Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

14 May 2020 * [i]

(Reference for a preliminary ruling — Directive 2009/138/EC — Legal expenses insurance — Article 201 — Insured person's right freely to choose a lawyer — Proceedings — Meaning — Mediation proceedings)

In Case C-667/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Grondwettelijk Hof (Constitutional Court, Belgium), made by decision of 11 October 2018, received at the Court on 25 October 2018, in the proceedings

Orde van Vlaamse Balies,

Ordre des barreaux francophones et germanophone

v

Ministerraad,

THE COURT (Third Chamber),

composed of A. Prechal, President of the Chamber, K. Lenaerts, President of the Court, acting as a Judge of the Third Chamber, L.S. Rossi (Rapporteur), J. Malenovský and F. Biltgen, Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 2 October 2019,

after considering the observations submitted on behalf of:

– the Orde van Vlaamse Balies and the Ordre des barreaux francophones et germanophone, by F. Judo and N. Goethals, advocaten,

– the Belgian Government, by C. Pochet, L. Van den Broeck and M. Jacobs, acting as Agents, and by S. Ronse, avocat, and T. Quintes, advocaat,

– the European Commission, by H. Tserepa-Lacombe and by A. Nijenhuis and F. Wilman, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 December 2019,

* Language of the case: Dutch.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 201 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) (OJ 2009 L 335, p. 1).

2 The request has been made in proceedings between the Orde van Vlaamse Balies and the Ordre des barreaux francophones et germanophone ('the bar associations') and the Ministerraad (Council of Ministers, Belgium) concerning the freedom of the insured person, in the context of a legal expenses insurance contract, to choose his or her representative in mediation proceedings.

Legal context

European Union law

Directive 87/344/EEC

3 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laws, regulations and administrative provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77), which was repealed by Directive 2009/138, provided in Article 4 as follows:

'1. Any contract of legal expenses insurance shall expressly recognise 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.

…

2. Lawyer means any person entitled to pursue his professional activities under one of the denominations laid down in Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services [(OJ 1977 L 78, p. 17)].'

Directive 2009/138

4 Recital 16 of Directive 2009/138 is worded as follows:

'The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries. The term beneficiary is intended to cover any natural or legal person who is entitled to a right under an insurance contract. Financial stability and fair and stable markets are other objectives of insurance and reinsurance regulation and supervision which should also be taken into account but should not undermine the main objective.'

5 Title II of that directive, entitled 'Specific provisions for insurance and reinsurance', includes Chapter II, concerning 'provisions specific to non-life insurance', Section 4 of which, entitled 'Legal expenses insurance', contains Articles 198 to 205.

6 Article 198 of that directive, entitled 'Scope of this Section', provides in paragraph 1 as follows:

'This Section shall apply to legal expenses insurance referred to in class 17 in Part A of Annex I whereby an insurance undertaking promises, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to the following:

…

(b) defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against that person.'

7 Article 201 of Directive 2009/138, entitled 'Free choice of lawyer', provides as follows:

'1. 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;

…

2. For the purposes of this Section "lawyer" means any person entitled to pursue his professional activities under one of the denominations laid down in [Directive 77/249].'

Belgian law

8 Article 156 of the Law of 4 April 2014 on insurance (*Belgisch Staatsblad* of 30 April 2014, p. 35487), was worded as follows:

'Any insurance contract relating to legal expenses shall explicitly provide at least that:

1° when it is necessary to proceed to judicial or administrative proceedings, the insured person can freely choose a lawyer or any other person who, under the law applicable to the proceedings, has the necessary qualifications to defend, represent or serve his interests;

…'

9 Article 2 of the Law amending the Law of 4 April 2014 on insurance, which seeks to ensure the free choice of a lawyer or any other person who, under the law applicable to the proceedings, has the necessary qualifications to defend his interests at every judicial stage in the context of a legal expenses insurance contract, of 9 April 2017 (*Belgisch Staatsblad* of 25 April 2017, p. 53207) ('the Law of 9 April 2017') provides as follows:

'In Article 156 of the Law of 4 April 2014 on insurance, paragraph 1 shall be replaced by the following:

"1° the insured person shall be free to choose, when it is necessary to proceed to judicial, administrative or arbitration proceedings, a lawyer or any other person who, under the law applicable to the proceedings, has the necessary qualifications to defend, represent or serve his interests and, in the case of arbitration, mediation or any other recognised non-judicial method for settling disputes, a person who has the necessary qualifications and is appointed for that purpose".'

10 It is apparent from the documents in the case file that the Belgian Judicial Code, as last amended by the Law containing various civil law provisions and provisions with a view to promoting alternative ways of settling disputes, of 18 June 2018 (*Belgisch Staatsblad* of 2 July 2018, p. 53455; 'the Judicial Code'), provides for two forms of mediation, namely extrajudicial mediation laid down in Articles 1730 to 1733 of that code, and judicial mediation, referred to in Articles 1734 to 1737 of that code.

11 Regarding extrajudicial mediation, any party may propose this form of mediation to the other parties before, during or after the conduct of judicial proceedings. The parties appoint the mediator by mutual consent or they entrust that appointment to a third party. If the parties reach an agreement in mediation, that agreement is put into writing, dated, and signed by the parties and by the mediator. If the mediator who has conducted the mediation is accredited by the Federal Mediation Commission, the parties or one of the parties may submit the mediation agreement to the court having jurisdiction for approval. The court is permitted to refuse to approve the agreement only if it is contrary to public policy or if the agreement reached at the end of family mediation is contrary to the interests of minor children. The approval order has the same effect as a judgment, such that the approved agreement becomes enforceable.

12 As regards judicial mediation, this presupposes that the court seised of a dispute is permitted, at the joint request of the parties or on its own initiative but with the agreement of the parties, to order mediation, as long as the pleadings have not ended. The court is to remain seised of the dispute for the course of the mediation and is permitted, at any time, to take any measures it deems necessary. It is also permitted, at the request of the mediator or one of the parties, to terminate the mediation. If mediation has led to the conclusion of a mediation agreement, even if only partial, the parties or one of them, are permitted to request that it be approved by the court; approval may be refused only if the agreement reached is contrary to public policy or if the agreement reached at the end of family mediation is contrary to the interests of minor children. If mediation has not led to the conclusion of a full mediation agreement, the proceedings continue.

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

13 The bar associations brought an action before the Grondwettelijk Hof (Constitutional Court, Belgium) seeking annulment of the Law of 9 April 2017. In support of their action, they raise, inter alia, a plea alleging infringement of certain provisions of the Belgian Constitution, read in conjunction with Article 201 of Directive 2009/138.

14 In particular, the bar associations state that that law is contrary to Article 201 of Directive 2009/138 since, in essence, it does not stipulate that an insured person, in the context of a legal expenses insurance contract, has the right to choose his or her lawyer for mediation proceedings. Indeed, according to the bar associations, since those proceedings are covered by the term 'proceedings' within the meaning of Article 201, the insured person should have that right.

15 The referring court notes that before the entry into force of the Law of 9 April 2017, all legal expenses insurance contracts had to prescribe that the insured person was free to choose a lawyer or other qualified person 'when it [was] necessary to proceed to judicial or administrative proceedings'. That law, while extending that freedom to choose to arbitration proceedings, excluded it for mediation proceedings on the ground, first, that the presence of counsel is not likely to favour mediation and, second, that mediation is not necessarily based on legal reasoning.

16 The referring court notes that it is indeed apparent from the case-law of the Court of Justice that the term 'proceedings' within the meaning of Article 201 of Directive 2009/138 must be interpreted broadly in order to protect the interests of insured persons by granting them a general and independent right to choose freely their legal representative within the limits laid down by that article.

17 However, that case-law does not make it possible to determine with certainty whether that right also applies to mediation proceedings such as those at issue in the main proceedings. In that regard, the referring court states that mediation proceedings under Belgian law have the characteristics of both an amicable settlement of the dispute and of legal proceedings. In particular, on the one hand, just as in an amicable settlement, mediation proceedings aim to reach a mediation agreement between the parties to the dispute. On the other hand, mediation proceedings are similar to judicial proceedings in that they generally follow from an amicable consultation, are regulated by the Judicial Code and are capable of leading to a mediation agreement concluded under the direction of an accredited mediator, which may be approved by the competent court by an approval order which has the same effect as a judgment.

18 In those circumstances, the Grondwettelijk Hof (Constitutional Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Should the term "proceedings" in Article 201(1)(a) of Directive [2009/138] be interpreted as including extrajudicial and judicial mediation proceedings, as provided for in Articles 1723/1 to 1737 of the [Judicial Code]?'

Consideration of the question referred

19 By its question, the referring court asks, in essence, whether Article 201(1)(a) of Directive 2009/138 must be interpreted as meaning that the term 'proceedings' referred to in that provision includes judicial or extrajudicial mediation proceedings in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.

20 In order to answer that question, it should be recalled that, in accordance with Article 201(1)(a), all legal expenses insurance contracts expressly provide that, 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, the insured person is to be free to choose such lawyer or other person.

21 Since that provision reproduces, in essence, Article 4(1)(a) of Directive 87/344, the case-law relating to the latter provision is relevant to the interpretation of Article 201(1)(a).

22 The Court has already clarified, first of all, that Article 4(1) of Directive 87/344, as regards the free choice of representative, is general in application and obligatory in nature (see, to that effect, judgments of 10 September 2009, *Eschig*, C-199/08, EU:C:2009:538, paragraph 47; of 26 May 2011, *Stark*, C-293/10, EU:C:2011:355, paragraph 29; and of 7 November 2013, *Sneller*, C-442/12, EU:C:2013:717, paragraph 25).

23 Next, it follows from the very wording of Article 4(1)(a) of Directive 87/344 that the term 'inquiry' must be read in opposition to the term 'proceedings' (see, to that effect, judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 19, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 17). Furthermore, the interpretation of the terms 'inquiry' or 'proceedings' cannot be limited by drawing a distinction between the preparatory stage and the decision-making stage of an inquiry or proceedings (see, to that effect, judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 21, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 19).

24 That being said, neither Article 4(1)(a) of Directive 87/344 nor Article 201(1)(a) of Directive 2009/138 defines the term 'proceedings'.

25 In those circumstances, in accordance with settled case-law, it is necessary, in interpreting a provision of EU law, to consider not only its wording but also its context and the objectives pursued by the rules of which it forms part (judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 22 and the case-law cited, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 20).

26 In the first place, it must be recalled, as is apparent from recital 16 of Directive 2009/138, that the objective pursued by that directive, and in particular by Article 201 thereof concerning the free choice of lawyer or representative, is to provide adequate protection for the interests of insured persons. The general scope and obligatory nature that the right of the insured party to choose his lawyer or representative is recognised to possess militate against a restrictive interpretation of Article 201(1)(a) of that directive (see, to that effect, judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 23, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 21).

27 Therefore, the Court has ruled that the term 'inquiry' within the meaning of that provision includes, in particular, a procedure at the end of which a public body authorises an employer to dismiss an employee who is covered by legal expenses insurance, and the stage of an objection before a public body in the course of which that body gives a decision against which an action may be brought before the courts (see, to that effect, judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 28, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 26, respectively).

28 In that regard, the Court has pointed out that an interpretation of the term 'inquiry' limited to legal proceedings in administrative matters only, that is to say, those that take place before a court in the strict sense, would deprive the term 'inquiry', expressly used by the legislature of the European Union, of its meaning (see, to that effect, judgments of 7 April 2016, *Massar*, C-460/14, EU:C:2016:216, paragraph 20, and of 7 April 2016, *AK*, C-5/15, EU:C:2016:218, paragraph 18).

29 Consequently, as the Advocate General observes in point 81 of his Opinion, the term 'proceedings' includes not only the appeal stage before a court in the strict sense, but also a stage that precedes those proceedings and which is capable of leading to a judicial stage.

30 The term 'proceedings', within the meaning of Article 201 of Directive 2009/138, must be interpreted just as broadly as the term 'inquiry', since it would otherwise be inconsistent to interpret those two terms differently as concerns the right to choose one's lawyer or representative.

31 It follows that the term 'proceedings' cannot be limited, either solely to non-administrative proceedings conducted before a court in the strict sense, or by drawing a distinction between the preparatory stage and the decision-making stage of such proceedings. Thus, any stage, even a preliminary stage, which is capable of leading to proceedings before a judicial body must be regarded as falling within the term 'proceedings' within the meaning of Article 201 of Directive 2009/138.

32 In the present case, as regards judicial mediation, it is apparent from the file submitted to the Court that such mediation is necessarily ordered by a court hearing a legal action and that it represents a stage in the proceedings brought before a court in the strict sense, which is, as a rule, bound by any mediation agreement obtained by the parties.

33 In those circumstances, if it were considered that such mediation does not constitute 'proceedings' for the purposes of Article 201 of Directive 2009/138, that would, for that stage only, deprive the insured person of the right to choose his or her lawyer or representative. Further, it cannot be disputed that the insured person needs legal protection during the stage which, once initiated, forms an integral part of the proceedings before the court which ordered it. Such an interpretation is, moreover, consistent with the objective of Directive 2009/138, recalled in paragraph 26 above, seeking to ensure adequate protection for insured persons, since it enables them to continue to benefit from the assistance of the same representative for the strictly judicial stage of the proceedings.

34 Similarly, the fact that extrajudicial mediation proceedings do not take place before a court also does not allow their exclusion from the term 'proceedings' within the meaning of Article 201 of Directive 2009/138.

35 Indeed, such mediation proceedings are capable of resulting in an agreement between the parties concerned which can, on request even by only one of them, be approved by a court. Furthermore, in the context of the approval process, that court is bound by the content of that agreement as established by the parties during mediation, except where it is contrary to public policy or, as the case may be, to the interests of minor children.

36 It follows that the effect of the agreement reached by the parties, whether in judicial or extrajudicial mediation, is to bind the competent court which approves it and, after having become enforceable, the agreement has the same effect as a judgment.

37 In those circumstances, the role of the lawyer or representative appears even more important in the context of mediation than in that of an objection lodged with an administrative authority, such as that referred to in paragraph 27 of the present judgment, the outcome of which is not binding either on any subsequent administrative body or on an administrative court.

38 In the context of proceedings which are capable of determining definitively the legal position of the insured person, without him or her having any real opportunity to alter that position by means of legal proceedings, the insured person needs legal protection and, in view of the effects of the agreement resulting from the mediation being approved, the interests of the insured person who uses mediation will be better protected if he or she can rely on the right to a free choice of representative laid down in Article 201 of Directive 2009/138, in the same way as an insured person who turns to the courts directly may so rely.

39 In the second place, as regards the context of Article 201, it should be stated that the scope of Section 4 of Chapter II of Title II of Directive 2009/138 on legal expenses insurance is defined particularly broadly in Article 198 of that directive, since, according to that provision, that section applies to legal expenses insurance by which an insurance undertaking promises, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly related to insurance cover, in particular with a view to defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any complaint made against that person.

40 Such definition of the scope of that section confirms a broad interpretation of the rights of insured persons provided for in that section, including, in particular, the right to choose one's representative referred to in Article 201 of Directive 2009/138.

41 Furthermore, EU law itself encourages the use of mediation proceedings, whether, as the bar associations state, by means of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (OJ 2008 L 136, p. 3) or based on primary law, in particular Article 81(2)(g) TFEU, under which, in the context of judicial cooperation in civil matters, the Union legislature is called upon to adopt measures aimed at ensuring 'the development of alternative methods of dispute settlement'. It would therefore be inconsistent for EU law to encourage the use of such methods while at the same time restricting the rights of individuals who decide to rely on those methods.

42 Consequently, in the light of all the foregoing, the answer to the question referred is that Article 201(1)(a) of Directive 2009/138 must be interpreted as meaning that the term 'proceedings' referred to in that provision includes judicial and extrajudicial mediation proceedings in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.

Costs

43 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 (Third Chamber) hereby rules:

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) must be interpreted as meaning that the term 'proceedings' referred to in that provision includes judicial and extrajudicial mediation proceedings in which a court is involved or is capable of being involved, whether when those proceedings are initiated or after they are concluded.

[Signatures]

i — The name set out in paragraphs 23 and 25 to 28 has been replaced by letters following a request for anonymisation.