Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 12 September 2013 [1]

Case C-555/11

Enosi Epangelmation Asfaliston Ellados (Hellenic Association of Insurance Professionals) (EEAE)
Sillogos Asfalistikon Praktoron N. Attikis (Attica Association of Insurance Agents) (SPATE)
Panellinios Sillogos Asfalistikon Simboulon (Hellenic Association of Insurance Advisors) (PSAS)
Sindesmos Ellinon Mesiton Asfaliseon (Hellenic Insurance Broker Association) (SEMA)
Panellinios Sindesmos Sintoniston Asfalistikon Simboulon (Hellenic Association of Insurance Advisor Coordinators) (PSSAS)
v
Ipourgos Anaptixis, Antagonistikotitas kai Naftilias (Minister for Development, Competitiveness and Shipping)
and
Omospondia Asfalistikon Sillogou Ellados (Federation of Hellenic Insurance Associations)

(Request for a preliminary ruling from the Simvoulio tis Epikratias (Council of State) (Greece))

(Right of establishment and freedom to provide services — Directive 2002/92/EC — Scope — Insurance mediation — Exclusion of activities pursued by an insurance undertaking or an employee of an insurance undertaking — Whether it is possible for that employee to pursue activities of insurance mediation on an incidental basis)

1. This request for a preliminary ruling is the first case in which the Court is asked for an interpretation of Directive 2002/92/EC, [2] which lays down rules for the taking-up and pursuit of the activities of insurance mediation by natural and legal persons in the European Union.

2. In essence, the question referred seeks clarification as to the term 'insurance mediation' within the meaning of the second subparagraph of Article 2(3) of that directive. [3] Under that provision, when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking, insurance mediation activities are not to be regarded as insurance mediation.

3. The case arises out of a dispute between the Enosi Epangelmation Asfaliston Ellados (Hellenic Association of Insurance Professionals) and other professional associations in the field of insurance mediation, namely Sillogos Asfalistikon Praktoron N. Attikis (SPATE), Panellinios Sillogos Asfalistikon Simboulon (PSAS), Sindesmos Ellinon Mesiton Asfaliseon (SEMA) and Panellinios Sindesmos

1 — Original language: French.

2 — Directive of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3).

3 — It should be noted that the referring court has referred to 'the second subparagraph of Article 3(3) of Directive 2002/92'. Given that the term 'insurance mediation', referred to in the question, is defined in Article 2(3), not in Article 3, of the Directive, that clerical error should, in my view, be corrected.

Sintoniston Asfalistikon Simboulon (PSSAS) ('the EEAE and others'), the applicants in the main proceedings, and the Ipourgos Anaptixis Antagonistikotitas kai Naftilias (Minister for Development) and the Omospondia Asfalistikon Sillogou Ellados (Federation of Hellenic Insurance Associations, 'the OASE').

4. In that dispute, the EEAE and others maintained that the national implementing measures were incompatible with Directive 2002/92, claiming that those measures adversely affected the practice of the profession of independent insurance intermediary in Greece. As is apparent from the documents before the Court, under the national legislation at issue, an employee of an insurance undertaking is permitted to pursue the activity of insurance mediation on an incidental basis, provided that the income from that activity does not exceed a maximum threshold, without being subject to the requirements applicable under the Directive.

I – Legal context

A – *Directive 2002/92*

5. Recitals 9, 13 and 14 in the preamble to Directive 2002/92 state as follows:

'(9) Various types of persons or institutions, such as agents, brokers and "bancassurance" operators, can distribute insurance products. Equality of treatment between operators and customer protection requires that all these persons or institutions be covered by this Directive.

(13) This Directive should not apply to persons practising insurance mediation as an ancillary activity under certain strict conditions.

(14) Insurance and reinsurance intermediaries should be registered with the competent authority of the Member State where they have their residence or their head office, provided that they meet strict professional requirements in relation to their competence, good repute, professional indemnity cover and financial capacity.'

6. Article 1(1) of Directive 2002/92 provides as follows:

'This Directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation by natural and legal persons which are established in a Member State or which wish to become established there.'

7. Article 2(3) of Directive 2002/92 is worded as follows:

'For the purpose of this Directive:

…

3. "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.

These activities when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation.

The provision of information on an incidental basis in the context of another professional activity provided that the purpose of that activity is not to assist the customer in concluding or performing an insurance contract, the management of claims of an insurance undertaking on a professional basis, and loss adjusting and expert appraisal of claims shall also not be considered as reinsurance mediation'.

8. Article 3 of Directive 2002/92, under the heading 'Registration', provides in paragraph 6 thereof as follows:

'Member States shall ensure that insurance undertakings use the insurance and reinsurance mediation services only of registered insurance and reinsurance intermediaries and of the persons referred to in Article 1(2).'

9. Article 4(1) of Directive 2002/92 provides as follows:

'Insurance and reinsurance intermediaries shall possess appropriate knowledge and ability, as determined by the home Member State of the intermediary.

…

Member States need not apply the requirement referred to in the first subparagraph of this paragraph to all the natural persons working in an undertaking who pursue the activity of insurance or reinsurance mediation. Member States shall ensure that a reasonable proportion of the persons within the management structure of such undertakings who are responsible for mediation in respect of insurance products and all other persons directly involved in insurance or reinsurance mediation demonstrate the knowledge and ability necessary for the performance of their duties.'

B – *Greek legislation*

1. Presidential Decree 190/2006

10. Directive 2002/92 was transposed into Greek law by Presidential Decree 190/2006.[4] The second subparagraph of Article 2(3) of that decree provides as follows:

'"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. When undertaken by an insurance undertaking or an employee of an insurance undertaking who is bound to that undertaking by an employment contract and is acting under the responsibility of that insurance undertaking, these activities shall not be considered to be insurance mediation …'.

4 — FEK A' 196.

2. Law 3557/2007

11. Presidential Decree 190/2006 was amended by Law 3557/2007.[5] Article 15(2) of that law added the following new subparagraph to Article 2(3) of the presidential decree:

'By way of exception, an employee of an insurance undertaking as referred to in the previous subparagraph may pursue the activity of insurance mediation without being subject to the provisions of the present decree, provided that his gross annual income from such activity does not exceed, in total, the sum of five thousand euros (EUR 5 000)'.

12. In accordance with Article 11(3)(b) of Law 3557/2007, the documents proving the general commercial or professional knowledge of candidate insurance and reinsurance intermediaries, tied insurance and reinsurance intermediaries, employees of insurance undertakings and employees of insurance and reinsurance mediation undertakings and the circumstances in which those persons must undergo additional training were to be stipulated by decision of the Minister for Development, to be adopted within 30 days of publication of that law.

3. Decision K3-8010

13. The State Secretary for Development issued Decision K3-8010 of 8 August 2007[6] pursuant to Article 11(3)(b) of Law 3557/2007. Paragraph XX of that decision provides as follows:

'An employee of an insurance undertaking may pursue the activity of insurance intermediary without the need to register with the competent professional association, provided that his gross annual income paid in commission from such activity does not exceed, in total, the sum of five thousand euros (EUR 5 000). If the gross annual income from such activity exceeds the above sum, such a person must register with the competent professional association in accordance with the requirements applicable to the category of insurance intermediary for which he chooses to register. The status of employee in the insurance sector is incompatible with the status of insurance advisor.'

II – The dispute in the main proceedings, the question referred for a preliminary ruling and the procedure before the Court

14. The EEAE and others represents professional associations whose purpose is to protect the professional and financial interests of their members, who are active, as self-employed professionals, in the field of insurance mediation. On 29 October 2007, the EEAE and others brought before the referring court an application for the annulment of, inter alia, paragraph XX of Decision K3-8010. By that application, they claimed that that paragraph was incompatible with Directive 2002/92 in so far as it exempts from the provisions of the Directive employees of insurance undertakings who pursue the activity of insurance mediation while lacking the formal qualifications required under Article 4(1) of the Directive, subject to certain conditions.

15. As is apparent from the order for reference, the referring court has reservations as to the merits of the application for the annulment of paragraph XX of Decision K3-8010. According to that court, as it is possible, within the framework of Greek legislation, interpreted in accordance with Directive 2002/92, to ensure that an employee of an insurance undertaking pursuing the activity of mediation on an incidental basis always acts under the responsibility and supervision of the undertaking – which

5 — FEK 100 A'/14.5.2007.

6 — FEK B' 1600/17.8.2007, 'Decision K3-8010'.

also provides the employee with the necessary training – for the purpose of such activity, the requirements laid down in the Directive should be deemed to have been satisfied, and the nature of the relationship between the employee concerned and the undertaking when that person pursues that activity is immaterial.

16. However, given that a different chamber of the referring court appears not to share that view, the Simvoulio tis Epikratias (Council of State) (Greece) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the second subparagraph of Article 2(3) of Directive 2002/92/EC, which states: "[T]hese activities (those listed in the first subparagraph of that provision), when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking shall not be considered as insurance mediation", to be interpreted as meaning that an employee of an insurance undertaking who does not possess the qualifications required under Article 4(1) of that directive is permitted to pursue the activity of insurance mediation on an incidental basis, and not as his main professional activity, even if that employee does not act as a subordinate of the undertaking, bearing in mind that, in any event, the latter supervises his activities, or does the Directive permit that activity to be pursued only in the context of an employer/employee relationship?'

17. The order for reference was received at the Court Registry on 3 November 2011. Written observations were submitted by the EEAE and others, the OASE, the Greek, Belgian, Cypriot and Austrian Governments and the European Commission. The OASE, the Greek Government and the Commission attended the hearing on 20 June 2013.

III – Analysis

A – *Directive 2002/92*

1. The purpose and scope of the Directive

18. By way of introduction, I note that it is apparent from the documents before the Court that a literal interpretation of the relevant provisions of Directive 2002/92 does not provide an unequivocal answer enabling the referring court to adjudicate on the dispute before it. Consequently, reference should be made to the settled case-law of the Court, according to which, in determining the scope of a provision of European Union law, it is necessary to consider its wording, context and objectives. [7]

19. In that regard, it is well known that insurance intermediaries are key players in the distribution of insurance products in the European Union. As is clear from recitals 6 and 7 in its preamble, the purpose of Directive 2002/92 is to eliminate the obstacles which those intermediaries could face in exercising freedom of establishment and freedom to provide services. Insurance intermediaries also play an important role in protecting the interest of insurance policy holders, not only by distributing insurance products marketed by different insurance undertakings, but especially by advising and assisting customers with an analysis of their specific needs. [8]

7 — See Case C-33/11 *A*. [2012] ECR, paragraph 27.

8 — Proposal for a Directive of the European Parliament and of the Council on insurance mediation (COM (2000) 511 final).

20. Conceived as a harmonisation measure reflecting a new approach of legislating by reference to the activity and not to the person concerned,[9] Directive 2002/92 therefore laid down rules for the taking-up and pursuit of the activities of insurance mediation by making insurance intermediaries in particular subject to obligations such as the requirement to register and to comply with minimum professional standards.[10] Directive 2002/92 is also an instrument for the protection of insurance policy holders and aims to facilitate the provision of insurance products to consumers.

21. To that end, Directive 2002/92 introduces a system for mutual recognition[11] based on harmonised qualifications and a restriction on the use of intermediaries, which requires insurance undertakings to use only the insurance mediation services of registered insurance intermediaries.[12]

22. As a result of the new functional approach adopted by Directive 2002/92, its scope is established both by defining the term 'mediation',[13] and by excluding from it persons offering certain types of mediation services.[14]

2. The definitions of mediation and intermediary

23. As regards the definition of activities of 'insurance mediation' given in Article 2(3) of Directive 2002/92, the term in question covers the activities of 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.

24. However, in accordance with the second subparagraph of Article 2(3) of Directive 2002/92, when undertaken by an insurance undertaking or an employee of an insurance undertaking who is acting under the responsibility of the insurance undertaking, these activities are not to be regarded as insurance mediation. It follows that those categories of persons are not subject to the requirements imposed by the Directive, although they are authorised to pursue activities of proposing the conclusion of contracts of insurance, of concluding such contracts, or of assisting in the administration of such contracts. Moreover, it seems to me that the distinction drawn by the Directive between the activities of undertakings and the activities of employees is redundant, except where contracts are concluded in the absence of any personal contact with the representative of an undertaking.[15]

25. On the other hand, according to the third subparagraph of Article 2(3) of Directive 2002/92, the provision of information on an incidental basis in the context of another professional activity is not considered to be insurance mediation.[16]

9 — In contrast with 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 (OJ 1977 L 26, p. 14), Directive 2002/92 is characterised by harmonisation based not on existing categories of intermediaries, but on the activities of insurance intermediaries in general.

10 — In accordance with Articles 3 and 4 of Directive 2002/92, the essential requirements relate to registration, professional qualifications, good repute and professional indemnity insurance cover, as well as measures to protect customers' monies.

11 — Proposal for a Directive referred to above (COM (2000) 511 final).

12 — And of the persons referred to in Article 1(2) of the Directive. Intermediaries registered in one Member State may operate in other Member States by carrying on business under the right of freedom to provide services or by opening a branch. Member States may introduce further professional requirements in addition to those laid down in the Directive, but only as regards intermediaries registered by them.

13 — Article 2(3) and (4) of the Directive.

14 — Article 1(2) and (3) of the Directive.

15 — For example, where a contract is concluded via the internet.

16 — Such as, for example, where lawyers, notaries, experts or consultants provide information on an incidental basis without proposing the conclusion of an insurance contract.

26. Furthermore, some activities are excluded from the scope of Directive 2002/92 pursuant to Article 1(2), even though they fall within the definition of insurance mediation. That is the case as regards the category of persons offering insurance contracts which satisfy all the conditions laid down in the directive, including the condition relating to the *de minimis* rule, according to which the annual premium must not exceed EUR 500, and the condition relating to the duration of the contract, which must not exceed five years.

27. Accordingly, Directive 2002/92 contains a definition of the term 'mediation', based on to function, for the purpose of identifying the various different categories of intermediary (broker, agent, sub-agent), while at the same time encompassing other distribution channels, such as 'bancassurance'.[17] Indeed, as is apparent from recital 9 in the preamble to the Directive, a very wide range of persons and institutions can distribute insurance products.[18]

28. The definition of 'insurance intermediary' in Article 2(5) of Directive 2002/92 covers any natural or legal person who, for remuneration, takes up or pursues insurance mediation. This implies, on the one hand, that the activity is therefore performed in a professional capacity and, on the other, that where the activity of mediation is pursued without any pecuniary consideration or other form of economic benefit, the persons carrying on that activity are not considered to be intermediaries within the meaning of the Directive.

29. In that connection, I would point out that the profession of insurance intermediary can also be pursued in accordance with the 'tied mediation' model. Article 2(7) of Directive 2002/92 provides that 'tied insurance intermediary' means any person who carries on such activity for and on behalf of one or more insurance undertakings.

30. I note, moreover, that, in line with a new approach, Directive 2002/92 does not replicate the distinctions made at national level between the different types of mediation. Indeed, during the preparatory work, it was not possible to make a distinction between agents and brokers[19] in all the Member States. Consequently, the profession of insurance intermediary within the meaning of the Directive covers various subcategories of the profession in the different Member States.[20] However, since the Directive lays down a set of minimum requirements as regards the conditions under which information is to be provided and the content of the information which insurance intermediaries must make available to their potential customers, those customers should be able to identify the type of intermediary they are dealing with.[21]

17 — See preparatory work for the Directive (COM (2000) 511 final).

18 — However, as is apparent from the draft recast, Directive 2002/92 is not applicable to all those who sell insurance, including insurance undertakings themselves. In the recast, it was therefore proposed that the scope of the Directive should be extended. See point 60 of this Opinion.

19 — A distinction is drawn between these terms in the aforementioned Directive 77/92/EEC, repealed by the Directive; they corresponded to different insurance sales professions in the Member States.

20 — It is apparent from the documents before the Court that Greek legislation recognises five categories of insurance intermediary, namely, insurance agents, insurance brokers, insurance advisors, insurance advisor coordinators and the category at issue, insurance employees. Under Finnish legislation on mediation, a distinction is drawn between an agent, who is a natural or legal person acting on behalf and under the responsibility of the insurance undertaking, and a broker, who pursues the activity of mediation on the basis of a contract with a party other than the insurance undertaking (see Laki vakuutusedustuksesta (Law on Insurance Mediation) No 570 of 15 July 2005). Belgian legislation provides for three categories of intermediary: brokers, who act as intermediaries between insurance customers and insurance undertakings, without being bound to a particular undertaking; agents, who are defined as intermediaries who pursue mediation activities on the basis of one or more agreements or authorisations for and on behalf of one or more insurance undertakings; and, lastly, sub-agents, who are intermediaries acting under the responsibility of a broker or an agent (see www.fsma.be). Under French law, on the other hand, the Code des Assurances (Insurance Code) (Article R.511-2) divides intermediaries into six categories, since intermediaries are entitled to pursue activities in more than one capacity, such as: insurance brokers; general insurance agents; authorised insurance agents, who are self-employed natural persons and legal persons authorised by an insurance undertaking; authorised agents of insurance intermediaries, who are self-employed natural persons and legal persons authorised by brokers, general insurance agents, authorised insurance agents and foreign intermediaries. (Bigot, J., 'L'intermédiation en assurance: les nouvelles règles du jeu', *La semaine Juridique*, Édition Générale No 47, France, 2006, I 189).

21 — See the Proposal for a Directive referred to above (COM (2000) 511 final) and Chapter III of Directive 2002/92.

3. Examples of transposition of Directive 2002/92

31. It is worth noting that, in the light of the specific scope of Directive 2002/92 and the definitions it provides, the Member States have adopted various solutions for the purposes of transposing the Directive. Thus, under French legislation, a distinction must be drawn between activities which are not considered to constitute mediation and those which fall within the definition of insurance mediation but are not subject to the requirements attaching thereto. [22] Finnish legislation, on the other hand, provides a general definition of mediation, while at the same time identifying activities classified as 'non-mediation', which relate to the activities of insurance companies and their employees. [23]

32. The Member States have also provided for some exceptions to the requirement for insurance intermediaries to be included in a national register, such as the exception applicable under Belgian law as regards indemnity insurance for the intermediary's own undertaking or mediation relating to insurance contracts which satisfy all the conditions laid down in Article 1(2) of Directive 2002/92. [24] This is also the case under United Kingdom legislation as regards the provision of insurance-related information on an incidental basis and the offer of insurance contracts as an ancillary activity to the main business being conducted, subject to a condition relating to the duration of the contracts and an income threshold. [25]

33. The question referred must be answered in the light of the foregoing considerations.

B – *Definition of the concept of insurance mediation*

1. The national legislation at issue in the main proceedings

34. By its question, the referring court is seeking, in essence, to establish whether the definition of 'mediation' in Article 2(3) of Directive 2002/92 covers a situation in which an employee [26] of an insurance undertaking who does not satisfy the qualifications requirements for insurance intermediaries under the Directive and does not act as a subordinate of the undertaking, but whose activities are supervised by it, is permitted to pursue the activity of insurance mediation on an incidental basis.

35. Firstly, it should be pointed out that the activity of insurance mediation is governed under Greek law by several measures of differing rank, the wording of which is somewhat problematic. The definition of insurance mediation is given in Presidential Decree 190/2006, subsequently amended by Law 3557/2007. That law introduced a derogation from that definition, based on an upper income limit applicable to all employees of insurance undertakings. That provision seems, therefore, to exempt such employees from the formalities applicable to the pursuit of insurance mediation activities without, however, specifying who is required to fulfil the obligations relating to the activities thus exempted. Finally, Decision K3-8010 was adopted pursuant to the enabling provision in Law 3557/2007 and sets out somewhat vague rules for the implementation of that derogation.

22 — Langé, D., 'Les intermédiaires d'assurance à l'heure du marché unique: la réforme de l'intermédiation en assurance', *Revue générale du droit des assurances*, No 2006-4, France, 2006, p. 857. I note that, under French legislation, insurance undertakings classed as undertakings 'without intermediaries', which distribute insurance products through branch offices where employees deal with customers, fall within the scope of that exception. The employees of those undertakings are not included in the professional category of insurance intermediaries and are not subject to the registration requirement.

23 — See Law No 570/2005.

24 — For a description of the exceptions applicable under Belgian law, see: http://www.fsma.be.

25 — For the system applicable in the United Kingdom, see: http://www.fsa.gov.uk/pubs/other/ins_reg.pdf.

26 — I observe that the term 'salarié' is expressed in the different language versions of Directive 2002/92 as υπάλληλο (Greek), empleado (Spanish), Angestellte (German), employee (English), impiegato (Italian), pracownik (Polish), työntekijä (Finnish) and anställd (Swedish), which justifies the use of the broader term 'employé' in French.

36. However, since the application brought before the referring court seeks the annulment only of the provisions of Decision K3-8010, this analysis will be confined to that decision, in particular paragraph XX thereof.

37. It is apparent from the documents before the Court that the national legislation at issue before the referring court introduces a derogation the scope of which differs from the scope of the exclusion in Article 2(3) of Directive 2002/92 in that it allows any employee of an insurance undertaking to pursue the activity of insurance mediation on an incidental basis, for remuneration not exceeding EUR 5 000, without being required to fulfil the specific conditions applicable under Article 4(1) of the Directive. Furthermore, it is apparent from those documents that an insurance employee may not work as an insurance advisor if he is permitted to pursue mediation activities.

38. I would observe, in this connection, that the parties which have submitted written observations in this case hold differing views. According to the EEAE and others, since paragraph XX of Decision K3-8010 equates an insurance undertaking employee to an insurance intermediary, it is inconsistent with Directive 2002/92. According to the Austrian and Belgian Governments, the second subparagraph of Article 2(3) of the directive must be interpreted as meaning that an employee of an insurance undertaking who does not have the qualifications required under Article 4(1) of that directive may not pursue insurance mediation activities on an incidental basis.

39. The OASE and the Greek and Cypriot Governments propose that, in the light of the second subparagraph of Article 2(3) of Directive 2002/92, it should be found that an employee of an insurance undertaking who does not have the qualifications required under Article 4(1) of that directive is permitted to pursue insurance mediation activities on an incidental basis, but not as his main professional activity.

40. Finally, the Commission submits that the derogation provided for in Article 2(3) of the Directive is applicable to activities pursued by an employee of an insurance undertaking who is acting under the responsibility of his employer, even where those activities are not covered in their entirety by his ‘employment contract’.

2. Conditions laid down by Directive 2002/92 for the pursuit of insurance mediation

41. It seems to me that it is necessary to distinguish three main situations relating to the pursuit of the activity of mediation, in the light of the scope of Directive 2002/92.

42. First, it is appropriate to consider the situation at issue in the present case, namely that of an employee of an insurance undertaking. In this case, although the activities of an employee may fall within the general definition of insurance mediation, they are not considered as insurance mediation under the Directive.

43. As noted by the Austrian Government, one of the reasons for excluding those activities from the scope of Directive 2002/92 and, consequently, for exempting from the requirements of the Directive the persons pursuing those activities, is that insurance undertakings or their employees are deemed to meet professional requirements that guarantee the protection of insurance policy holders, since, in particular, under the Directive, insurance undertakings are defined as undertakings which have received official authorisation in accordance with Article 6 of 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 (OJ 1979 L 63, p. 1).

44. In my view, the main aim of restricting the scope of Directive 2002/92 in this way is, first, to allow insurance undertakings to market their own insurance products and, secondly, to enable them to act as intermediaries for the purposes of marketing the products of other insurance companies which, for example, belong to the same group or to which they are bound by commercial or other agreements. These considerations clearly apply to the employees of those undertakings.

45. Since an undertaking can act only through its employees, when those employees act for and on behalf of their employer, they must be treated in the same way as the undertaking and, therefore, their activities are excluded from the scope of the Directive. In this case, when insurance is sold via an intermediary, the contractual relationship is therefore between the insurance undertaking concerned and the policy holder, the employee acting purely as the undertaking's agent.

46. Furthermore, as regards the legal relationship between the insurance undertaking and the employee, the Commission rightly points out that Article 2(3) of Directive 2002/92 is to be interpreted as applying to the activities pursued by an employee of an insurance undertaking under the responsibility of his employer, even where those activities are not covered in their entirety by his 'employment contract' for the purposes of national employment law. Indeed, it would be impossible for the derogation at issue to be interpreted in a uniform manner if account were to be taken of the variety of contractual relationships between employees and employers that exists in the various Member States.[27] Moreover, the way in which an employee is paid is, in my view, irrelevant in the light of the definitions given in the Directive.

47. However, in my view, the preservation of the effectiveness of Directive 2002/92 rules out any possibility that the employees of an insurance undertaking may pursue mediation activities in their own name if they do not satisfy the conditions laid down in the Directive. As noted by the Belgian Government, by referring to insurance mediation activities pursued on an incidental and ancillary basis outside the framework of the contract of employment binding an employee to an insurance undertaking, the national legislation at issue in the main proceedings goes beyond the scope of the second subparagraph of Article 2(3) of the Directive. Indeed, it goes beyond the realm of the direct selling of insurance products and into that of insurance mediation in the true sense of the term.

48. It is apparent from the documents before the Court that the legislation at issue in the main proceedings enables an employee of an insurance undertaking to wear 'two hats', since he can act at the same time as an employee who can be equated to his employer and as an independent, unqualified agent, provided that his income does not exceed a certain threshold.[28] I would observe that that legislation creates a three-sided contractual arrangement involving, first, the employee and the insurance policy holder, second, that same policy holder and the insurance undertaking and, third, the employee and the insurance undertaking. Moreover, that legislation creates uncertainty as to the rules on the division of responsibility as regards the intermediary's typical obligations towards insurance policy holders.

27 — I note, in this connection, that, since employment law has not been harmonised at European Union level, there is a range of possible solutions under national law that is inherent in contractual freedom. In addition, the basic relationship may be either an employment relationship in the broad sense, or that under a contract of employment. That said, under EU law, the exclusion of 'employees' of insurance undertakings from the definition of 'mediation' should reasonably be interpreted as being directed at contractual relations between employees and insurance undertakings which are characterised by a relationship of subordination. Where the parties to a contract have equal status, neither party may be considered an employee.

28 — As regards the income threshold, it should be pointed out that, during the preparatory work for Directive 2002/92, the possibility of restricting the scope of the Directive to insurance intermediaries with a certain level of activity (for example, by reference to a certain annual volume of premiums collected) was ruled out in order not to exclude from its scope 'small' intermediaries, which are considered not to guarantee an adequate level of protection for insurance policy holders. See the proposal for a Directive referred to above (COM (2000) 511 final).

49. To allow such a possibility would, in my view, be tantamount to circumventing the purpose of Directive 2002/92, particularly in view of the scope of the concept of insurance mediation in the directive, the requirements relating to the professional qualifications of intermediaries and the need to protect insurance policy holders.

50. In that context, it should be noted that the difference between an employee, who has a duty of loyalty to his employer, and an insurance intermediary lies, in particular, in the degree of independence and impartiality, since an intermediary is expected to give advice on the basis of his obligation to provide a fair analysis, which is not the case with an employee acting for and in the interests of an undertaking. The interpretation proposed is supported by the purpose of Directive 2002/92, namely, to facilitate the exercise of freedom of establishment and freedom to provide services by intermediaries. Persons employed by an undertaking are automatically precluded from this.

51. Admittedly, the Greek Government is right to point out that Directive 2002/92 does not bring about full harmonisation. However, this has no bearing on its objective of setting minimum requirements as regards the professional knowledge and ability of intermediaries, with a view to achieving a genuine European market for insurance mediation. Where the activities pursued are insurance mediation activities, the Directive offers a degree of flexibility in terms of the conditions that may be imposed, but not with regard to the actual principle of a minimum level of requirements.

52. In any event, the provisions of the fourth subparagraph of Article 4(1) of Directive 2002/92, under which Member States need not apply the conditions relating to the requisite knowledge and ability to all persons working for an undertaking, clearly constitute an adjustment of the requirements which is similar to that made in the regulated professions. Accordingly, it is clear that in the same way that a law firm employs both lawyers who are not members of the Bar and staff who have not completed legal training, not all the employees of an insurance undertaking have to fulfil the professional qualification requirements.

53. Secondly, it is necessary to consider the situation of tied insurance intermediaries within the meaning of Article 2(7) of Directive 2002/92, who work entirely under the responsibility of either an insurance undertaking or another intermediary. [29]

54. From a legal perspective, a tied insurance intermediary is an agent of such a company or of another intermediary who cannot be equated to either of them since he is self-employed. [30] According to Article 12(1) of Directive 2002/92, insurance intermediaries are, however, required to inform the customer about anything which may influence their impartiality, in particular, whether they give advice based on the obligation to provide a fair analysis. Unlike insurance undertakings and their employees, tied intermediaries are required to disclose a lack of impartiality.

55. I would point out, however, that a tied insurance intermediary must act as intermediary for and on behalf of an insurance undertaking. In my view, this would appear to rule out the possibility that an employee may act, at the same time, both as an employee and as an intermediary of the undertaking that employs him.

29 — The definition of ‘tied insurance intermediary’ in Article 2 (as amended) of the revised Directive 2002/92 is extended to include intermediaries working under the responsibility of another insurance intermediary (see Proposal for a Directive of the European Parliament and of the Council on insurance mediation (COM(2012) 360 final).

30 — The profession of tied agent is referred to in other directives concerning the financial markets, such as Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field (OJ 1993 L 141, p. 27) and Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1).

56. The function of a tied intermediary involves, by necessary implication, pursuing insurance mediation in addition to another activity. If it were accepted that the 'other activity' could consist in an employment relationship with an insurance undertaking, a question would therefore arise concerning the implications that would have in terms of the protection of insurance policy holders and the avoidance of confusion between these different roles.

57. Under the legislation at issue in the main proceedings, an employee of an insurance undertaking, including technical, security or cleaning staff, may, according to a literal interpretation, be remunerated as a business finder equivalent to a broker, as provided for in the law of obligations. [31] Furthermore, I would observe that, at the hearing, the agent of the Greek Government seems to have disputed that interpretation of the national provisions, without, however, establishing the existence under national law of any provision under which that possibility would be limited to specialist employees of insurance undertakings.

58. Thirdly, it is necessary to consider the case of a self-employed insurance intermediary acting as a representative of customers vis-à-vis insurance undertakings. Directive 2002/92 is fully applicable in that case, and the Member States are obliged to determine the requirements in relation to the knowledge and ability which intermediaries must possess.

59. In that regard, I note that, in the recast of Directive 2002/92, provision was made to enlarge its scope to include sales of insurance contracts by insurance and reinsurance undertakings without the intervention of an insurance intermediary. The proposal for the revised directive is also intended to apply to all distribution channels (e.g. direct writers, car rentals, etc.). [32] It should be noted that the recast of the Directive provides that insurance policies sold ancillary to the sale of services fall in the scope of the revised directive. [33]

IV – Conclusion

60. In light of the foregoing considerations, I propose that the Court should answer the question referred by the Simvoulio tis Epikratias as follows:

The second subparagraph of Article 2(3) of Directive 2002/92/EC of the European Parliament and Council of 9 December 2002 on insurance mediation must be interpreted as meaning that an employee of an insurance undertaking who does not have the qualifications required under Article 4(1) of that directive is not permitted to pursue the activity of insurance mediation on an incidental basis independently of the relationship of subordination arising under the contractual relationship binding the employee to the insurance undertaking, including where such an employee is subject to an annual income threshold. On the other hand, the activities pursued by an employee of an insurance undertaking acting for and on behalf of his employer are excluded from the scope of the Directive.

31 — As is apparent from the documents before the Court, if employees sell insurance policies for the insurance undertaking which employs them, they are entitled to receive a commission in addition to the salary they receive under their contract of employment.

32 — Consequently, it is proposed in the recast Directive to delete the second subparagraph of Article 2(3) of the Directive and replace it with a sentence to be added to its first subparagraph, according to which activities considered to be 'insurance mediation' will include activities 'carried on by an insurance undertaking without the intervention of an insurance intermediary'. See the proposal for a Directive referred to above (COM(2012) 360 final).

33 — For example, this would be the case with travel insurance policies marketed and sold by travel agents and 'multi-risk' insurance policies marketed and sold by car rental companies and leasing companies. See the proposal for a directive referred to above (COM(2012) 360 final).