JUDGMENT OF THE COURT (First Chamber)

16 September 2004 *

In Case C-28/03,

REFERENCE for a preliminary ruling under Article 234 EC

from the Simvoulio tis Epikratias (Greece), made by order of 23 October 2002, received at the Court on 24 January 2003, in the proceedings

Epikouriko Kefalaio

v

Ipourgos Anaptixis,

Omospondia Asfalistikon Sillogon Elladas,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of: P. Jann, President of the Chamber, A. Rosas, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts (Rapporteur), Judges,

Advocate General: L.A. Geelhoed,
Registrar: M.-F. Contet, Principal Administrator,

having regard to the written procedure and further to the hearing on 6 May 2004,

after considering the observations submitted on behalf of:

— Epikouriko Kefalaio, by A. Gratsia-Plati, dikigoros,

— the Greek Government, by S. Spiropoulos, K. Georgiadis and M. Tassopoulou, acting as Agents,

— the United Kingdom Government, by P. Ormond, acting as Agent, and K. Smith, barrister,

— the Commission of the European Communities, by G. Zavvos and M. Shotter, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 June 2004,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 15 and 16 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 Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239 (OJ 1988 L 172, p. 1) and by 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 and 88/357 (third non-life insurance Directive) (OJ 1992 L 228, p. 1). It also concerns Articles 17 and 18 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), as amended by Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267 (OJ 1990 L 330, p. 50) and by Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267 and 90/619 (third life assurance Directive) (OJ 1992 L 360, p. 1).

2 The reference was made in the course of proceedings between Epikouriko Kefalaio (an additional fund in relation to road-accident liability insurance) and the Greek Minister for Development, following the latter's decision to release part of the guarantee fund of the Greek insurance undertaking Intercontinental AE ('Intercontinental') in order to pay salary claims.

Legal context

Community law

3 Directives 73/239 and 79/267, as respectively amended by Directive 92/49 and Directive 92/96, laid down the principles of single authorisation (Articles 6 and 7 of both directives) and of sole responsibility of the Member State in which the insurance undertaking's head office is situated (the home Member State) so far as concerns the financial supervision of that undertaking (Article 13 of Directive 73/239 and Article 15 of Directive 79/267).

4 As provided by Article 15 of Directive 73/239 and Article 17 of Directive 79/267, the home Member State is to require every insurance undertaking to establish sufficient technical provisions in respect of its entire business. The assets representing those provisions are subject to measures designed to ensure diversification as to where they are invested.

5 By virtue of Article 16 of Directive 73/239 and Article 18 of Directive 79/267, the home Member State is to require every insurance undertaking to establish an adequate solvency margin in respect of its entire business and corresponding to its free assets. Under Article 18 of Directive 73/239 and Article 21 of Directive 79/267, Member States may not prescribe any rules as to the choice of the assets in excess of those representing the technical provisions.

6 Article 22 of Directive 73/239 and Article 26 of Directive 79/267 specify a series of situations in which authorisation may be withdrawn by the competent authority of the home Member State and provide that, in such cases, the authority is to take all necessary measures to safeguard the interests of the insured and is to restrict the free disposal of the assets of the undertaking.

7 On 19 March 2001, Directive 2001/17/EC of the European Parliament and of the Council on the reorganisation and winding-up of insurance undertakings (OJ 2001 L 110, p. 28) was adopted.

National law

8 The directives referred to in paragraph 1 of this judgment were transposed into Greek law by Presidential Decrees No 118/1985 (FEK A, 35) and No 252/1996 (FEK A, 186), which amend Legislative Decree No 400/1970 concerning private insurance business (FEK A, 10; 'the Legislative Decree').

9 Article 3(1) of the Legislative Decree provides that, in order to conduct business, an insurance undertaking whose head office is in Greece must have obtained an authorisation issued by the Minister for Trade. Under Article 3(3) and (5) of the Legislative Decree, withdrawal of the authorisation — whether total or partial,

definitive or temporary -– in the cases prescribed by the Legislative Decree is to take place by reasoned decision of the Minister for Trade. In accordance with Article 3 (7), definitive withdrawal of the authorisation entails the automatic withdrawal of the authorisation of establishment and the dissolution of the insurance undertaking.

10 As provided by Article 7 of the Legislative Decree, insurance undertakings whose head office is in Greece are required to establish sufficient technical provisions in respect of their entire business. Those technical provisions must be represented by assets of equivalent value that are expressed in the same currency.

11 By virtue of Article 8(1) of the Legislative Decree, insurance undertakings whose head office is in Greece are required to establish a guarantee fund to which assets are allocated, in Greece or in any other Member State of the European Union or of the European Economic Area, for the purpose of safeguarding the interests of persons entitled to any benefit under a contract of insurance. Under Article 8(1) the guarantee fund is to include the assets covering the technical provisions referred to in Article 7 of the Legislative Decree and the assets covering a quarter of the minimum level as referred to in Article 20(2)(A)(e) of the Legislative Decree.

12 Article 9(1) of the Legislative Decree provides that, if an insurance undertaking does not comply with the provisions of Articles 7 and 8 regarding technical provisions, the Minister for Trade may, having first communicated his intention to the competent authorities of any Member States where the undertaking operates with branches or under the freedom to provide services, adopt various measures by decision published in the *Official Gazette of the Hellenic Republic*. He may in this way allocate part or all of the undertaking's available assets to the guarantee fund, prohibit the free disposal of part or all of its assets, temporarily or definitively withdraw operating authorisation for some or all of the classes undertaken by it and take any other appropriate measure with the objective of safeguarding the interests of persons insured and any other person entitled to an insurance payment.

13 The first subparagraph of Article 10(1) of the Legislative Decree, as amended by Article 35(9) of Law No 2496/1997 (FEK A, 87), provides:

'Persons entitled to an insurance payment and successors to all or certain of their rights shall have a priority as regards the guarantee fund which takes precedence over any other general or specific priority, apart from the priority under Article 12a (8) and the priority in respect of claims arising from an employment relationship, with the exception of claims of persons exercising the right to manage and administer the insurance undertaking.'

14 Article 12a(8) of the Legislative Decree establishes an overriding priority, covering all the assets of the undertaking, in favour of the remuneration and expenses of the supervisor of a liquidation or insolvency and of the liquidator and the remuneration and expenses of the liquidator of the insurance portfolio.

15 By Presidential Decree No 27/1996 (FEK A, 19), the power to supervise insurance undertakings was transferred to the Minister for Development.

The main proceedings and the question referred for a preliminary ruling

16 Epikouriko Kefalaio is a body set up by Law No 489/1976 (FEK A, 331) membership of which is held by undertakings providing civil-liability motor-vehicle insurance in Greece. Its functions include compensating road-traffic accident victims (injured parties and their successors) where the undertaking insuring the liability of the person responsible for the accident becomes the subject of insolvency proceedings or has its licence withdrawn. After making payment it acquires, under that law, by subrogation the priority established by Article 10 of the Legislative Decree in favour of the insured person responsible for the accident.

17 In 1995 Intercontinental's authorisation was withdrawn by the Minister for Trade, who decided that all the movable and immovable assets of that undertaking were to be allocated to its guarantee fund.

18 By Decision K3-9086 of 4 November 1998 (Official Gazette, volume for public and private limited companies, 10 November 1998, p. 8649; 'the contested decision'), the Minister for Development released property, in the sum of GRD 28 967 185, corresponding to Intercontinental's guarantee fund, in order to meet preferentially claims arising from an employment relationship, in accordance with the provision referred to in paragraph 13 above.

19 On 16 December 1998 Epikouriko Kefalaio, which paid the insurance moneys owed by Intercontinental, brought an action before the Simvoulio tis Epikratias for annulment of the contested decision, on the ground that that decision cut into the assets capable of covering the claim held by it by subrogation with regard to Intercontinental.

20 The Simvoulio tis Epikratias pointed out that protection of persons insured is a fundamental objective of the Community legislation and noted that the obligation on insurance undertakings to establish technical provisions and Article 9(1) of the Legislative Decree are designed to achieve that objective. It considered that Article 35(9) of Law No 2496/1997 infringes the Community provisions referred to in paragraphs 4, 5 and 6 of the present judgment inasmuch as it provides, in the event of insolvency proceedings, liquidation or an analogous state of insolvency, that the priority which the insurance undertaking's employees may assert over the guarantee fund in respect of claims arising from their employment relationship takes precedence over the priority which persons insured and their successors may assert over the same guarantee fund. According to the Simvoulio tis Epikratias the contested decision must therefore be annulled.

21 However, taking the view that its interpretation left room for reasonable doubt, the Simvoulio tis Epikratias decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Given the provisions of, in particular, Articles 15 and 16 of ... Directive 73/239 ... and Articles 17 and 18 of ... Directive 79/267 ..., may the national legislature provide that, where an insurance company is the subject of insolvency proceedings, is put into liquidation or is otherwise in a state of insolvency, claims arising from an employment relationship with it are satisfied from the assets which are included in its technical provisions in preference to claims of persons entitled to an insurance payment and of successors to all or certain of their rights?'

Consideration of the question referred for a preliminary ruling

22 By its question, the national court asks in essence whether the Community provisions laying down the obligation for insurance companies to establish sufficient technical provisions and an adequate solvency margin for their entire business preclude national provisions whose effect is that, where an insurance company is the subject of insolvency proceedings, is put into liquidation or is otherwise in a state of insolvency, the assets representing the technical provisions are used for payment of salary claims in precedence to payment of insurance claims.

23 This question concerns legislation which establishes a priority in favour of insurance claims in the event of liquidation of an insurance company. The priority is applicable to the undertaking's guarantee fund and covers, in addition to the assets representing the technical provisions, other assets of that undertaking. It may have been extended by ministerial decision, as in the main proceedings, to all the available assets of the undertaking. The priority takes precedence over any other general or specific priority, with the exception of the priority for liquidation expenses and that

for salary claims other than those of persons exercising the right to manage and administer the insurance undertaking.

24 As the Greek and United Kingdom Governments and the Commission point out, neither the Community provisions relating to the obligation on insurance undertakings to establish sufficient technical provisions and an adequate solvency margin for their entire insurance business nor any other provision of Directives 73/239 and 79/267 contain coordinating rules concerning the liquidation of an insurance undertaking (see, to this effect, the second recital in the preamble to Directive 2001/17).

25 It is true that the coordination of national provisions relating to the financial guarantees required of insurance undertakings that is achieved, in particular, by the Community provisions referred to in paragraphs 4 and 5 of this judgment is intended to ensure adequate protection for policyholders and third-party beneficiaries in every Member State of the Community (see the second recital in the preamble to Directive 73/239 and the first recital in the preamble to Directive 79/267). In particular, the obligation imposed on insurance undertakings to establish sufficient technical reserves is designed to ensure that they have the financial means to comply with their contractual commitments to policyholders (see Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 38; see also the ninth recital in the preamble to Directive 73/239 and the seventh recital in the preamble to Directive 79/267, as well as the 12th recital in the preamble to Directive 92/49 and the 13th recital in the preamble to Directive 92/96).

26 None the less, the Community provisions in question cannot be interpreted as signifying that the Community legislature meant that, in the event of liquidation of an insurance undertaking, the assets representing technical provisions must, in all circumstances, be allocated by way of absolute priority to the payment of insurance claims.

27 Such an interpretation finds no support at all in Directives 73/239 and 79/267. Furthermore, it is contradicted by Article 10(1) of Directive 2001/17 which, in order to 'ensure an appropriate balance between the protection of insurance creditors and other privileged creditors protected by the Member State's legislation' (14th recital), allows the Member States to accord to certain categories of claims, in particular claims by employees of the insurance undertaking, a priority ranking above that of insurance claims, including over the assets representing technical provisions, where the priority of the insurance claims is not limited in its scope to the assets representing those provisions.

28 The answer to the question referred for a preliminary ruling must therefore be that Articles 15 and 16 of Directive 73/239 and Articles 17 and 18 of Directive 79/267 do not preclude national legislation under which, if an insurance company is the subject of insolvency proceedings, is put into liquidation or is otherwise in a state of insolvency, the assets representing the technical provisions may be allocated to payment of salary claims before payment of insurance claims, where that legislation accords to insurance claims a priority whose scope encompasses in any event, in addition to the assets representing the technical provisions, other assets of the undertaking and may, by virtue of a ministerial decision, have been extended to all the available assets of the undertaking.

Costs

29 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 (First Chamber) rules as follows:

Articles 15 and 16 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 Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 73/239 and by 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 and 88/357 (third non-life insurance Directive), and Articles 17 and 18 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, as amended by Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267 and by Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267 and 90/619 (third life assurance Directive) do not preclude national legislation under which, if an insurance company is the subject of insolvency proceedings, is put into liquidation or is otherwise in a state of insolvency, the assets representing the technical provisions may be allocated to payment of salary claims before payment of insurance claims, where that legislation accords to insurance claims a priority whose scope encompasses in any event, in addition to the assets representing the technical provisions, other assets of the undertaking and may, by virtue of a ministerial decision, have been extended to all the available assets of the undertaking.

Signatures.