

Insurance mediation or investment advice?

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Introduction

On November 21 2017 the advocate general's opinion regarding the European Court of Justice (ECJ) Case C-542/16 was published. The Swedish Supreme Court had referred the case to the ECJ for preliminary rulings. The case concerned the demarcation of insurance mediation and investment advice, and the extent to which the statutory liability insurance for insurance intermediaries should respond to claims in respect of such services. These questions were dealt with in two Swedish cases: *Connecta* (T 25-16) and *EWMG* (T 2761-15). *Connecta* is pending leave to appeal, while *EWMG* has been granted leave to appeal by the Supreme Court.

Connecta

Background

In *Connecta* a number of consumers had engaged an insurance intermediary of Connecta Fond och Försäkring AB to arrange certain capital assurance contracts. The consumers subsequently paid the premium to Connecta. However, the insurance intermediary kept the funds without making the agreed investments on the consumers' behalf.

The insurance intermediary was later reported to the police. Connecta's insurance mediation licence was revoked and Connecta was declared bankrupt. The consumers brought suit against Connecta's liability insurer, Länsförsäkringar Sak Försäkringsaktiebolag, seeking indemnity for the sizable losses that they suffered as a result of Connecta's failure to make the investments. Länsförsäkringar declined coverage and argued, among other things, that the scope of the services covered by the liability policy did not include insurance mediation regarding fictitious products. The consumers won the case before the district court, but the appellate court held that the insurance intermediary's actions fell outside the scope of insurance mediation.

ECJ referral

The Supreme Court referred questions to the ECJ in respect of the *Connecta* case, regarding whether the EU Insurance Mediation Directive 2002/92 covered activity where an insurance intermediary had no intention of concluding an insurance contract. In the event that the directive covers such activity, the Supreme Court asked whether it would bear any meaning if the intermediary also conducted legitimate insurance mediation services in addition to the aforesaid activity and if the client's perception of the services should be considered.

Advocate general's opinion

Advocate General Campos Sánchez-Bordona proposed that the questions posed by the Supreme Court should be replied to as follows. Whether certain activities are considered insurance mediation services is ultimately to be determined based on objective criteria. To the extent that the insurance intermediary has carried out services in preparation of a potential insurance contract, such services are within the scope of the directive, notwithstanding any fraudulent intentions on behalf of the insurance intermediary or a client's perception of the activity. Consequently, an insurance

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intermediary's liability for such errors or omissions will be covered by the liability insurance.

EWMG

Background

In *EWMG*, a consumer had concluded a capital assurance contract arranged by insurance mediation firm European Wealth Management Group AB. In respect of the financial instruments components of the capital assurance, the insurance intermediary had advised the consumer to invest in an investment certificate. The consumer eventually lost everything that he had invested.

EWMG was declared bankrupt and the consumer brought suit against *EWMG*'s liability insurer, Länsförsäkringar, which had declined coverage for the consumer's losses. Länsförsäkringar stated that, although the mediation of the capital assurance was within the scope of the directive and thus covered by the insurance, the advice provided by *EWMG* that caused the loss concerned placements of financial instruments in the insurance policy. Länsförsäkringar claimed that the advice did not constitute insurance mediation, but rather investment advice regarding financial instruments and was governed by the EU Markets in Financial Instruments Directive 2004/39 (MiFID) (as transposed into Swedish Law). Länsförsäkringar lost the case before both the district court and the appellate court.

ECJ referral

The Supreme Court referred a number of questions to the ECJ in respect of the *EWMG* case, regarding whether the Insurance Mediation Directive governs advice given in connection with insurance mediation that does not concern actual insurance elements, but rather advice concerning the capital placements within the realm of capital assurance. Further, the Supreme Court asked whether such advice – if defined as 'investment advice' under MiFID – is covered by MiFID instead of, or in addition to, the Insurance Mediation Directive. The Supreme Court also asked whether MiFID or the Insurance Mediation Directive should take precedence in case of overlapping provisions.

Advocate general's opinion

The advocate general proposed that, to the extent that an insurance contract qualifies as capital assurance, unit-linked insurance or insurance-based investment products – which is to be determined by the Supreme Court – an insurance intermediary's advice to the client is covered by the Insurance Mediation Directive. The advocate general stated that capital assurance is an indivisible whole and within the scope of the directive. Investment advice regarding placements within the realm of such insurance is not covered by MiFID.

Comment

The advocate general proposed that the relevant activities in both *Connecta* and *EWMG* be deemed to be within the scope of the Insurance Mediation Directive.

In tandem with the ECJ proceedings, the Swedish Ministry of Finance proposed that the EU Insurance Distribution Directive 2016/97 be transposed into local law by way of introducing an insurance distribution act. The ministry has taken the following approach: according to the proposal, investment advice regarding financial instruments – whether inside or outside the scope of an insurance policy and with the exception of certain unit-linked products – will be governed by the Securities Market Act (based on MiFID II, 2014/65). Formal steps in the legislative process have yet to take place and it cannot, at this stage of the process, be presumed that the principles of the ministry's proposal will be upheld. It remains uncertain what effect the advocate general's opinion or ECJ ruling may have on the implementation of the Insurance Distribution Directive.

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