties.*⁴⁵”

There may be some doubts about the classification of the activities of persons employed in an insurance undertaking which relate to the sphere of governance of an insurance product. The regulation of product governance is a novelty in the context of the IDD (there were no similar regulations in the IMD). It should be assumed that, although product governance is a regulated area in the IDD, it does not apply to the distribution of insurance and should not be treated as such by the local legislation.

Firstly, one can assume that the addressee of product governance obligations would be an entity which creates a given insurance product, and not the insurance distributor. An insurance product, according to Article 25 of the IDD, is manufactured by an insurance undertaking and sometimes also by an insurance intermediary. However, it may be the case that the product manufacturer remains completely separate from the distributor, for example in a situation where the product has been developed by an insurance undertaking and the distributors are simply insurance intermediaries.

Secondly, it is clear from the IDD rules that the product governance issues have been separated from the product distribution issues, since their launch times differs. According to Article 25 sec. 1 paragraph 1 of the IDD, that can be treated as a good example: *“Insurance undertakings, as well as intermediaries which manufacture any insurance product for sale to customers, shall maintain, operate and review a process for the approval of each insurance product, or significant adaptations of an existing insurance product, before it is marketed or distributed to customers.”*

Consequently, product governance is a process carried out by the manufacturer of an insurance product, which is separate from the distribution of that product. There are only functional compounds between product management and distribution processes, i.e. proper product governance allows its distribution in a legally compliant manner, and the experience of distribution processes can improve the solutions adopted in the framework of product governance.

The same approach should be applied to underwriting activities of insurance undertakings. Such activities are specific to insurance business (risk assessment and accepting), and are not part of insurance distribution, although are performed in relation to a particular potential customer, in order to determine, whether the insurance cover should be granted or not. Still, it is a part of internal process within the insurance undertaking, and not a part of process of offering an insurance product. Such approach seems to have certain recognition by the European Insurance and Occupational Pension Authority (“EIOPA”). In one of its “Questions & Answers”⁴⁶ it referred to “EIOPA Final Report on Public Consultation No. 14/017 on Guidelines on the System of Governance” stating (in explanatory text for Guideline 61): “where an insurance intermediary is mandated to write insurance business or to settle claims on behalf of the undertaking, this is an outsourced service and, as such, the

⁴⁵Article 10 sec. 2 paragraph 5 of the IDD.

⁴⁶https://www.eiopa.europa.eu/content/1994_en?source=search (access 31.05.2020).

arrangement is caught by the Solvency II outsourcing requirements. The typical intermediation activities of an insurance intermediary, i.e. introducing, proposing or carrying out other preparatory work for the conclusion of insurance contracts, or concluding such contracts, or assisting in the administration and performance of such contracts, in particular in the event of a claim, as set out in the IDD, are not subject to the outsourcing requirements. In the case of outsourcing of underwriting activities, the application of the outsourcing requirements needs to be analysed taking into consideration the specific requirements applicable under the IDD". It seems that EIOPA separates underwriting activities and mediation (or, extensively, sales) activities as having different nature and, as such, subject to different legal regimes.

Another issue that can cause difficulties in defining the scope of activities falling within a definition of an "employee conducting distribution activity" is the "*professional management of claims*". The IDD does not specify what the "*professional management of claims*" means, but recital 14 of the IDD literal reading applies not to the general management of claims but to a "professional" one and made "on behalf of an insurance or reinsurance undertaking". It looks like this recital relates to the entities that perform certain functions, not as insurance distributors, but as performers of other professional activity.

On the basis of the principle of rationality of the European legislation, one should consider that the word 'professional' that appears in the text has not found its way there by accident. At the same time, the element of professional performance of the activity is also specified in Article 2 sec. 2 of the IDD. In light of the foregoing, one could conclude that, professional claims handling—in the understanding of the EU legislator—is only the handling of claims of an insurance undertaking by a third party and not by a group of employees of an insurance undertaking.

6 Conclusions

The IDD does not provide for a definition of an "*employee of an insurance undertaking*", nor does it include an indication of how this term should be interpreted; it also does not point out to any reference to a national legislation. The IDD also does not indicate one type of legal relationship between the insurance undertaking and the "employee". The above should lead to a conclusion that the notion of the "employee" in the IDD should be interpreted in the context of EU legislation and case law, and not in the context of national legislation of the EU Member States.

Summing up, as regards the definition of an "*employee of an insurance undertaking conducting distribution activity*", the IDD does not provide for an obligation that the distribution activity in an insurance undertaking can only be performed by the "employees" employed on the basis of a contract of employment. This notion should be understood in a much wider manner, as any legal relationship that has been concluded between an insurance undertaking and the person that is to perform

distribution of insurance products. Provided the local regulations of the EU Member States do not provide for some limitations within gold-plating practices, the insurance undertakings may benefit from the contractual freedom; they may employ persons performing distribution acts under different types of contracts of provision of work for a contractor of such work. The IDD itself has not introduced any limitations in this respect.

Another issue which may result in a legal uncertainty for insurance undertakings is the scope of their activities (and the activities of their employees) falling within the regime of the IDD as the acts of insurance distribution. The definition of insurance distribution remains very extensive and depending on the interpretation of the notion, some activities may be regarded, or not, as examples of distribution activities. Ultimately, taking the purposes of the IDD into account, the scope of application of the regulation of the IDD should be limited to those actions, which are conducted by way of a (direct or indirect) contact with a customer, where such contact is intended to establish insurance coverage, or to execute the existing insurance contract, and, eventually, the actions undertaken by an employee of an insurance undertaking may exert influence on the interest of the customer (it may be detrimental if such actions are unfair or unprofessional in nature).

Legal Acts

- Act dated 15 December 2017 on insurance distribution (uniform text: J.L. 2019 item 1881).
- Act dated 27 June 1974 Labour Code (uniform text: J.L. 2019 item 1040, as amended).
- Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast) text with EEA relevance (O.J. L 26, 2.2.2016, pp. 19–59).
- First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (O.J. L 228, 16.8.1973, pp. 3–19).
- First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (O.J. L 63, 13.3.1979, pp. 1–18).
- Council Directive 77/92/EEC of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex ISIC Group 630) and, in particular, transitional measures in respect of those activities (O.J. L 26, 31.1.1977, pp. 14–19).
- Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (O.J. L 185, 4.7.1987, pp. 77–80).

Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (OJ L 360, 9.12.1992, pp. 1–27).

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (OJ L 271, 9.10.2002, pp. 16–24).

Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (O.J. L 9, 15.1.2003, pp. 3–10).

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (O.J. L 335, 17.12.2009, pp. 1–155).

Treaty on the Functioning of the European Union.

Case Law: European Court of Justice

Judgment of the Court (Fifth Chamber) of 18 January 1984, Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees, Case 327/82.

Judgment of the Court of 19 September 2000, Grand Duchy of Luxemburg v Berthe Linster, Aloyse Linster and Yvonne Linster, C-287/98.

Judgement of the Court (Third Chamber) of 21 October 2010, Padawan SL v Sociedad General de Autores y Editores de España (SGAE), C-467/08.

Judgment of the Court (Fifth Chamber) of 17 July 2008, Andrea Raccanelli v Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV, C-94/07.

Judgment of the Court (First Chamber) of 3 March 2005, Staatssecretaris van Financiën v Arthur Andersen & Co. Accountants c.s., Case C-472/03 Arthur Andersen.

Other Sources

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EIOPA Q&A: https://www.eiopa.europa.eu/content/1994_en?source=search (access 31.05.2020).

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