



## JUDGMENT OF THE COURT

27 October 2017\*

*(Directive 87/344/EEC – Article 201(1)(a) of Directive 2009/138/EC – Legal expenses insurance  
– Free choice of lawyer)*

In Case E-21/16,

REQUEST to the Court under Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in a case pending before it between

**Pascal Nobile**

and

**DAS Rechtsschutz-Versicherungs AG**

concerning the interpretation of Article 201(1)(a) of 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),

THE COURT,

composed of: Carl Baudenbacher, President, Per Christiansen (Judge-Rapporteur) and Benedikt Bogason (ad hoc), Judges,

Registrar: Gunnar Selvik,

having considered the written observations submitted on behalf of:

- DAS Rechtsschutz-Versicherungs AG (“DAS” or “the respondent”), represented by Batliner Wanger Batliner, Rechtsanwälte AG, advocates;

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\* Language of the request: German. Translations of national provisions are unofficial and based on those contained in the documents of the case.

- the Liechtenstein Government, represented by Andrea Entner-Koch, Director, and Monika Zelger-Jarnig, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the Czech Government, represented by Martin Smolek and Jiří Vlášil, Ministry of Foreign Affairs, acting as Agents;
- the Slovak Government, represented by Iveta Hricová, General Director, Ministry of Foreign and European Affairs, acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Markéta Šimerdová and Karl-Philipp Wojcik, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

having heard oral argument of Pascal Nobile (“Mr Nobile” or “the appellant”), represented by Isabella Ziernhöld, lawyer; the Liechtenstein Government, represented by Thomas Bischof, Deputy Director, EEA Coordination Unit, and Monika Zelger-Jarnig, acting as Agents; the Slovak Government, represented by Dominik Baco, Legal Adviser, National Bank of Slovakia, acting as Agent; ESA, represented by Michael Sánchez Rydelski; and the Commission, represented by Karl-Philipp Wojcik and Markéta Šimerdová, at the hearing on 6 July 2017,

gives the following

## **Judgment**

### **I Legal background**

#### *EEA law*

- 1 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) (OJ 2009 L 335, p. 1) (“the Solvency II Directive”) was incorporated into the Agreement on the European Economic Area (“the EEA Agreement”) by Joint Committee Decision No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45), which added the Directive as point 1 of Annex IX (Financial Services).
- 2 The Solvency II Directive repeals several directives previously included in Annex IX to the EEA Agreement, including Council Directive 87/344/EEC of 22 June 1987 on the

coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77). The date of repeal, which was originally set as 1 November 2012, was postponed twice. Most recently, Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I) (OJ 2013 L 341, p. 1), which was incorporated into the EEA Agreement by Joint Committee Decision No 128/2014 of 27 June 2014 (OJ 2014 L 342, p. 27), set the date of repeal as 1 January 2016.

3 Recitals 82 and 83 in the preamble to the Solvency II Directive read:

*(82) In the interest of the protection of insured persons, national law concerning legal expenses insurance should be harmonised. Any conflicts of interest arising, in particular, from the fact that the insurance undertaking is covering another person or is covering a person in respect of both legal expenses and any other class of insurance should be precluded as far as possible or resolved. To that end, a suitable level of protection of policy holders can be achieved by different means. Whichever solution is adopted, the interest of persons having legal expenses cover should be protected by equivalent safeguards.*

*(83) Conflicts between insured persons and insurance undertakings covering legal expenses should be settled in the fairest and speediest manner possible. It is therefore appropriate that Member States provide for an arbitration procedure or a procedure offering comparable guarantees.*

4 Title II, Chapter II, Section 4 of the Solvency II Directive contains provisions on legal expenses insurance and comprises Articles 198 to 205.

5 Article 200 of the Solvency II Directive obliges the EEA States to ensure that insurance undertakings adopt at least one of three methods for the management of claims as set out in paragraphs 2, 3 and 4 of that provision. The option provided for in Article 200(4) reads:

*The contract shall provide that the insured persons may instruct a lawyer of their choice or, to the extent that national law so permits, any other appropriately qualified person, from the moment that those insured persons have a claim under that contract.*

6 Article 201(1) of the Solvency II Directive reads:

*Any contract of legal expenses insurance shall expressly provide that:*

*(a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person;*

*(b) the insured persons shall be free to choose a lawyer or, where they so prefer and to the extent that national law so permits, any other appropriately qualified person, to serve their interests whenever a conflict of interests arises.*

### *National law*

7 Article 201 of the Solvency II Directive is implemented in Liechtenstein law by Article 60 of the Insurance Contracts Act (*Versicherungsvertragsgesetz*, LR 215.229.1), which reads:

*Any contract of legal expenses insurance shall expressly provide that:*

*(a) Where recourse is had to a lawyer or other person appropriately qualified in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person;*

*(b) The insured person shall be free to choose a lawyer or any other appropriately qualified person, to serve his interests whenever a conflict of interest arises.*

## **II Facts and procedure**

8 The respondent, DAS, is a public limited liability company under Swiss law. It has entered into a contract for legal expenses insurance with the appellant, Mr Nobile. The contract is subject to the general terms and conditions of insurance of DAS. Under those general terms and conditions, DAS grants insurance cover for legal expenses, inter alia, in tenancy disputes with landlords.

9 Article 18 of DAS's general terms and conditions obliges the insured person immediately to inform DAS of any legal case that could give rise to its involvement under the insurance contract.

10 Article 19 of DAS's general terms and conditions is headed "Conduct of the case" and reads:

*1. The DAS legal service shall advise the insured person as to his rights, and safeguard his interests. The insured person shall provide DAS with all requisite authorisations.*

*2. The insured person shall leave the conduct of the case exclusively to DAS. Without prior consent of DAS, the insured person shall not instruct any attorneys, experts, etc., nor shall he commence proceedings, take any legal steps, or agree to any settlements. The insured person shall not enter into any fee agreement with the instructed attorney.*

...

4. *In the event that there is a conflict of interests (representation of different insured persons with opposing interests) or where, in view of judicial or administrative proceedings, it becomes necessary to instruct an external lawyer (Anwaltsmonopol), the insured person shall be free to choose a legal representative with the requisite qualifications, resident in the district of the court. In the event that DAS rejects the suggested attorney, the insured person shall nominate three other attorneys from different law firms, and resident in the district of the court, from whom DAS shall select one. No reason needs to be given for rejecting an attorney.*

...

- 11 Article 22 of DAS's general terms and conditions reads:

*Any culpable breach of contractual duties by the insured person shall entitle DAS to refuse its performance.*

- 12 From 1 September 2014, Mr Nobile rented a property in Liechtenstein. The property owner terminated the tenancy agreement with effect from 30 September 2015. A dispute arose concerning the financial settlement after the termination.
- 13 From March 2015 onwards, there had been recurring phone contact between Mr Nobile's spouse and DAS concerning the possible presence of mould in the property, and subsequently also concerning the property owner's termination of the agreement and the recovery of the deposit of CHF 1 900. DAS also corresponded with the property owner. The latter eventually returned part of the deposit.
- 14 In autumn 2015, without informing DAS in advance, Mr Nobile provided a lawyer, Mr Antonius Falkner, with a power of attorney. Mr Falkner subsequently requested DAS to cover the costs of legal proceedings against the property owner concerning recovery of the remaining deposit, and a retrospective rent reduction of at least CHF 500 per month due to the alleged presence of mould during the tenancy. DAS rejected this request, alleging that Mr Nobile had breached his contractual obligations by not leaving the conduct of the case exclusively to DAS.
- 15 Mr Nobile then lodged proceedings against DAS before the Princely Court (*Fürstliches Landgericht*), seeking a declaration that DAS was liable to provide legal expenses insurance cover in respect of the proceedings against the property owner. However, the Princely Court dismissed the action by a judgment of 27 July 2016. It held that the contract provision, granting DAS an exclusive right to conduct the case, was compatible with Article 60 of the Insurance Contracts Act. The free choice of lawyer only applied, as a rule, in judicial or administrative proceedings. It did not apply at the stage of notification of a claim, for the assessment of the legal and factual situation, or for any efforts to settle matters out of court. In the opinion of the Princely Court, the dispute between Mr Nobile and the property owner was still at the stage where DAS had an

exclusive right to conduct the case. It therefore held that Mr Nobile had no legitimate interest in a judgment declaring DAS liable under the insurance policy.

- 16 Mr Nobile brought an appeal against the judgment before the Princely Court of Appeal, maintaining that he has a legitimate interest in the declaration sought. According to the Princely Court of Appeal, the question whether Mr Nobile has a legitimate interest in the declaratory judgment sought depends on whether he has breached his contractual duties by instructing Mr Falkner as attorney. That, in turn, depends on the interpretation of Article 201(1)(a) of the Solvency II Directive.
- 17 By letters of 20 and 22 December 2016, the Princely Court of Appeal requested the Court to give an advisory opinion and to apply the accelerated procedure provided for in Article 97a of the Rules of Procedure. The following questions were referred:
  1. *Does Article 201(1)(a) of [the Solvency II Directive] preclude a contractual agreement between a legal expenses' insurer and an insured person, according to which it is a breach of duty of the insured person, releasing the insurance company from its obligations, if the insured person mandates an attorney to represent his interests, without the consent of the provider of the legal expenses insurance, at a point in time when the insured person would be entitled to make a claim according to the legal expenses insurance contract?*
  2. *In the event that question 1 is answered in the negative: In initiating litigation proceedings, when does an inquiry or do proceedings referred to in Article 201(1)(a) of [the Solvency II Directive] start, leading to the free choice of a lawyer? Is the relevant point in time solely based on the formal commencement of court proceedings (the lawsuit being filed with the court), or are prior steps also included, and, if so, which ones?*
- ...
  - 18 The Princely Court of Appeal also referred a third question, which raised the issue of the lawfulness of the Court's composition. The Court decided to consider that question in a separate procedure. By a decision of 14 February 2017, the Court held that the composition of the Court was lawful.
  - 19 By an order of 20 February 2017, the President of the Court rejected the referring court's request for an accelerated procedure since the remaining questions did not concern matters of exceptional urgency.
  - 20 Reference is made to the Report for the Hearing for a fuller account of the legal framework, the facts, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only insofar as is necessary for the reasoning of the Court.

### III Admissibility

#### *Observations submitted to the Court*

- 21 The respondent submits that the questions referred are inadmissible because they are neither necessary to enable the referring court to give judgment in the main proceedings, nor do they concern an unclear legal situation. As regards the first question, the respondent argues that the question of the free choice of lawyer does not arise in the present case, where the provider of legal expenses insurance has refused to provide benefits for the commencement of proceedings. On the second question, the respondent submits that there is no dispute in the main proceedings as to which elements of preparatory work are covered by the free choice of lawyer.

#### *Findings of the Court*

- 22 Pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice (“SCA”), any court or tribunal in an EFTA State may refer questions on the interpretation of the EEA Agreement to the Court, if it considers an advisory opinion necessary to enable it to give judgment.
- 23 The purpose of Article 34 SCA is to establish cooperation between the Court and the national courts and tribunals. That cooperation is intended to contribute to ensuring a homogeneous interpretation of EEA law by providing assistance to the courts and tribunals in the EFTA States in cases in which they have to apply provisions of EEA law (see Case E-1/16 *Synnøve Finden* [2016] EFTA Ct. Rep. 931, paragraph 27 and case law cited).
- 24 It is settled case law that questions on the interpretation of EEA law referred by a national court enjoy a presumption of relevance. It is for the referring court to define and assess the accuracy of the factual and legislative context in the case before it. Accordingly, the Court may only refuse to rule on a question referred by a national court where it is quite obvious that the interpretation of EEA law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *Synnøve Finden*, cited above, paragraph 28 and case law cited).
- 25 Where domestic legislation, in regulating purely internal situations not governed by EEA law, adopts the same or similar solutions as those adopted in EEA law in order to avoid any distortion of competition, it is in the interest of the EEA to forestall future differences of interpretation. Provisions or concepts taken from EEA law should thus be interpreted uniformly, irrespective of the circumstances in which they are to apply. However, as the jurisdiction of the Court is confined to considering and interpreting provisions of EEA law only, it is for the national court to assess the precise scope of that reference to EEA law in national law (see Case E-3/16 *Ski Taxi and Others* [2016] EFTA Ct. Rep. 1002, paragraph 27 and case law cited).

- 26 It is therefore not quite obvious that the interpretation of EEA law sought bears no relation to the actual facts of the main action. Furthermore, contrary to the respondent's argument, the Court does not find any of the other exceptions to the presumption of relevance applicable. The questions referred seem to address the core of the dispute between the parties to the main proceedings, as also noted by the Commission at the hearing.
- 27 Based on the foregoing, it must be held that the request is admissible.

#### **IV Answers of the Court**

##### *The first question*

- 28 In essence, the first question referred concerns whether Article 201(1)(a) of the Solvency II Directive permits a legal expenses insurance contract to release the insurance company from its obligations if the insured person mandates an attorney without the consent of the company, at a point in time when the insured person would be entitled to make a claim under the contract.

##### Observations submitted to the Court

- 29 DAS submits that a refusal to provide benefits in the event of a breach of contractual obligations does not restrict the free choice of lawyer in any way. Since DAS had refused to provide benefits for the commencement of proceedings under its contract with the appellant, the question does not even arise as to whether the appellant has the right to specify a legal representative of his own choosing. The reason for the refusal was that proceedings against the property owner were deemed by DAS to be unnecessary, disproportionate and premature. For disagreements of this nature, DAS's general terms and conditions provide for an arbitration procedure as envisaged by Article 203 of the Solvency II Directive.
- 30 Mr Nobile submits that the Solvency II Directive does not permit a contract such as the one at issue in the present case. He contends that the free choice of lawyer would be undermined if it were made subject to the consent of the insurer. The Liechtenstein Government, the Czech Government, ESA, and the Commission essentially support this position.
- 31 The Slovak Government submits that, due to the disagreement between the respondent and the appellant over how to conduct proceedings against the property owner, there was arguably a conflict of interest that would trigger Mr Nobile's free choice of lawyer under Article 201(1)(b) of the Solvency II Directive.
- 32 ESA submits that a requirement to obtain the insurer's consent before taking steps liable to generate costs, may serve the interests of controlling costs, and it may enable the insurer to make non-binding recommendations to the insured person regarding the choice of lawyer. However, in the present case, the combination of the prior consent



requirement and the other limitations imposed by the insurer's general terms and conditions are such as to render meaningless the insured person's free choice of lawyer. Therefore, the contract violates Article 201(1)(a) of the Solvency II Directive.

- 33 The Commission submits that it is not for the insurance undertaking to assess whether court proceedings are necessary or proportionate. Under a legal expenses insurance contract, the insured person is entitled to have recourse to a lawyer of his choice to defend, represent or serve his interests in any inquiry or proceedings. A requirement of prior consent is incompatible with that freedom. Moreover, the Commission submits that the arbitration procedure referred to by DAS is not mandatory. It is rather an option that is available to the insured person and applies without prejudice to any other right of judicial review provided for by national law.

#### Findings of the Court

- 34 The circumstances of the present case relate to the period prior to 1 January 2016, which is before the Solvency II Directive entered into force and repealed Directive 87/344/EEC. However, the relevant provisions of the two directives are identical in substance. Case law concerning Directive 87/344/EEC will thus be relevant in interpreting the provisions at issue. As the referring court, the parties, and other participants have argued on the basis of the Solvency II Directive, the Court will do the same.
- 35 As set out in recital 82 of its preamble, one of the aims of the Solvency II Directive is to harmonise national law concerning legal expenses insurance, in particular with regard to conflicts of interest. To that end, Article 199 requires a contractual separation between legal expenses insurance and other classes of insurance. Article 200 sets out alternative methods for managing claims under legal expenses insurance. Article 201(1)(b) requires a contract of legal expenses insurance to recognise the free choice of lawyer whenever a conflict of interest arises. The Solvency II Directive's provisions on legal expenses insurance are, however, not limited to these situations. Article 201(1)(a) recognises the insured person's free choice of lawyer in any inquiry or proceedings. Moreover, Article 203 requires EEA States to provide for arbitration or other similar procedure for the settlement of any dispute between the insurance undertaking and the insured person.
- 36 However, the Solvency II Directive does not seek to harmonise fully the EEA States' legislation on legal expenses insurance contracts. The EEA States therefore remain free to determine the body of rules applicable to those contracts, as long as they comply with EEA law and, in particular, Article 201 of the Solvency II Directive (compare the judgment in *Eschig*, C-199/08, EU:C:2009:538, paragraphs 65 and 66).
- 37 At issue in the present case is the question whether Article 201(1)(a) of the Solvency II Directive permits a contractual clause releasing the insurance company from its obligations if the insured person mandates an attorney without the prior consent of the company, at a point in time when the insured person would be entitled to make a claim under the legal expenses insurance contract.

- 38 According to Article 22 of DAS's general terms and conditions, any culpable breach of contractual obligations by the insured person shall entitle DAS to refuse insurance cover. The alleged breach by Mr Nobile of his obligations is that he mandated an attorney to act on his behalf without seeking the prior consent of DAS, at a point in time when he was entitled to make a claim according to the legal expenses insurance contract.
- 39 Apart from cases of conflict of interest, a requirement to grant insured persons the freedom to choose a lawyer whenever they have a claim under the contract only exists for insurance undertakings that apply the method of claim management set out in Article 200(4) of the Solvency II Directive. According to the referring court, this method of claim management is not applied in Liechtenstein.
- 40 Nevertheless, Article 201(1)(a) of the Solvency II Directive recognises the insured person's free choice of lawyer in any inquiry or proceedings. This rule has general application and is obligatory in nature (compare the judgment in *Eschig*, cited above, paragraph 47). Moreover, the context, the objective pursued and the wording of Article 201(1)(a) militate against a restrictive interpretation of the term "inquiry or proceedings" (compare the judgment in *Büyüktipi*, C-5/15, EU:C:2016:218, paragraphs 16 to 21 and case law cited).
- 41 In the present case, it appears that DAS's general terms and conditions do not set out the right for the insured person freely to choose a lawyer in any inquiry or proceedings as required by Article 201(1)(a) of the Solvency II Directive.
- 42 First, according to Article 19(1) of DAS's general terms and conditions, the insured person shall leave the conduct of the case exclusively to DAS. Accordingly, the insured person may not instruct an attorney without DAS's prior consent. However, the insured person's right under Article 201(1)(a) of the Solvency II Directive freely to choose a lawyer may not be made conditional on the prior consent of the insurance undertaking (compare, by analogy, the judgment in *Sneller*, C-442/12, EU:C:2013:717, paragraph 23).
- 43 Second, Article 19(2) of DAS's general terms and conditions stipulates that the insured person shall not commence proceedings, take any legal steps or agree to any settlements without DAS's prior consent. In line with this provision, DAS has argued before the Court that it denied coverage for the proceedings because it deemed such proceedings to be unnecessary, disproportionate and premature. However, as noted by the Commission at the hearing, it is not for the insurance undertaking to make such an assessment. That could motivate the insurance undertaking to reject coverage, which could deprive the insured person of the protection afforded by the legal expenses insurance contract.
- 44 Third, Article 19(4) of DAS's general terms and conditions provides that the insured person's right freely to choose a lawyer only arises where it becomes necessary to instruct an external lawyer due to the existence of a lawyer's monopoly in the matter. However, under Article 201(1)(a) of the Solvency II Directive it is not relevant whether

specific legal assistance is compulsory under national law (compare the judgment in *Sneller*, cited above, paragraphs 30 to 32).

- 45 Fourth, even in cases where, according to DAS's general terms and conditions, it becomes necessary to instruct an external lawyer, the pool of eligible lawyers is limited to those residing in the district of the court. This is also contrary to the right freely to choose a lawyer (compare the judgment in *Stark*, C-293/10, EU:C:2011:355, paragraphs 29 and 30).
- 46 Fifth, even among the lawyers resident in the district of the court, the insured person is not entirely free to choose his lawyer. DAS may reject the suggested attorney, and it has no obligation to state its reasons for any such rejection. In such situations, the contract provides that the insured person may nominate three other attorneys from different law firms, from whom DAS shall select one. In other words, it is ultimately for DAS, and not the insured person, to choose the lawyer.
- 47 In view of the above, it appears that the effect of a clause such as Article 19 of DAS's general terms and conditions is that the insured person's right freely to choose a lawyer would consist solely of the possibility of suggesting a lawyer, the acceptance of whom would be, ultimately, at the discretion of the insurance company.
- 48 Thus, contractual terms and conditions, such as Article 19 of DAS's general terms and conditions, are incompatible with Article 201(1)(a) of the Solvency II Directive. Consequently, it would also be incompatible with that provision to accept that an insurance undertaking could be released from its obligations under legal expenses insurance contracts because the insured person breached such terms and conditions.
- 49 For the sake of completeness, the Court notes that the Solvency II Directive does not specify, in general, the insurance coverage of actual legal expenses incurred in any inquiry or proceedings. Consequently, the freedom to choose a lawyer within the meaning of Article 201(1) of the Solvency II Directive, cannot extend to obliging an EEA State to require insurers to cover in full the costs incurred by the person instructed to represent the insured person. Limitations of coverage may, for example, relate to a single claim or to the economic value of a claim. However, terms and conditions to limit the coverage may not be such as to render it impossible for the insured person freely to choose a lawyer (compare the judgment in *Stark*, cited above, paragraphs 32 and 33).
- 50 The answer to the first question referred must therefore be that Article 201(1)(a) of the Solvency II Directive precludes terms and conditions in a legal expenses insurance contract that release the insurance company from its obligations under the contract if the insured person mandates an attorney to represent his interests, without the consent of the company, at a point in time when the insured person would be entitled to make a claim under the contract.
- 51 In light of the answer to the first question, there is no need to answer the second question.

## V Costs

- 52 The costs incurred by the Liechtenstein, Czech and Slovak Governments, ESA, and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are a step in the proceedings pending before the national court, any decision on costs for the parties to those proceedings is a matter for that court.

On those grounds,

### THE COURT

in answer to the question referred to it by the Princely Court of Appeal hereby gives the following Advisory Opinion:

**Article 201(1)(a) of Directive 2009/138/EC precludes terms and conditions in a legal expenses insurance contract that release the insurance company from its obligations under the contract if the insured person mandates an attorney to represent his interests, without the consent of the company, at a point in time when the insured person would be entitled to make a claim under the contract.**

Carl Baudenbacher

Per Christiansen

Benedikt Bogason

Delivered in open court in Luxembourg on 27 October 2017.

Gunnar Selvik  
Registrar

Carl Baudenbacher  
President