Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

7 March 2013 *

(Freedom to provide services — Freedom of establishment — Directives 73/239/EEC and 92/49/EEC — Direct insurance other than life assurance — Freedom to set rates — Health insurance contracts not linked to professional activity — Restrictions — Overriding reasons in the public interest)

In Case C-577/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour d'appel de Bruxelles (Court of Appeal, Brussels) (Belgium), made by decision of 10 November 2011, received at the Court on 21 November 2011, in the proceedings

DKV Belgium SA

v

Association belge des consommateurs Test-Achats ASBL,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, J. Malenovský, U. Lõhmus, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 6 December 2012,

after considering the observations submitted on behalf of:

— DKV Belgium SA, by C. De Meyer and C. Gommers, advocaten,

— the Association belge des consommateurs Test-Achats ASBL, by V. Callewaert and F. Krenc, avocats,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, assisted by M. Kaiser and S. Ben Messaoud, avocats,

— the Netherlands Government, by C. Wissels and M. Bulterman, acting as Agents,

— the Portuguese Government, by L. Inez Fernandes and M. Rebelo, acting as Agents,

* Language of the case: French.

— the European Commission, by K.-P. Wojcik and C. Vrignon, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 29 and 39(2) and (3) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive) (OJ 1992 L 228, p. 1), Article 8(3) of 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 (OJ 1973 L 228, p. 3), as amended by Directive 92/49 ('Directive 73/239'), and also Articles 49 TFEU and 56 TFEU.

2 The request has been made in proceedings between DKV Belgium SA ('DKV') and the Association belge des consommateurs Test-Achats ASBL ('Test-Achats') concerning the increases in premium rates payable for supplementary hospitalisation insurance for 'individual room' coverage.

Legal context

European Union legislation

3 Article 8(3) of Directive 73/239 provided:

'Nothing in this Directive shall prevent Member States from maintaining in force or introducing laws, regulations or administrative provisions requiring approval of the memorandum and articles of association and communication of any other documents necessary for the normal exercise of supervision.

Member States shall not, however, adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums and forms and other printed documents which an undertaking intends to use in its dealings with policyholders.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.

...'

4 Article 28 of Directive 92/49 provided:

'The Member State in which a risk is situated shall not prevent a policyholder from concluding a contract with an [authorised insurance undertaking] ..., as long as that does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated.'

5 Under Article 29 of Directive 92/49:

'Member States shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an insurance undertaking intends to use in its dealings with policyholders. They may only

require non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

Member States may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.'

6 Article 39(2) and (3) of Directive 92/49 provided:

'2. The Member State of the branch or of the provision of services shall not adopt provisions requiring the prior approval or systematic notification of general and special policy conditions, scales of premiums, or forms and other printed documents which an undertaking intends to use in its dealings with policyholders. It may only require an undertaking that proposes to carry on insurance business within its territory, under the right of establishment or the freedom to provide services, to effect non-systematic notification of those policy conditions and other documents for the purpose of verifying compliance with its national provisions concerning insurance contracts, and that requirement may not constitute a prior condition for an undertaking's carrying on its business.

3. The Member State of the branch or of the provision of services may not retain or introduce prior notification or approval of proposed increases in premium rates except as part of general price-control systems.'

Belgian legislation

7 Article 138a(4) of the Law of 25 June 1992 on terrestrial insurance contracts (loi du 25 juin 1992 sur le contrat d'assurance terrestre) (*Moniteur belge* of 20 August 1992, p. 18283), as amended by the Law of 17 June 2009 (*Moniteur belge* of 8 July 2009, p. 47120) ('Law on terrestrial insurance contracts'), provides:

'1. Apart from the case of a reciprocal agreement of the parties following a request from the principal person insured and the cases referred to in subparagraphs 2, 3 and 4, the insurer may not make changes to the technical bases of the premium or to the conditions of coverage after the health insurance contract has been concluded.

...

2. The premium, the excess payable and the benefit can be adapted, on the annual date of the premium on the basis of the consumer price index.

3. The premium, the excess payable and the benefit can be adapted, on the annual date of the premium on the basis of one or more specific indices, to the costs of the services covered by private health insurance contracts if and in so far as the evolution of that indicia or those indices exceeds that of the consumer price index.

...

4. The application of the present article shall be without prejudice to Article 21g [of the Law of 9 July 1975 on the supervision of insurance undertakings (Article 21octies de la loi du 9 July 1975 relative au contrôle des entreprises d'assurances) (*Moniteur belge* of 29 July 1975, p. 9267), as amended by the Law of 17 June 2009 (*Moniteur belge* of 8 July 2009, p. 47120) ("the Law on the supervision of insurance undertakings")].

...'

8 According to Article 21g(2) of the Law on the supervision of insurance undertakings:

'The Banking, Finance and Insurance Commission (Commission bancaire, financière et des assurances, the "CBFA") may require the undertaking to take measures in order to balance its premium rates if it determines that the application of that premium rate gives rise to losses.

... [T]he CBFA, at the request of an undertaking and if it determines that the application of that premium rate, notwithstanding the application of subparagraphs 2 and 3 of Article 138a(4) of the Law … on terrestrial insurance contracts, gives rise to, or is likely to give rise to losses, in the case of a health insurance contract other than a occupational one …, may authorise the undertaking to take measures in order to balance its premium rates. Those measures may include an amendment to the conditions of cover.

...'

9 It is apparent from judgment No 90/2011 of 31 May 2011 of the Cour constitutionnelle (Constitutional Court) (extracts of which are published in the *Moniteur belge* of 10 August 2011, p. 45413), to which the national court refers, that the objective pursued by the Belgian legislature at the time of adoption of the Law on terrestrial insurance contracts is to make Article 138a(4) thereof a provision aimed at protecting consumers, particularly with a view to preventing them from being faced with sharp, unexpected increases in insurance premium rates.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 The order for reference indicates that in December 2009, DKV, an insurance undertaking active in the health and hospitalisation insurance market, sent out a letter informing all its insured parties holding supplementary hospitalisation insurance for 'individual room' coverage that it would apply a rate increase of 7.84% on the premiums payable for that insurance as from the annual date of the premium of their contract in 2010.

11 Before taking that decision to increase premium rates, DKV had requested authorisation from the CBFA. Considering inter alia that it was necessary to wait until a number of specific indices, referred to in subparagraph 3 of Article 138a(4) of the Law on terrestrial insurance contracts ('the medical index'), had been published, the CBFA did not grant the authorisation requested.

12 By notice of 22 February 2010, Test-Achats brought an action for an injunction before the President of the Tribunal de commerce de Bruxelles (Commercial Court, Brussels) seeking, inter alia, to have DKV ordered to reverse its decision to increase premiums.

13 By judgment of 20 December 2010, that court upheld the action in part. DKV appealed against that judgment before the Cour d'appel de Bruxelles.

14 In the dispute in the main proceedings DKV has argued inter alia that Article 138bis-4 of the Law on terrestrial insurance contracts and 21g(2) of the Law on the supervision of insurance undertakings infringe the principle of freedom to set rates laid down in Articles 29 and 39(2) and (3) of Directive 92/49 and Article 8(3) of Directive 73/239 because they introduce a system of prior approval of premium rates. DKV further argues that the first provisions referred to are incompatible with the freedom of establishment and the freedom to provide services of an insurance undertaking established in a Member State other than the Kingdom of Belgium that wishes to conclude health insurance contracts in Belgium.

15 Test-Achats contends that the principle of freedom to set rates relied on by DKV is not expressly laid down in EU legislation and cannot be considered an absolute principle without limits.

16 It is apparent from the order for reference that, on 22 June 2010, the CBFA found, on the basis of medical indices published in the meantime, that DKV was permitted to increase its premium rates for the insurance in question by 7.45%. As DKV had applied for authorisation to increase its premium rates by 7.84%, that is, by 0.39% over the medical index, the CBFA considered that that difference did not render the category of insurance products concerned loss-making and accordingly rejected the request for an increase.

17 In those circumstances, the Cour d'appel de Bruxelles decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should Articles 29 and 39(2) and (3) of [Directive 92/49] and 8(3) of [Directive 73/239], and Articles 49 [TFEU] and 56 [TFEU] be interpreted as prohibiting the Member States from providing, with regard to health insurance contracts not linked to professional activity, provisions under which the premium, the excess payable and the benefit can be adapted, on the annual date of the premium, only:

— on the basis of the consumer price index;

— on the basis of one or more specific indices, to the costs of the services covered by private health insurance contracts [known as a "medical index"], if and in so far as the changes in that index or those indices exceed that in the consumer price index;

— with authorisation from an administrative authority responsible for the supervision of insurance undertakings, at the request of the insurance undertaking concerned, where that authority finds that the application of the premium rate of that undertaking, notwithstanding the adaptations calculated on the basis of the indices referred to in the paragraphs above, gives rise to, or is likely to give rise to losses, thereby enabling it to take measures in order to balance its premium rates, which may include an amendment to the conditions of cover?'

The question referred for a preliminary ruling

The interpretation of Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239

18 DKV submits that the system of prior approval of rate increases at issue in the main proceedings is contrary to the principle of freedom to set rates provided for in Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239. The only permitted derogation from that principle is as part of a general price-control system. Yet the system of prior approval of rate increases cannot be regarded as being part of a general price-control system, as it does not affect all goods and services offered to the public, but rather is limited to health insurance.

19 The European Commission shares the view that legislation such as those at issue in the main proceedings is contrary to the principle of freedom to set rates. By contrast, Test-Achats and the Belgian, Netherlands and Portuguese Governments contend that it is not.

20 It should be borne in mind that Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239 prohibit Member States from introducing a system of prior approval or systematic notification of scales of premiums that an insurance undertaking intends to use in their territory in its dealings with policyholders (see Case C-518/06 *Commission* v *Italy* [2009] ECR I-3491, paragraph 100).

21 As the Court has already stated, the Community legislature thus meant to secure the principle of freedom to set rates in the non-life insurance sector (Case C-518/06 *Commission* v *Italy*, paragraph 101 and the case-law cited).

22 However, full harmonisation in the field of non-life insurance rates precluding any national measure liable to have effects on rates cannot be presumed in the absence of a clearly expressed intention to this effect on the part of the European Union legislature (Case C-346/02 *Commission* v *Luxembourg* [2004] ECR I-7517, paragraph 24; Case C-347/02 *Commission* v *France* [2004] ECR I-7557, paragraph 25; and Case C-518/06 *Commission* v *Italy*, paragraph 106).

23 Accordingly, national legislation introducing a technical framework governing how insurance undertakings are to calculate their premiums is not contrary to the principle of freedom to set rates on the sole ground that that technical framework affects premium rate changes (see, to that effect, Case C-346/02 *Commission* v *Luxembourg*, paragraph 25; Case C-347/02 *Commission* v *France*, paragraph 26; and Case C-518/06 *Commission* v *Italy*, paragraph 105).

24 In a system for premium rate increases such as that at issue in the main proceedings, insurance undertakings are authorised to increase their premium rates on the basis of two types of indices, namely the consumer price index and the medical index.

25 Such a system, which does not impact on those undertakings' freedom to set their basic premiums, has the features of a technical framework as referred to in the case-law cited in paragraph 23 above.

26 As it allows premium rate increases only on the basis of two types of indices, that system functions as a technical framework limited to providing a structure for rate changes, under which insurance undertakings are to calculate their premiums.

27 In those circumstances, the mere fact that the administrative authority responsible for the supervision of insurance undertakings may, at the request of an insurance undertaking, decide to authorise that undertaking to take measures in order to balance its premium rates where they risk giving rise to losses is not sufficient to cast doubt on the nature of the technical framework for the system of premium rate increases at issue.

28 This interpretation is not precluded by Article 28 of Directive 92/49. Contrary to the position advocated by the Commission, the 'general good' referred to in that provision is not a relevant criterion for ascertaining whether national legislation is liable to undermine the principle of freedom to set rates for the purposes of Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239 (see, to that effect, Case C-59/01 *Commission* v *Italy* [2003] ECR I-759, paragraph 38).

29 It follows from the foregoing that a system of premium rate increases, such as that at issue in the main proceedings, is not contrary to Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239.

The interpretation of Articles 49 TFEU and 56 TFEU

The concept of restriction on the freedom of establishment and the freedom to provide services

30 Test-Achats argues that a system of premium rate increases such as that at issue in the main proceedings is not a restriction within the meaning of Articles 49 TFEU and 56 TFEU. Were it otherwise, any national measure intended to provide a structure for amendments to essential terms of a contract during its performance would have to be categorised as a restriction.

31 It is settled case-law in this regard that the term 'restriction' within the meaning of Articles 49 TFEU and 56 TFEU covers all measures which prohibit, impede or render less attractive the freedom of establishment or the freedom to provide services (Case C-518/06 *Commission* v *Italy*, paragraph 62 and the case-law cited).

32 As regards the question of the circumstances in which a measure applicable without distinction, such as the system of premium rate increases at issue in the main proceedings, may come within that concept, it should be borne in mind that rules of a Member State do not constitute a restriction within the meaning of the FEU Treaty solely by virtue of the fact that other Member States apply less strict, or more commercially favourable, rules to providers of similar services established in their territory (see Case C-518/06 *Commission* v *Italy*, paragraph 63 and the case-law cited).

33 By contrast, the concept of restriction covers measures taken by a Member State which, although applicable without distinction, affect access to the market for undertakings from other Member States and thereby hinder intra-Community trade (Case C-518/06 *Commission* v *Italy*, paragraph 64 and the case-law cited).

34 As rightly pointed out by DKV and the Commission, a system of premium rate increases such as that at issue in the main proceedings is liable to dissuade insurance undertakings having their head office in a Member State other than the one which introduced such a system from opening a branch in that Member State or to offer their products there as part of the free movement of services.

35 Those undertakings will not only have to change their terms and rates to meet the requirements imposed by that system, they will also have to determine their premium positioning and, therefore, their commercial strategy when they first set their premiums, with the risk that future premium rate increases will be insufficient to cover the costs with which they will be faced.

36 It follows that insurance undertakings entering the market of a Member State which has introduced a system of premium rate increases such as that at issue in the main proceedings are obliged, if they want to be able to access that market under conditions which comply with the legislation of that Member State, to re-think their business policy and strategy (see, to that effect, Case C-518/06 *Commission* v *Italy*, paragraph 69).

37 In those circumstances, a system of premium rate increases such as that at issue in the main proceedings must be held to constitute a restriction on the freedom of establishment and the freedom to provide services.

Justification for a restriction on the freedom of establishment and the freedom to provide services

38 A restriction on the freedom of establishment and the freedom to provide services may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, Case C-518/06 *Commission* v *Italy*, paragraph 72 and the case-law cited).

39 Test-Achats and the Belgian, Netherlands and Portuguese Governments submit, in essence, that those requirements are satisfied by a system of premium rate increases such as that at issue in the main proceedings, whilst DKV contends that they are not. The Commission, for its part, expresses doubts as to the proportionality of such a system in relation to the objective pursued.

40 It should first of all be borne in mind in that regard that, as is apparent from paragraph 9 above, a system of premium rate increases such as that at issue in the main proceedings is aimed at protecting consumers, particularly with a view to preventing them from being faced with sharp, unexpected increases in insurance premium rates.

41 Moreover, the objective of consumer protection is an overriding requirement relating to the public interest, given the sensitivity of the insurance sector from the point of view of the consumer as a policyholder and an insured person (see, to that effect, Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraphs 32 and 33).

42 Secondly, a system of premium rate increases such as that at issue in the main proceedings, in so far as it prevents insurance undertakings from implementing sharp, unexpected increases in insurance premium rates, is suitable for securing the attainment of the objective which it pursues.

43 Thirdly, turning to the issue of whether such a system goes beyond what is necessary in order to attain the objective which it pursues, it should be observed, firstly, that, as pointed out by Test-Achats and the Belgian Government, one of the characteristics of hospitalisation insurance resides in the fact that the probability of involvement by insurers increases with the age of the insured parties, since most medical costs are incurred in the latter years of life. Consequently, as also observed by the Commission, whilst supplementary hospitalisation insurance for 'individual room' coverage, such as that at issue in the main proceedings, may be offered at low rates to relatively young people, those rates tend to increase with the age of the insured party and the increase in the costs that party causes for his insurer.

44 Given that feature, a system of premium rate increases such as that at issue in the main proceedings provides for a guarantee that the insured party, precisely at an age when he needs that insurance, will not be faced by a sharp, unexpected increase in his insurance premium rates which will deprive him of the benefit of that insurance if he is unable to meet the costs thereof.

45 Moreover, as it is common ground that a system of premium rate increases such as that at issue in the main proceedings does not prohibit insurance undertakings from setting freely the basic premium, such a system does not prevent them, at the time of setting the basic premium, from taking account of higher costs than the insurance coverage will entail for them when the insured party becomes older.

46 Lastly, as observed in paragraph 27 of this judgment, the administrative authority responsible for the supervision of insurance undertakings may, at the request of an insurance undertaking, authorise that undertaking to take measures in order to balance its premium rates where they risk giving rise to losses.

47 Given the specific circumstances and in so far as there are no less restrictive measures which might be used to achieve, under the same conditions, the objective of protecting consumers against sharp, unexpected increases in insurance premiums, which it is for the national court to ascertain, a system of premium rate increases such as that at issue in the main proceedings does not go beyond what is necessary in order to achieve that objective.

48 In the light of all the foregoing, the answer to the question referred is that Articles 29 and 39(2) and (3) of Directive 92/49 and 8(3) of Directive 73/239 must be interpreted as not precluding legislation of a Member State which provides, with regard to health insurance contracts not linked to professional activity, provisions under which the premium, the excess payable and the benefit can be adapted annually only:

— on the basis of the consumer price index, or

— on the basis of a so-called 'medical index', if and in so far as the changes in that index exceed that in the consumer price index, or

— after obtaining authorisation from an administrative authority responsible for the supervision of insurance undertakings, at the request of the insurance undertaking concerned, where that authority finds that the application of the premium rate of that undertaking, notwithstanding the adaptations calculated on the basis of those two types of indices, gives rise to, or is likely to give rise to losses.

49 Articles 49 TFEU and 56 TFEU must be interpreted as not precluding such legislation, provided that there are no less restrictive measures which might be used to achieve, under the same conditions, the objective of protecting consumers against sharp, unexpected increases in insurance premium rates, which it is for the national court to ascertain.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Articles 29 and 39(2) and (3) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (Third Non-life Insurance Directive) and Article 8(3) of 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, as amended by Directive 92/49, must be interpreted as not precluding legislation of a Member State which provides, with regard to health insurance contracts not linked to professional activity, provisions under which the premium, the excess payable and the benefit can be adapted annually only:

— **on the basis of the consumer price index, or**

— **on the basis of a so-called 'medical index', if and in so far as the changes in that index exceed that in the consumer price index, or**

— **after obtaining authorisation from an administrative authority responsible for the supervision of insurance undertakings, at the request of the insurance undertaking concerned, where that authority finds that the application of the premium rate of that undertaking, notwithstanding the adaptations calculated on the basis of those two types of indices, gives rise to, or is likely to give rise to losses.**

Articles 49 TFEU and 56 TFEU must be interpreted as not precluding such legislation, provided that there are no less restrictive measures which might be used to achieve, under the same conditions, the objective of protecting consumers against sharp, unexpected increases in insurance premium rates, which it is for the national court to ascertain.

[Signatures]