JUDGMENT OF THE COURT (Fourth Chamber)

26 May 2011 *

In Case C-293/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Landesgericht Innsbruck (Austria), made by decision of 22 April 2010, received at the Court on 14 June 2010, in the proceedings

Gebhard Stark

v

D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG,

THE COURT (Fourth Chamber),

composed of J.-C. Bonichot, President of the Chamber, K. Schiemann, L. Bay Larsen, C. Toader (Rapporteur) and A. Prechal, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Mr Stark, by H. Kofler, Rechtsanwalt,

— D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG, by E.R. Karauscheck, Rechtsanwalt,

— the Austrian Government, by E. Riedl, acting as Agent,

— the European Commission, by K.-Ph. Wojcik and N. Yerrell, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) of 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).

2 The reference has been submitted in the course of proceedings between the insurance company D.A.S. Österreichische Allgemeine Rechtsschutzversicherung AG ('D.A.S.') and Mr Stark concerning, in particular, the validity of a clause included in the general conditions applicable to legal expenses insurance that entitles the insurer to limit the benefits under that cover to reimbursement of the amount normally claimed by a lawyer established in the place of the court before which proceedings coming within the scope of that cover have been brought.

Legal context

European Union ('EU') legislation

3 The 11th recital in the preamble to Directive 87/344 reads:

'… the interest of persons having legal expenses cover means that the insured person must be able to choose a lawyer or other person appropriately qualified according to national law in any inquiry or proceedings and whenever a conflict of interests arises.'

4 Article 1 of Directive 87/344 provides:

'The purpose of this Directive is to coordinate the provisions laid down by law, regulation or administrative action concerning legal expenses insurance … in order to facilitate the effective exercise of freedom of establishment and preclude as far as possible any conflict of interest arising in particular out of the fact that the insurer is covering

another person or is covering a person in respect of both legal expenses and any other class … and, should such a conflict arise, to enable it to be resolved.'

5 Article 2(1) of the Directive reads as follows:

'This Directive shall apply to legal expenses insurance. Such consists in undertaking, 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:

— securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of court or through civil or criminal proceedings,

— defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against him.'

6 Article 4(1) of Directive 87/344 provides:

'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;

(b) the insured person shall be free to choose a lawyer or, if he so prefers and to the extent that national law so permits, any other appropriately qualified person, to serve his interests whenever a conflict of interests arises.'

National legislation

7 Paragraph 23(1) of the Law on rates for lawyers' fees (Rechtsanwaltstarifgesetz; 'the RATG') provides that a single flat rate is to be applied for the remuneration of certain ancillary services provided by a lawyer in civil-law disputes.

8 Pursuant to Paragraph 23(5) of the RATG, the portion of the flat rate corresponding to those services must, however, be doubled in the case where the lawyer provides the service at a place other than that of his chambers.

9 The Austrian legislature transposed Article 4 of Directive 87/344 by way of Paragraph 158k of the Law on insurance contracts (Versicherungsvertragsgesetz; 'the VersVG'), which reads as follows:

'(1) Insured persons have the right to choose a person professionally qualified in the representation of parties to represent them in any judicial or administrative proceedings. In addition, insured persons have the right to choose a lawyer to defend their legal interests in other ways if a conflict of interests with the insurer has arisen.

(2) It may be agreed in the insurance contract that the insured person may, for the purpose of his representation in judicial or administrative proceedings, select only persons professionally authorised to represent parties who have their chambers at the place of the judicial or administrative authority before which the proceedings at first instance are to be conducted. Where in such place there are not at least four such persons with chambers, the right to choose must extend to persons in the district of the Gerichtshof erster Instanz (court of first instance) in which the authority concerned is situated.

…'

The dispute in the main proceedings and the question referred

10 Mr Stark and D.A.S. were linked by a legal expenses insurance contract since 1997. The contract covered, inter alia, protection in respect of legal expenses connected with labour-law litigation before the labour courts and, as an additional service, legal expenses insurance for part-time self-employed persons.

11 That contract was based on the 1997 general conditions applicable to legal expenses insurance (Allgemeine Bedingungen für die Rechtsschutzversicherung; 'the 1997 ARB'). Clause 10 of the 1997 ARB, which is derived directly from Paragraph 158k of the VersVG, reads as follows:

'(1) The insured person is entitled freely to choose a person professionally authorised to represent him before courts or administrative authorities (lawyer, notary, etc.). The insurer is obliged to inform the insured person of his freedom of choice as

soon as the latter requires insurance cover for the purpose of initiating judicial or administrative proceedings.

…

(3) The right [to choose a representative] conferred under paragraph 1 … is limited … to persons who have their chambers at the place of the court or administrative authority with jurisdiction in respect of the proceedings at first instance. Where there are not at least four such persons with chambers at the place of that court or administrative authority, the right to choose shall extend to persons authorised to represent parties in the district of the Landesgericht (Regional Court) having jurisdiction.

…'

12 According to the order for reference, the Oberster Gerichtshof (Austrian Supreme Court), in a judgment of 16 December 2009, essentially endorsed the objectives pursued by Paragraph 158k(2) of the VersVG in finding that Clause 10(3) had to be interpreted as meaning that an insured person may also choose a legal representative who is 'not locally established', where that representative undertakes to invoice his costs and fees in the same way as a lawyer established in the place where the court of first instance having jurisdiction is situated.

13 Mr Stark is domiciled in Landeck (Austria), a locality situated some 600 km from Vienna. On 24 March 2006, Mr Stark, together with four other persons, brought an action before the Arbeits- und Sozialgericht Wien (Labour and Social Security Court, Vienna) against his former employer. In order to ensure their representation before that court, Mr Stark and the other applicants freely instructed a lawyer who had his chambers in Landeck.

14 By letter dated 8 May 2006 addressed to that lawyer, D.A.S. confirmed that it would cover the costs of the legal proceedings before the Arbeits- und Sozialgericht Wien, although it stated that it would be limiting its cover to the costs normally invoiced by a lawyer established at the place where that court is situated.

15 In a reply sent by e-mail on the same day, Mr Stark's lawyer stated that he would not be invoicing in accordance with the rate of a lawyer having his chambers in the judicial district of that court, in view of the fact that the costs for his chambers of having to conduct proceedings in Vienna would be very high.

16 During the hearing held on 4 July 2008 before the Arbeits- und Sozialgericht Wien, the parties to those proceedings entered into a court settlement.

17 D.A.S. paid to Mr Stark's lawyer the sum of EUR 5782.19 corresponding, for services provided in the context of those proceedings, to the costs and fees of a lawyer established in the judicial district of the Arbeits- und Sozialgericht Wien, calculated, not pursuant to the double flat rate under Paragraph 23(5) of the RATG, but in accordance with the single flat rate resulting from Paragraph 23(1) of the RATG. That amount did not cover the total amount of the costs and fees invoiced to Mr Stark by his lawyer.

18 By application lodged at the Bezirksgericht (District Court) Landeck on 27 February 2009, D.A.S. sought an order requiring Mr Stark to pay a premium of EUR 211.46 due under the legal expenses insurance contract which had been concluded between them.

19 Mr Stark lodged a counter-claim against that application in the amount of EUR 3 000, corresponding to the outstanding balance of the cost of the services of the lawyer

who had represented him during the proceedings before the Arbeits- und Sozialgericht Wien and taking into account the application of the double flat rate under Paragraph 23(5) of the RATG. Mr Stark thus raised the question of the relevance, in the context of the legal expenses insurance taken out with D.A.S., of the difference between the single flat rate and the double flat rate for his lawyer's services in respect of the five hearings which had been held before that court. In support of that counter-claim, he contended that Paragraph 158k(2) of the VersVG and Clause 10(3) of the 1997 ARB were contrary to EU law.

20 The Bezirksgericht Landeck declared D.A.S.'s claim to be well founded but dismissed the counter-claim brought by Mr Stark, thereby ordering the latter to pay to D.A.S. the sum of EUR 211.46 plus interest. In its decision, the Bezirksgericht Landeck held that EU law did not preclude the application of Paragraph 158k(2) of the VersVG, which did not have the effect of restricting freedom of choice but imposed only a pecuniary restriction in respect of lawyers 'not locally established'.

21 Mr Stark appealed against that judgment to the Landesgericht Innsbruck (Regional Court, Innsbruck), arguing again that Article 4 of Directive 87/344 precludes the application of Paragraph 158k(2) of the VersVG.

22 It is in those circumstances that the Landesgericht Innsbruck decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 4(1) of Directive 87/344/EEC to be interpreted as precluding a provision such as Paragraph 158k(2) of the VersVG and a clause, based on that Law, contained in the general conditions of insurance applied by a legal expenses insurer to the effect that it may be agreed in the insurance contract that the insured person may select, to represent him in judicial or administrative proceedings, only persons professionally authorised to represent parties who have their chambers at the place of the court

or administrative authority before which the proceedings at first instance are to be conducted?'

The question referred for a preliminary ruling

23 By its question, the Landesgericht Innsbruck asks, in essence, whether Article 4(1) of Directive 87/344 precludes national legislation under which it may be agreed that the insured person may, in order to have his interests represented in administrative or judicial proceedings, select only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority with jurisdiction to deal with the proceedings at first instance.

Admissibility

24 According to the Austrian Government, the question referred is hypothetical, as the outcome of the proceedings is not dependent on the response to that question, given that Mr Stark had not, in fact, been restricted in his right freely to choose a lawyer.

25 In that regard, it is settled case-law that the Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU 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 provide a useful

answer to the questions submitted to it (see, inter alia, Case C-188/07 *Commune de Mesquer* [2008] ECR I-4501, paragraph 30).

26 However, as has been stated in paragraphs 18 to 21 above, the outcome of the dispute in the main proceedings depends specifically on whether the fact that Mr Stark was not reimbursed for the full amount of the costs and fees invoiced by his lawyer, contrary to what would have been the case had he chosen a lawyer established in Vienna, is compatible with Article 4(1) of Directive 87/344.

27 The interpretation of that EU law provision is therefore necessary to enable the referring court to resolve the dispute in the main proceedings. Accordingly, the objection of inadmissibility raised by the Austrian Government must be dismissed.

Substance

28 It follows from both the 11th recital in the preamble to Directive 87/344 and Article 4(1) of that directive that the interest of persons covered by legal expenses insurance means that the insured person must have the freedom to choose his own lawyer or other person appropriately qualified under national law for the purpose of any judicial or administrative proceedings.

29 In that regard, the Court has already held that Article 4(1) of Directive 87/344, which provides for the right freely to choose a representative, is of general application and is obligatory in nature (see, to that effect, Case C-199/08 *Eschig* [2009] ECR I-8295, paragraph 47).

30 It follows that national legislation such as that at issue in the main proceedings cannot, according to the interpretation given to it by the Oberster Gerichtshof in the judgment of 16 December 2009 cited at paragraph 12 above, restrict that freedom of choice to only lawyers who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted, or only to lawyers who undertake to invoice their costs and fees in the same way as such lawyers would do.

31 In paragraphs 65 and 66 of *Eschig*, however, the Court pointed out that Directive 87/344 does not seek to harmonise completely the Member States' legal expenses insurance contracts, with the result that, as EU law currently stands, the Member States remain free to determine the body of rules applicable to those contracts, on condition that those comply with EU law, and in particular with Article 4 of Directive 87/344.

32 Accordingly, the question of the scope of the cover in respect of costs relating to the involvement of a representative, which is at issue in the main proceedings, is not the subject of an express rule in that directive. Neither the articles nor the recitals of that directive allow the conclusion to be drawn that the determination of the amount which should be paid by the legal insurance provider to cover the costs incurred by the person instructed to represent the insured person is governed by that directive.

33 Consequently, freedom of choice, within the terms of Article 4(1) of Directive 87/344, does not mean that Member States are obliged to require insurers, in all circumstances, to cover in full the costs incurred in connection with the defence of an insured person, irrespective of the place where the person professionally entitled to represent that person is established in relation to the court or administrative authority with jurisdiction to deal with a dispute, on condition that that freedom is not rendered meaningless. That would be the case if the restriction imposed on the payment of those costs were to render *de facto* impossible a reasonable choice of representative

by the insured person. In any event, it is for the national courts, if an action is brought before them in this regard, to determine whether or not there is any such restriction.

34 Moreover, national legislation such as that at issue in the main proceedings does not exclude the freedom of contracting parties to agree that legal expenses insurance is also to cover the reimbursement of costs relating to the involvement of representatives who are not established at the place of the court having jurisdiction, possibly against payment of a higher premium by the insured person.

35 In the present case, Mr Stark was able to choose his lawyer without opposition on the part of his insurer. Furthermore, Mr Stark would be deemed to bear only the costs relating to the distance between the chambers of his lawyer and the place of the court having jurisdiction, which, subject to the assessment to be carried out in this respect by the referring court, does not appear, as a general rule, to be such as to hinder the freedom to choose his lawyer.

36 In view of all the foregoing, the answer to the question referred is that Article 4(1) of Directive 87/344 must be interpreted as not precluding a national provision under which it may be agreed that a person covered by legal expenses insurance may select, in order to have his interests represented in administrative or judicial proceedings, only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority having jurisdiction at first instance, on condition that, in order not to render meaningless the insured person's freedom to choose the person instructed to represent him, that restriction relates only to the extent of the cover by the legal insurance provider in respect of costs linked to the involvement of a representative and that the reimbursement actually provided by that insurer is sufficient, this being a matter for the referring court to determine.

Costs

37 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:

Article 4(1) of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not precluding a national provision under which it may be agreed that a person covered by legal expenses insurance may select, in order to have his interests represented in administrative or judicial proceedings, only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority having jurisdiction at first instance, on condition that, in order not to render meaningless the insured person's freedom to choose the person instructed to represent him, that restriction relates only to the extent of the cover by the legal insurance provider in respect of costs linked to the involvement of a representative and that the reimbursement actually provided by that insurer is sufficient, this being a matter for the referring court to determine.

[Signatures]