

IDD – application of the ‘duck test’

11 December 2022

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In a recent ruling, the Court of Justice of the European Union (“ECJ”) has clarified the application of the Insurance Distribution Directive (“IDD”) to those who arrange group insurance policies.

The facts

The case of TC Medical Air Ambulance Agency GmbH related to an organisation that offered its customers membership of a group insurance policy. The membership entitled customers to enter into an insurance contract under which they would receive financial protection in the event of sickness or an accident overseas. The organisation used advertising agencies to promote and sell its membership, including doing so door-to-door. However, neither the organisation itself nor the advertising agencies were licenced under the IDD.

The organisation concerned argued that a licence was not required as no insurance contracts were directly concluded between them and the customers. Rather, customers joined the group policy (to which the defendant was also subscribed), giving the customers the benefits of the policy.

The matter was referred to the ECJ to consider the implications pursuant to the IDD. Specifically, the ECJ was required to rule on “whether a legal person, such as the defendant in the main proceeding falls within the definition of ‘insurance intermediary’ and therefore, that of an ‘insurance distributor’”.

Judgment

With specific reference to article 2(1)(3) IDD, the ECJ referred to the definition of ‘insurance intermediary’ as being ‘a person, who for remuneration takes up or pursues the activities of insurance distribution’.

Firstly, the ECJ was satisfied that the remuneration condition was satisfied here because the organisation received a payment from each customer who joined the group policy. This amounted an economic interest that was distinct from the economic interest of the members of the policy. The fact the payment was made by the customer and not the insurer (i.e. by way of commission) was held to be irrelevant.

Secondly, and more generally, the act of seeking memberships in consideration for financial payment was deemed to be comparable to the activities of a ‘conventional’ insurance agent or distributor.

For the reasons, the ECJ considered the activities in this case to be caught by the IDD and a licence was therefore required by the German regulator.

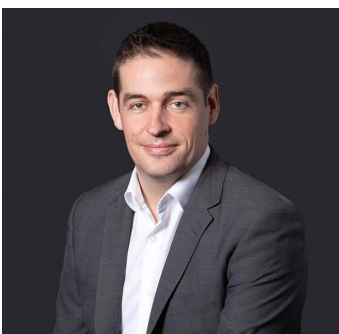
Conclusion

This case confirms the application of a purposive approach to the application of the IDD, which is consistent with the FCA's approach in the UK. Essentially, insurance distribution is subject to the 'duck test'. If an activity looks and feels like insurance distribution or intermediation, it probably is!

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