Reports of Cases

JUDGMENT OF THE COURT OF JUSTICE (Third Chamber)

24 February 2022 *

(References for a preliminary ruling – Freedom to provide services – Direct life assurance – Unit-linked life assurance contracts – Directive 2002/83/EC – Article 36 – Directive 2002/92/EC – Article 12, paragraph 3 – Pre-contractual information disclosure obligation – Information on the nature of the assets underlying unit-linked assurance contracts – Scope – Extent – Directive 2005/29/EC – Article 7 – Unfair commercial practices – Misleading omissions)

In Joined Cases C-143/20 and C-213/20,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland), made by decisions of 24 March 2020 and 2 October 2019, received at the Court on 24 March 2020 and 12 May 2020, in the proceedings

A

v

O (C-143/20),

and

G.W.,

E.S.

v

A. Towarzystwo Ubezpieczeń Życie S.A. (C-213/20),

THE COURT (Third Chamber),

composed of A. Prechal, President of the Second Chamber, acting as President of the Third Chamber, J. Passer, F. Biltgen, L.S. Rossi (Rapporteur) and N. Wahl, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

* Language of the case: Polish.

having regard to the written procedure,

after considering the observations submitted on behalf of:

– G.W. and E.S., by A. Lengiewicz, radca prawny,

– A. Towarzystwo Ubezpieczeń Życie S.A., by A.M. Pukszto, radca prawny, and S. Sołtysik, adwokat,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Greek Government, by S. Chala, S. Charitaki and S. Papaioannou, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, and F. Meloncelli and A. Collabolletta, avvocati dello Stato,

– the European Commission, by S.L. Kalėda, N. Ruiz García, T. Scharf, H. Tserepa-Lacombe and B. Sasinowska, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2021,

gives the following

Judgment

1 The present requests for a preliminary ruling concern the interpretation of Article 36(1) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), read together with point (a)(11) and (12) of Annex III(A) to that directive, Article 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (OJ 2005 L 149, p. 22), and Article 185(3) and (4) 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), as amended by Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 (OJ 2013 L 341, p. 1) ('Directive 2009/138').

2 These requests were made in the course of two disputes, between A and O (Case C-143/20) and between G. W. and E. S. and A. Towarzystwo Ubezpieczeń Życie S.A. (Case C-213/20), concerning the reimbursement of assurance premiums paid under unit-linked group life assurance contracts.

Legal context

European Union law

Directive 2002/83

3 Recitals 2, 5, 35, 39, 44, 50 and 52 of Directive 2002/83 which has been repealed and replaced by Directive 2009/138, read as follows:

'(2) In order to facilitate the taking-up and pursuit of the business of life assurance, it is essential to eliminate certain divergences which exist between national supervisory legislation. In order to achieve this objective and at the same time ensure adequate protection for policy holders and beneficiaries in all Member States, the provisions relating to the financial guarantees required of life assurance undertakings should be coordinated.

…

(5) This directive therefore represents an important step in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling all policy holders to have recourse to any assurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection.

…

(35) It is necessary from the point of view of the protection of lives assured that every assurance undertaking should establish adequate technical provisions. …

…

(39) It is necessary that, over and above technical provisions, including mathematical provisions, of sufficient amount to meet their underwriting liabilities, assurance undertakings should possess a supplementary reserve, known as the solvency margin … This requirement is an important element of prudential supervision for the protection of insured persons and policy holders. …

…

(44) The provisions in force in the Member States regarding contract law applicable to the activities referred to in this directive differ. The harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance. Therefore, the opportunity afforded to the Member States of imposing the application of their law to assurance contracts covering commitments within their territories is likely to provide adequate safeguards for policy holders. …

…

(50) It is necessary to provide for measures in cases where the financial position of the undertaking becomes such that it is difficult for it to meet its underwriting liabilities. In specific situations where policy holders' rights are threatened, there is a need for the competent authorities to be empowered to intervene at a sufficiently early stage …

…

(52) In an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided with whatever information is necessary to enable him/her to choose the contract best suited to his/her needs. This information requirement is all the more important as the duration of commitments can be very long. The minimum provisions must therefore be coordinated in order for the consumer to receive clear and accurate information on the essential characteristics of the products proposed to him/her as well as the particulars of the bodies to which any complaints of policy holders, assured persons or beneficiaries of contracts may be addressed.'

4 Article 14 of Directive 2002/83, entitled 'Transfer of portfolio', provided, in paragraph 5 thereof:

'A transfer authorised in accordance with this Article … shall automatically be valid against policy holders, the assured persons and any other person having rights or obligations arising out of the contracts transferred.

…'

5 Article 35 of that directive, entitled 'Cancellation period', provided, in paragraph 1 thereof:

'Each Member State shall prescribe that a policy holder who concludes an individual life-assurance contract shall have a period of between 14 and 30 days from the time when he/she was informed that the contract had been concluded within which to cancel the contract.

The giving of notice of cancellation by the policy holder shall have the effect of releasing him/her from any future obligation arising from the contract.

The other legal effects and the conditions of cancellation shall be determined by the law applicable to the contract as defined in Article 32, notably as regards the arrangements for informing the policy holder that the contract has been concluded.'

6 Article 36 of that directive, entitled 'Information for policy holders', provided:

'1. Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.

…

3. The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex III only if it is necessary for a proper understanding by the policy holder of the essential elements of the commitment.

4. The detailed rules for implementing this article and Annex III shall be laid down by the Member State of the commitment.'

7 Article 53 of the same directive, entitled 'Transfer of portfolio', provided, in paragraph 6 thereof:

'A transfer authorised in accordance with this article … shall automatically be valid against policy holders, assured persons and any other persons having rights or obligations arising out of the contracts transferred.

…'

8 Annex III to the Directive 2002/83, entitled 'Information for policy holders', stated:

'The following information, which is to be communicated to the policy holder before the contract is concluded (A) or during the term of the contract (B), must be provided in a clear and accurate manner, in writing, in an official language of the Member State of the commitment.

…

A. *Before concluding the contract*

Information about the assurance undertaking	Information about the commitment
…	… a.11. For unit-linked policies, definition of the units to which the benefits are linked a.12. Indication of the nature of the underlying assets for unit-linked policies …'

Directive 2002/92/EC

9 Recitals 9 and 11 of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3), which was repealed and replaced, with effect from 23 February 2018, by Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (OJ 2016 L 26, p. 19), stated:

'(9) Various types of persons or institutions, such as agents, brokers and "bancassurance" operators, can distribute insurance products. Equality of treatment between operators and customer protection requires that all these persons or institutions be covered by this directive.

…

(11) This directive should apply to persons whose activity consists in providing insurance mediation services to third parties for remuneration, which may be pecuniary or take some other form of agreed economic benefit tied to performance.'

10 Article 1 of that directive was drafted in the following terms:

'1. This directive lays down rules for the taking-up and pursuit of the activities of insurance and reinsurance mediation by natural and legal persons which are established in a Member State or which wish to become established there.

2. This directive shall not apply to persons providing mediation services for insurance contracts if all the following conditions are met:

…

(b) the insurance contract is not a life assurance contract;

…'

11 Article 2 of that directive, entitled 'Definitions', provided:

'For the purpose of this directive:

…

3. "insurance mediation" means the activities of introducing, proposing or carrying out other work preparatory to the conclusion of contracts of insurance, or of concluding such contracts, or of assisting in the administration and performance of such contracts, in particular in the event of a claim.

…

5. "insurance intermediary" means any natural or legal person who, for remuneration, takes up or pursues insurance mediation;

…'

12 Article 12 of the same directive, entitled 'Information provided by the insurance intermediary', provided, in paragraph 3 thereof:

'Prior to the conclusion of any specific contract, the insurance intermediary shall at least specify, in particular on the basis of information provided by the customer, the demands and the needs of that customer as well as the underlying reasons for any advice given to the customer on a given insurance product. These details shall be modulated according to the complexity of the insurance contract being proposed.'

13 Article 13 of Directive 2002/92, entitled 'Information conditions', stated, in paragraph 1 thereof:

'All information to be provided to customers in accordance with Article 12 shall be communicated:

…

(b) in a clear and accurate manner, comprehensible to the customer;

…'

Directive 2004/39/EC

14 Recital 10 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ 2004 L 145, p. 1) stated:

'Insurance or assurance undertakings the activities of which are subject to appropriate monitoring by the competent prudential-supervision authorities and which are subject to [Directive 2002/83] should be excluded.'

15 Article 2 of that directive, entitled 'Exemptions', provided, in paragraph 1 thereof:

'This directive shall not apply to:

(a) insurance undertakings as defined in … Article 1 of [Directive 2002/83];

…

(c) persons providing an investment service where that service is provided in an incidental manner in the course of a professional activity and that activity is regulated by legal or regulatory provisions or a code of ethics governing the profession which do not exclude the provision of that service;

…'

16 Article 19 of Directive 2004/39, entitled 'Conduct of business obligations when providing investment services to clients', provided, in paragraph 3 thereof:

'Appropriate information shall be provided in a comprehensible form to clients or potential clients about:

– the investment firm and its services,

– financial instruments and proposed investment strategies; this should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies,

– execution venues, and

– costs and associated charges

so that they are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. This information may be provided in a standardised format.'

Directive 2005/29

17 Recital 10 of Directive 2005/29 is worded as follows:

'… This directive accordingly applies only in so far as there are no specific Community law provisions regulating specific aspects of unfair commercial practices, such as information requirements and rules on the way the information is presented to the consumer. It provides protection for consumers where there is no specific sectoral legislation at Community level and prohibits traders from creating a false impression of the nature of products. This is particularly important for complex products with high levels of risk to consumers, such as certain financial services products. …'

18 Article 2 of that directive, entitled 'Definitions', reads:

'For the purposes of this directive:

…

(b) "trader" means any natural or legal person who, in commercial practices covered by this directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

(c) "product" means any goods or service including immovable property, rights and obligations;

(d) "business-to-consumer commercial practices" (also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

…'

19 Article 3 of that directive, entitled 'Scope', provides:

'1. This directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.'

…

4. In the case of conflict between the provisions of this directive and other Community rules regulating specific aspects of unfair commercial practices, the latter shall prevail and apply to those specific aspects.'

20 Article 5 of the same directive, entitled 'Prohibition of unfair commercial practices', states:

'1. Unfair commercial practices shall be prohibited.

…

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

…'

21 Article 7 of Directive 2005/29, entitled 'Misleading omissions', provides:

'1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.'

22 In accordance with Annex II to that directive, material information, within the meaning of Article 7 of the directive, includes that referred to in Article 36 of Directive 2002/83 and Articles 12 and 13 of Directive 2002/92.

Directive 2009/138

23 Article 309 of Directive 2009/138 , entitled 'Transposition', provides, in paragraph 1 thereof:

'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with [Article 185] by 31 March 2015.

The laws, regulations and administrative provisions referred to in the first subparagraph shall apply from 1 January 2016.

…'

24 Pursuant to Article 310 of that directive, entitled 'Repeal', Directive 2002/83 was repealed with effect from 1 January 2016.

Directive 2014/65

25 Article 93 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ 2014 L 173, p. 349), as amended by Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 (OJ 2016 L 175, p. 8) ('Directive 2014/65'), entitled 'Transposition', provides, in paragraph 1 thereof:

'Member States shall adopt and publish, by 3 July 2017, the laws, regulations and administrative provisions necessary to comply with this directive. They shall forthwith communicate to the Commission the text of those measures.

Member States shall apply those measures from 3 January 2018. …'

26 In accordance with Article 94 of Directive 2014/65, entitled 'Repeal', Directive 2004/39 was repealed with effect from 3 January 2018.

Polish law

The Civil Code

27 Article 58(1) of the Kodeks cywilny (Civil Code), in the version applicable to the main actions ('the Civil Code'), provides:

'A legal act that is contrary to the law or intended to circumvent the law shall be invalid, unless a relevant provision provides otherwise, in particular that the invalid provisions of the legal act in question are to be replaced by relevant provisions of the law.'

28 Article 808(1) of the Civil Code provides:

'A policy holder may conclude an insurance contract on behalf of another person. The insured party need not be identified by name in the contract, unless that is necessary in order to determine the subject matter of the insurance.'

The Law on Assurance Activities

29 Article 13 of the Ustawa o działalności ubezpieczeniowej of 22 May 2003 (Dz. U. nº 124, item 1151), in the version applicable to the main actions (Dz. U. 2010, nº 11, item 66) ('the Law on Assurance Activities'), provided, in paragraph 4 thereof:

'As regards life assurance linked to an investment fund, referred to in Section I, Group 3 of the annex to the present law, the assurance company is required to specify or mention the following in the assurance contract:

(1) the list of proposed investment funds;

(2) the rules for determining the value of the benefits and the surrender value of the assurance, including the rules for redeeming investment fund units and the time limits for their conversion into cash and payment of the benefit;

(3) the rules governing how the fund is to invest its resources, including, in particular, the characteristics of the assets comprising the fund, the criteria for selecting assets and the principles for their diversification and other limits on investments;

(4) the rules and time limits for valuation of the investment fund units;

(5) the rules for determining the amount of the costs and all other charges deducted from the assurance premiums or from the investment fund;

(6) the rules governing the allocation of the assurance premiums to the investment fund units, in particular in so far as provided for in points 4 and 5, and the date of conversion of premiums into investment fund units.'

30 In accordance with the annex to the Law on Assurance Activities, 'life assurance linked to an investment fund', comes under Section I, Group 3, of that annex.

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-143/20

31 O, a legal person established in Poland, entered, as policyholder, into a unit-linked group life assurance contract with a life assurance undertaking.

32 The purpose of that contract was to collect assurance premiums paid by assured persons and invest them through an investment fund created from those premiums. The rules governing the fund specified that the premiums were to be converted into units of the investment fund and invested in certificates issued by an investment undertaking the value of which was calculated on the basis of an index.

33 In return, the assurance undertaking in question undertook to pay benefits in the event of the decease or the survival of each assured person, at the end of the insurance period. Those benefits were to be not less than the sum of the premiums invested, increased in line with any positive variation in the said index. On the other hand, in the event of the termination of the assurance contract before the expiry of its period of validity, the assurance undertaking undertook to reimburse each assured person a sum equal to the current value of the units of the investment fund into which that person's premiums had been converted.

34 The contract did not specify the rules governing the valuation of the units of the investment fund in question, of the net assets of the entire fund or of the certificates in which the resources of the fund were invested. Nor did it specify the method for calculating the value of the index on which the payout of the certificates was based. The rules of the investment fund in question did, however, state that investors were exposed to the credit risk of the issuer of those certificates.

35 By a declaration taking effect on 8 October 2010, A acceded, as an assured person, for a period of 15 years, to the group life assurance contract concluded by O and thus undertook to pay an initial premium and regular monthly premiums thereafter. A's accession to the contract took place during a meeting with an employee of O at one of that company's offices during which the

employee offered A a unit-linked life assurance contract. The rules of the investment fund in question, and the terms and conditions of the assurance, were provided to A on the occasion of his accession to the contract.

36 After seven years, A terminated the contract on account of significant losses in the value of the funds invested. The assurance undertaking paid him, as a surrender value, a sum corresponding to the value of his units of the investment fund in question on the date of termination of the contract, amounting to approximately one third of the premiums he had paid, after the deduction of liquidation costs.

37 Taking the view that he had been the victim of mis-selling and of unfair commercial practices, A brought an action for recovery before the referring court. In support of his action, A argued, in particular, that O had misled him about the nature of the investment in which the assurance premiums were to be invested.

38 In that connection, the referring court emphasises that, in the language versions other than Polish, the pre-contractual information disclosure obligation laid down in Article 36(1) of Directive 2002/83, read together with point (a)(11) and (12) of Annex III(A) to that directive, and in Article 185(3) of Directive 2009/138 appears to require that information be provided on the nature, the type specification and the characteristics of the assets underlying unit-linked life assurance contracts.

39 Where those underlying assets consist in derivatives, those provisions appear to require that the same information is provided as is required by Article 19(3) of Directive 2004/39 and Article 24(4) of Directive 2014/65, that is to say, comprehensive information on the derivatives and proposed investment strategies and, in particular, information on the method for pricing the underlying assets and on the risks associated with the derivatives and their issuer.

40 While the referring court acknowledges that those directives do not apply to assurance undertakings, it considers that, in light of recital 10 of Directive 2004/39 and recital 87 of Directive 2014/65, it is reasonable to afford special protection, by means of a stricter obligation to disclose information, to consumers who conclude a unit-linked life assurance contract, either as policy holder or as an assured person acceding to a group contract, since it is investment products, and derivatives in particular, that are being sold to them in the form of an assurance contract.

41 It would follow that, in the present case, the assurance undertaking in question and the policy holder O failed fully to discharge their obligation to disclose information to the assured person. That, according to the referring court, could also constitute an unfair commercial practice within the meaning of Articles 5 and 7 of Directive 2005/29, recital 10 of which mentions the need to afford special protection to consumers in the market for financial products with high levels of risk.

42 It was in those circumstances that the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland) decided the stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are Article 185(3)(i) of [Directive 2009/138] and Article 36(1) of Directive 2002/83, read in conjunction with [point (a)(12)] of Annex III(A) thereto, to be interpreted as meaning that, in the case of unit-linked life assurance contracts where the underlying assets of the fund are derivatives (or structured financial instruments with derivatives embedded in them), the insurer or policy holder (who offers such insurance, distributes the insurance product, or

"sells" the insurance) is obliged to communicate to the insured consumer information about the nature (German: *Angabe der Art*, French: *indications sur la nature*) and the type specification and the characteristics of the underlying instrument (a derivative or a structured financial instrument with a derivative embedded in it), or is it sufficient to indicate only the type of the underlying assets without communicating the characteristics of that instrument?

(2) If the answer to the first question is that the insurer or policy holder (who offers such insurance, distributes the insurance product, or "sells" unit-linked insurance) is obliged to communicate to the consumer information about the nature and the type specification and characteristics of the underlying instrument (a derivative or a structured financial instrument with a derivative embedded in it), are Article 185(3)(i) of [Directive 2009/138] and Article 36(1) of [Directive 2002/83], read in conjunction with [point (a)(12)] of Annex III(A) thereto, to be interpreted as meaning that information about the nature and the type specification and characteristics of the underlying instrument (a derivative or a structured financial instrument with a derivative embedded in it) communicated to the insured consumer should contain the same information as that required by Article 19(3) of [Directive 2004/39] and Article 24(4) of [Directive 2014/65], that is to say, comprehensive information on the derivatives and proposed investment strategies which should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies, including, in particular, information on the methodology used by the insurer or calculation agent during the term of the insurance cover for pricing the underlying instrument and information on the risks associated with the derivative and its issuer, including on the change in the value of the derivative over time, the various factors determining those changes and the extent to which those factors affect the value?

(3) Is Article 185(4) of Directive 2009/138 to be interpreted as meaning that, in the case of unit-linked life and endowment insurance contracts where the underlying asset of the fund is a derivative (or a structured financial instrument with a derivative embedded in it), the insurer or policy holder (who offers such insurance, distributes the insurance product, or "sells" the insurance) is obliged to communicate to the insured consumer the same information as that required by Article 19(3) of Directive 2004/39 and Article 24(4) of Directive 2014/65, that is to say, comprehensive information on the derivatives and proposed investment strategies which should include appropriate guidance on and warnings of the risks associated with investments in those instruments or in respect of particular investment strategies, including, in particular, information on the methodology used by the insurer or calculation agent during the term of the insurance cover for pricing the underlying instrument and information on the risks associated with the derivative and its issuer, including on the change in the value of the derivative over time, the various factors determining those changes and the extent to which those factors affect the value?

(4) If the answer to the second or third question (or both) is in the affirmative, does the failure of the insurer or the policy holder offering unit-linked life assurance to provide the insured consumer with the information required (as referred to in the second and third questions) when offering insurance to the consumer constitute an unfair commercial practice within the meaning of Article 5 of [Directive 2005/29] or does the failure to provide the information required constitute a misleading commercial practice within the meaning of Article 7 of that directive?

(5) If both the second and third questions are answered in the negative, does the failure of the insurer or the policy holder (who offers such insurance, distributes the insurance product, or "sells" unit-linked life assurance) to inform the consumer clearly that the assets of the investment fund (unit-linked fund) are invested in derivatives (or structured products with derivatives embedded in them) constitute an unfair commercial practice within the meaning of Article 5 of Directive 2005/29 or does the failure to provide the information required constitute a misleading commercial practice within the meaning of Article 7 of that directive?

(6) If both the second and third questions are answered in the negative, does the failure of the insurer or the policy holder offering unit-linked life assurance to explain to the consumer in detail the precise characteristics of the instrument in which the assets of the investment fund (unit-linked fund) are invested, including information on the operating rules of such an instrument, where it is a derivative (or a structured instrument with a derivative embedded in it) constitute an unfair commercial practice within the meaning of Article 5 of Directive 2005/29 or does the failure to provide the information required constitute a misleading commercial practice within the meaning of Article 7 of that directive?'

Case C-213/20

43 On 29 July 2011, A, a company active in the banking sector, concluded, as policy holder, a unit-linked group life assurance contract with the assurance undertaking A. Towarzystwo Ubezpieczeń Życie.

44 The purpose of that contract was to collect assurance premiums paid by assured persons and invest them in an investment fund. The rules governing that fund, which formed a standard clause in the assurance contract, stipulated that, after deduction of a monthly administration fee charged by the assurance undertaking, the premiums were to be used to purchase units of the fund, each of which would have an initial unit value. The moneys placed in the fund were then invested in their entirety in structured bonds, the payout of which was based on an index set by the issuer.

45 The fund rules described the risks associated with the investment, such as the risks associated with depreciation of the index caused by developments on the financial markets and the possible loss of part of the premiums invested in the event of termination of the assurance contract before the end of the assurance period. They also stated that the assurance undertaking in question could not be held liable for those risks.

46 By separate declarations filed on 28 and 30 November 2011, G. W. and E. S. acceded, as assured persons, for a period of 15 years, to the group life assurance contract concluded by the company A and thus undertook to pay an initial premium and regular monthly premiums thereafter. That accession took place at the company's premises, in the course of a single meeting with company employees having the title of 'customer advisor', who presented the insurance product in question as an investment in the form of regular saving. At that meeting, G. W. and E. S. received the offer of accession and were given the standard terms of the group life assurance contract, which is to say the general terms and conditions of insurance and the rules of the investment fund in question, and they filed their declarations of accession. Company A was paid a commission by the assurance undertaking for its intervention.

47 At the time of their accession to the group life assurance contract, G. W. and E. S. signed a written document which explained that, during the assurance period, the value of the units in the investment fund could fluctuate significantly depending on the valuation of the financial instruments in which the fund invested. The document also explained that the insurance product bore a risk associated with the possible failure of the issuer of the financial instruments, since the product was not a bank investment and so did not guarantee the assured any return on investment. However, the documentation relating to the conditions of purchase of those financial instruments, which set out the specific investment risk factors associated with the instruments, was not given to G. W. and E. S.

48 After a period of eight years, during which the value of the units in the investment fund in question had gradually decreased, G. W. terminated her contract, with effect from 23 January 2019. The assurance undertaking in question paid her, as a surrender value, a sum corresponding to the value of her units of the fund, which, after the deduction of liquidation costs, amounted to approximately two-thirds of the premiums she had paid. E. S., on the other hand, had not terminated her contract at the time when the request for a preliminary ruling in Case C-213/20 was made.

49 G. W. and E. S. brought an action against the assurance undertaking A. Towarzystwo Ubezpieczeń Życie before the referring court, claiming reimbursement of the premiums they had paid. They argue that, since the assurance undertaking had failed in its information disclosure obligations regarding the nature of the assets underlying the assurance contract in question and regarding all of the risks associated with it, that contract and their individual declarations of accession were null and void.

50 In that context, the referring court observes, in the first place, that although not formally a party to the contract concluded between the assurance undertaking and the policy holder, which is in the form of a group life assurance contract for the benefit of third parties, within the meaning of Article 808(1) of the Civil Code, an assured person acceding to that contract assumes the policy holder's obligation to pay the premiums and bears the actual economic burden of the investment and the risk associated with it. The question therefore arises of whether Article 36(1) of Directive 2002/83 requires the information mentioned in point (a)(11) and (12) of Annex III(A) to that directive to be made available to the assured person also.

51 In the second place, the referring court is uncertain about the precise meaning of 'indication of the nature of the underlying assets' in point (a)(12) of Annex III(A). While emphasising the need to maintain a balance between the amount of information provided and the degree of complexity of that information, the national court points out that the legal relationship between the assurance undertaking and the assured, who bears the investment risks, could provide justification for requiring the assured to be given all the information about the nature of the financial products and the risks associated with them and, in that context, for requiring the assurance undertaking to communicate to the assured all of the information regarding those products which it has received from the issuer of them.

52 The third issue raised by the referring court concerns the time when the obligation to provide pre-contractual information must be discharged and, more specifically, the interpretation of the expression '*before* the assurance contract is concluded' in Article 36(1) of Directive 2002/83. The referring court points out that the provision of Polish law transposing that article, namely Article 13(4) of the Law on Assurance Activities, merely requires that information about the legal relationship, including the characteristics of the assets comprising the investment fund, be

included in a standard form assurance contract. In that context, it questions whether, so as not to rob the information disclosure obligation of effectiveness, it might not be necessary to require information to be communicated to the assured person at a separate stage, distinct from the stage of conclusion of the contract.

53 In the fourth place, the referring court states that, in Polish law, the informative elements of a legal relationship are generally not regarded as part of the main subject matter of that relationship, in that they do not directly determine the rights and obligations of the parties. Given the scope and importance of the items of information listed in Annex III to Directive 2002/83, it nevertheless questions whether Article 36(1) of that directive, read in the light of recital 52 thereof, could be interpreted as meaning that the obligation to provide information which it lays down constitutes an essential element of an assurance contract, or even of the legal relationship to which the assured person accedes.

54 The referring court also observes that national law provides no legal basis for finding such a legal relationship to be invalid on the basis of a possible finding that this obligation to provide information has not been met. First of all, Article 58(1) of the Civil Code, concerning the invalidity of legal acts, is generally interpreted as only addressing the situation where the content or purpose of a legal act is incompatible with the law. Second, national law contains no specific rules in that regard and, third, the application of the general rules relating to errors vitiating consent is subject to strict conditions, including compliance with a one-year time limit and a finding that the error was an essential one and related to the content of the legal act. According to the referring court, it therefore remains to be determined whether Directive 2002/83 governs the legal consequences of a finding that the obligation to provide information has not been met.

55 It was in those circumstances that the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw) decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 36(1) of [Directive 2002/83], read in conjunction with [point (a)(12)] of Annex III(A) thereto, to be interpreted as meaning that the obligation to provide the information indicated therein also covers the assured person if he [or she] is not at the same time the policy holder and he [or she] acts as a person acceding, as a consumer, to a unit-linked group endowment and life assurance contract concluded between an assurance undertaking and the undertaking which is the policy holder, and as the actual investor in respect of the monies paid by way of assurance premiums?

(2) If the first question is answered in the affirmative, is Article 36(1) of Directive 2002/83, read in conjunction with [point (a)(11) and (12)] of Annex III(A) thereto, to be interpreted as meaning that, in the context of a legal relationship such as that set out in the first question, the obligation to provide information about the characteristics of the financial assets comprising the investment fund also means that the consumer, the assured person, must be informed in a comprehensive and comprehensible manner of all the risks associated with investment in the assets of such a fund (such as structured bonds or derivatives), of the nature of those risks and their extent, or is it sufficient, for the purposes of the provision cited, to provide the assured person merely with basic information about the principal types of risk associated with investing monies through an investment fund?

(3) Is Article 36(1) of Directive 2002/83, read in conjunction with [point (a)(11) and (12)] of Annex III(A) thereto, to be interpreted as meaning that, in the context of a legal relationship such as that described in the first and second questions, a consumer acceding to a life assurance contract as an assured person must be informed about all the investment risks and associated terms and conditions about which the issuer of the assets (structured bonds or derivatives) making up the investment fund informed the assurer?

(4) If the preceding questions are answered in the affirmative, is Article 36(1) of Directive 2002/83 to be interpreted as meaning that a consumer acceding to a unit-linked group endowment and life assurance contract as an assured person must receive information on the nature of the assets and the risks associated with investing in such assets before concluding a contract, in a separate pre-contractual procedure, and does it therefore preclude a provision of national law [such as] Article 13(4) of the [the Law on Assurance Activities] under which it is sufficient for that information to be disclosed for the first time in the assurance contract and during the conclusion thereof, and the time at which the information is received is not unambiguously and clearly kept separate and distinct in the procedure for acceding to the contract ?

(5) If the first three questions are answered in the affirmative, is Article 36(1) of Directive 2002/83, read in conjunction with [point (a)(11) and (12)] of Annex III(A) thereto, also to be interpreted as meaning that the proper implementation of the obligation laid down therein to provide information must be regarded as an essential element of a unit-linked group endowment and life assurance contract and, consequently, may a finding that that obligation has not been performed correctly have the effect of conferring on the assured consumer the right to claim the reimbursement of all the assurance premiums paid on the ground of a possible declaration that the contract is invalid or is ineffective *ab initio* or that the individual declaration of accession to that contract is invalid or ineffective?'

Procedure before the Court

56 By decision of 23 March 2021, the two cases C-143/20 and C-213/20 were joined for the purposes of the oral procedure and the decision closing the proceedings, in accordance with Article 54 of the Rules of Procedure of the Court.

57 On the same day, the parties to the main proceedings and the other interested parties referred to in Article 23 of the Statute of the Court of Justice of the European Union were requested to answer certain questions in writing, pursuant to Article 61(1) of the Rules of Procedure. The parties to the main proceedings in Case C-213/20, the Polish and Italian Governments and the Commission lodged their answers to those questions.

The questions referred for a preliminary ruling

58 Before turning to the questions asked by the referring court, it is appropriate to begin by establishing which provisions of EU law are applicable to the cases in the main proceedings.

59 It must be noted in that connection that it is clear from the order for reference in Case C-143/20 that the applicant in the main proceedings was covered by the assurance from 8 October 2010 onwards, such that the conclusion of the group life assurance contract to which he acceded, like his declaration of accession to that contract, necessarily preceded that date. In so far as Case

C-213/20 is concerned, the group life assurance contract at issue in the main proceedings was concluded on 29 July 2011 and the applicants in the main proceedings acceded to it by declarations which they respectively made on 28 November and 30 November 2011.

60 In accordance with Article 309(1) and Article 310 of Directive 2009/138, Article 185 of that directive, the period for the transposition of which expired on 31 March 2015, is applicable only from 1 January 2016 onwards, the date on which Directive 2002/83 was repealed. It follows that it is only the provisions of the latter directive that apply to the cases in the main proceedings.

61 Consequently, first of all, since, according to the settled case-law of the Court, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it, reformulating, if necessary, the questions referred to it (see, to that effect, judgment of 26 October 2021, *PL Holdings*, C-109/20, EU:C:2021:875, paragraph 34 and the case-law cited), it is appropriate to read the questions raised as relating exclusively to the interpretation of the provisions of Directive 2002/83, to the exclusion of the provisions of Directive 2009/138. Second, given that it relates solely to the interpretation of Article 185(4) of the latter directive, there is no need to answer the third questions referred in Case C-143/20.

62 Similarly, since the second question in that case relates to Article 24(4) of Directive 2014/65, which, in accordance with Article 93(1) and Article 94 thereof, applies only from 3 January 2018 onwards, the date of repeal of Directive 2004/39, that question should be read as relating solely to the interpretation of Article 19(3) of the latter directive.

The first question referred in Case C-213/20

63 By its first question in Case C-213/20, the referring court is essentially asking whether Article 36(1) of Directive 2002/83 is to be interpreted as meaning that the information indicated therein must be communicated to a consumer who accedes, as an assured person, to a group unit-linked life assurance contract concluded between an assurance undertaking and another undertaking which is the policy holder.

64 In answering that question, it must be stated at the outset that it is apparent from the orders for reference and from the documents before the Court, first of all, that the contracts at issue in the main proceedings are life assurance contracts linked to investment funds ('unit-linked contracts'). Those contracts are open-ended and collective in nature, inasmuch as they were concluded between an assurance undertaking and another undertaking, as the policy holder, for the purpose of offering consumers, not yet identified at the time the contracts were concluded, the opportunity of acceding to them, after their conclusion, by filing a separate, individual declaration of accession.

65 Second, by making that declaration, the consumer assumes the status of an assured person and undertakes to pay the assurance undertaking an initial premium and regular monthly premiums thereafter. Those premiums are converted into shares in, or units of an investment fund, referred to as '*unités de compte*' in French, and then invested in financial instruments in accordance with the value of the units, those financial instruments constituting the assets underlying the unit-linked contracts. In return for the premiums paid, the assurance undertaking undertakes to pay the consumer benefits in the event of his or her decease or his or her survival at the end of

the assurance period or alternatively, in the event of the termination of the assurance contract before that date, to reimburse the consumer a sum equal to the current value of the units of the investment fund into which his or her premiums have been converted.

66 Third, the procedure for acceding to a group unit-linked contract is managed exclusively by the policy holder, which offers the consumer the opportunity of acceding to the contract as a form of insurance-based financial investment and receives the consumer's expression of intent to do so in the form of a declaration of accession, while at the same time receiving a commission from the assurance undertaking for its intervention.

67 That being clear, it must be pointed out, first of all, that Article 36(1) of Directive 2002/83, which provides that, before the assurance contract is concluded, at least the information listed in Annex III(A) to that directive is to be communicated to the policy holder, contains no definition of the concepts 'assurance contract' and 'policy holder'. Nor does it make any reference to national law in so far as concerns the meaning to be ascribed to those concepts.

68 Thus, as dictated by the requirements of both the uniform application of EU law and the principle of equality, those concepts must be regarded as autonomous concepts of EU law which must be interpreted in a uniform manner throughout the territory of the European Union, with account being taken not only of the wording of that provision, but also of the context in which it occurs and the objectives pursued by the rules of which it is part (see, to that effect, judgments of 1 March 2012, *González Alonso*, C-166/11, EU:C:2012:119, paragraph 25, and of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 49).

69 As regards, first of all, the concept of 'policy holder', it must be pointed out, as the Advocate General observed, in essence, in point 79 of his Opinion, that in the scheme of Directive 2002/83, although the concept of 'policy holder' is generally understood as referring to the person who acts as the offeree in the legal relationship that qualifies an assurance contract, it need not necessarily designate the person who takes out the assurance contract with the assurance undertaking, since the assured person is also recognised by that directive as the holder of the rights and obligations arising under that contract.

70 That follows, in particular, from recitals 2, 35, 39 and 50 of that directive, as well as from the corresponding provisions of the directive concerning technical provisions and financial recovery measures, which mention the need to safeguard the interests of the assured persons and the rights which they derive from the assurance contract. The same conclusion may be drawn from the identical provisions of the first subparagraph of Article 14(5) of the directive and of the first subparagraph of Article 53(6) thereof, which concern the transfer of portfolios between assurance undertakings, from which it is clear that assured persons fall within the scope of those provisions in the same way as policy holders, in so far as they have rights or obligations arising from the assurance contract.

71 That interpretation is also corroborated by the objectives pursued by Directive 2002/83. It is clear from recitals 2 and 5 thereof that that directive seeks, in particular, to ensure adequate protection for insured persons and beneficiaries in all the Member States and to contribute to enabling all policy holders to have recourse to any insurer (judgment of 2 April 2020, *kunsthaus muerz*, C-20/19, EU:C:2020:273, paragraph 34).

72 In that context, recital 52 of Directive 2002/83 states that the consumer must be provided with whatever information is necessary to enable him or her to choose the contract best suited to his or her needs and that it is therefore necessary to coordinate the minimum provisions in order for the consumer to receive clear and accurate information, inter alia, about the essential characteristics of the products proposed to him or her.

73 It is for the purpose of attaining that objective of information that Article 36 of Directive 2002/83 provides, in paragraph 1 thereof, that at least the information listed in Annex III(A) to the directive must be communicated to the policy holder before the conclusion of the assurance contract (see, by analogy, judgments of 5 March 2002, *Axa Royale Belge*, C-386/00, EU:C:2002:136, paragraph 21; of 19 December 2013, *Endress*, C-209/12, EU:C:2013:864, paragraph 25; and of 29 April 2015, *Nationale-Nederlanden Levensverzekering Mij*, C-51/13, EU:C:2015:286, paragraph 20).

74 Accordingly, the Court has held, in essence, that any restrictive interpretation of the concept of 'policy holder', for the purposes of Article 36(1) of Directive 2002/83, would run counter to the objectives pursued by that directive, since it would entail a limitation of the protection conferred on assured persons by that directive (see, to that effect, judgment of 2 April 2020, *kunsthaus muerz*, C-20/19, EU:C:2020:273, paragraph 35).

75 That being so, it becomes apparent from a systematic and teleological interpretation of Article 36(1) of Directive 2002/83 that, for the purposes of the pre-contractual information disclosure obligation which it lays down, the concept of 'policy holder' designates the person who acts as the offeree in the legal relationship that qualifies an assurance contract and to whom, in that capacity, it falls to select an insurance product and to assume the rights and obligations arising under it. Consequently, that concept also encompasses persons who, by making a declaration addressed to an undertaking which is the policy holder, accede to a group assurance contract and thus take on the status of assured persons for the purposes of that contract.

76 As regards, second, the concept of 'assurance contract', for the purposes of that same provision, it must be observed that the Court has already held that unit-linked contracts fall within the material scope of Directive 2002/83 (see, to that effect, judgment of 1 March 2012, *González Alonso*, C-166/11, EU:C:2012:119, paragraph 29).

77 Moreover, in accordance with well-established case-law, the essentials of an insurance transaction are, as generally understood, that the insurer undertakes, in return for prior payment of a premium, to provide the insured, in the event of materialisation of the risk covered, with the service agreed when the contract was concluded (judgments of 26 March 2015, *Litaksa*, C-556/13, EU:C:2015:202, paragraph 28 and the case-law cited, and of 8 October 2020, *United Biscuits (Pensions Trustees) and United Biscuits Pension Investments*, C-235/19, EU:C:2020:801, paragraph 30 and the case-law cited). Such transactions necessarily imply the existence of a contractual relationship between the provider of the insurance service and the person whose risks are covered by the insurance, that is to say, the insured party (judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 50 and the case-law cited).

78 Accordingly, the Court has held, with regard to Directive 2002/92, that, since an insurance undertaking undertakes to supply a service in the event of the death of the insured party or the occurrence of another event in return for the payment of a premium by the insured party, that

insurance relationship fits the concept of 'insurance contract' referred to in that directive (see, to that effect, judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 51).

79 That interpretation applies equally to the concept of 'assurance contract' within the meaning of Article 36(1) of Directive 2002/83.

80 In the present case, as explained in paragraphs 64 to 66 of the present judgment, a consumer who decides to accede to a group unit-linked contract, by doing so accepts an offer of assurance made by the undertaking which is the policy holder. The consumer consequently undertakes to pay assurance premiums to the assurance undertaking in return for the latter's provision of benefits in the event of decease or survival at the end of the assurance period. Thus, the consumer assumes the typical rights and obligations stipulated in the contract and becomes a party to an assurance relationship with that undertaking.

81 Given those circumstances, that assurance relationship between the assurance undertaking and the assured consumer falls, as such, within the scope of the concept of 'assurance contract' within the meaning of Article 36(1) of Directive 2002/83, such that the consumer who becomes a party to it by acceding to the group unit-linked contract falls within the scope of the concept of 'policy holder' within the meaning of that provision. Whether or not the consumer formally becomes a party also to the group contract concluded between the assurance undertaking and the undertaking that is the policy holder is of no significance in that regard.

82 Consequently, such a consumer must, prior to acceding to a group unit-linked contract, be given the information referred to in Article 36(1) of Directive 2002/83, which will enable him or her to make an informed decision about which insurance product best suits his or her needs.

83 In order to provide the referring court with a useful answer that will assist it in resolving the disputes in the main proceedings, it must still be established, in the second place, which entity must fulfil the pre-contractual information disclosure obligation which Article 36(1) of Directive 2002/83 lays down for the benefit of such a consumer.

84 That provision does not expressly identify which entity bears the burden of that information disclosure obligation.

85 Admittedly, the Court has already held, with regard to the provision which preceded Article 36(1) of Directive 2002/83 and was drafted in exactly the same terms as its replacement, that EU law requires the assurance undertaking to discharge that obligation to inform the policy holder (see, to that effect, judgment of 19 December 2019, *Rust-Hackner and Others*, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraph 85 and the case-law cited).

86 Nonetheless, account must also be taken of the particular features of group unit-linked contracts. In particular, it follows from the considerations set out in paragraphs 64 and 66 of the present judgment, first, that the procedures for concluding such contracts and for acceding to them naturally imply the creation of two separate assurance relationships, one between the assurance undertaking and the undertaking that is the policy holder, which arises on the conclusion of the contract, the other – which is contingent and may arise after the first relationship – between the assurance undertaking and the assured consumer, which arises from the consumer's declaration of accession to that contract.

87 Second, in the context of the procedure whereby the consumer accedes to such a contract, the undertaking that is the policy holder acts as an 'insurance intermediary' within the meaning of Article 2(5) of Directive 2002/92, read in the light of recitals 9 and 11 thereof, and is subject, in that capacity, to the rules laid down by that directive, in accordance with Article 1(1) and (2)(b) thereof.

88 Such a policy-holding undertaking carries out an insurance mediation activity, within the meaning of Article 2(3) of that directive, for remuneration. That activity consists in offering consumers the opportunity of acceding to a group unit-linked contract, and thus of concluding, as explained in paragraphs 80 and 81 of the present judgment, a life assurance contract with the assurance undertaking, and in giving financial advice relating to the investment of capital in the form of assurance premiums which consumers may invest in the assets underlying the group unit-linked contract (see, to that effect, judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraphs 47 to 54 and 58).

89 Given all of that, it is clear from a combined reading of Directive 2002/83 and Directive 2002/92 that, first, it is incumbent on the assurance undertaking, prior to concluding a group unit-linked contract, to communicate at least the information listed in Annex III(A) to Directive 2002/83 to the undertaking that is the policy holder under that contract, in accordance with Article 36(1) thereof.

90 Having regard to the nature of such a contract, which is intended to be distributed to final consumers, and to the requirement that those consumers must receive that information before acceding to such a contract, so that they are able to choose the insurance product best suited to their needs, which derives from Article 36(1) of Directive 2002/83, as interpreted in paragraph 82 of the present judgment, the assurance undertaking must formulate that information in a clear and accurate manner which consumers can comprehend, with a view to its onward transmission to consumers in the course of the procedure for acceding to such a contract.

91 Second, it is incumbent on the undertaking that is the policy holder under a group unit-linked contract, acting in its capacity as insurance intermediary, to convey the same information that the assurance undertaking provided to it to any consumer who accedes to that contract, prior to such accession. That information must be accompanied by any further details which prove necessary in light of the requirements and needs of the consumer, which must be determined on the basis of the information provided by the consumer. Those further details must be tailored to the complexity of the contract and must be formulated in a clear and accurate manner which consumers can comprehend, in accordance with Article 12(3) and Article 13(1)(b) of Directive 2002/92.

92 Having regard to all the foregoing considerations, the answer to the first question referred in Case C-213/20 is that Article 36(1) of Directive 2002/83 must be interpreted as meaning that the information referred to in that provision must be communicated to any consumer who accedes, as an assured person, to a group unit-linked contract concluded between an assurance undertaking and an undertaking which is the policy holder. The assurance undertaking must communicate that information to the undertaking that is the policy holder, which must transmit it to the consumer before his or her accession to the contract, together with any further details which prove necessary in light of the requirements and needs of the consumer, in accordance with that provision, read together with Article 12(3) of Directive 2002/92.

The first and second questions referred in Case C-143/20 and the second and third questions referred in Case C-213/20

93 By the first and second questions referred in Case C-143/20 and the second and third questions referred in Case C-213/20, which it is appropriate to consider together, the referring court seeks to ascertain, in essence, whether Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, must be interpreted as meaning that the information about the nature of the underlying assets which is to be communicated to the consumer prior to his or her accession to a group unit-linked contract must include information about the characteristics of those underlying assets and, if so, whether that information:

– must include comprehensive information about the nature and extent of all the risks associated with investment in those underlying assets; and

– must include the same information as the issuer of the financial instruments comprising those underlying assets communicated to the assurance undertaking pursuant to Article 19(3) of Directive 2004/39.

94 In that regard, it is clear from the case-law set out in paragraph 68 of the present judgment that, in the absence of any definition or any reference to national law in Directive 2002/83, the meaning of the expression 'indication of the nature of the underlying assets for unit-linked policies', for the purposes of point (a)(12) of Annex III(A) to that directive, must be sought having regard not only to the wording of that point, but also to the context in which it occurs and the objectives pursued by that directive.

95 Admittedly, given the wording of point (a)(12) of Annex III(A) to Directive 2002/83, that expression could be understood as simply meaning an indication of the type of financial instruments constituting the assets of the investment fund to which the assurance contract in question is linked. Nonetheless, it becomes apparent from a systematic and teleological interpretation of point (a)(12) that the expression must be given a broad interpretation, one that encompasses the characteristics of those assets.

96 As observed in paragraphs 72 and 73 of the present judgment, it is clear from a combined reading of recital 52 and Article 36(1) of Directive 2002/83 that the pre-contractual information disclosure obligation laid down in that provision is intended to enable consumers who are considering acceding to a group life-assurance contract to choose from among the various insurance products the one which best suits their needs, by ensuring that they have the detailed, accurate and objective information necessary for that purpose and, in particular, clear and accurate information about the essential characteristics of those insurance products.

97 In the case of a unit-linked contract, the insurance product involves an investment element (see, to that effect, judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others*, C-542/16, EU:C:2018:369, paragraph 57) which is indissociable from that product. That element is inherent in the consumer's very choice to accede to the contract, inasmuch as the insurance product in question is, as was noted in paragraph 66 of the present judgment, presented to, and perceived by the consumer as a form of insurance-based investment different from other forms of investment.

98 Moreover, as was observed in paragraph 65 of the present judgment, that element has a direct impact on the performance of the obligations and the exercise of the rights arising under the contract. First of all, in addition to paying the assurance premiums, a consumer acceding to such a contract also bears the risks resulting from the investment of those premiums in financial instruments. Second, the performance of that investment directly affects the extent of the rights which the consumer derives from the contract and, in particular, its surrender value in the event of termination.

99 In that context, the characteristics of the financial instruments comprising the assets underlying a unit-linked contract and, in particular, the nature of those instruments and the yield from them, as well as the risks associated with them, are of primary importance to the consumer making an informed decision when choosing such an insurance product. That is especially true when, as in this instance, the underlying assets are derivatives or structured products with derivatives embedded in them, which carry a particularly high degree of investment risk.

100 In order to preserve the effectiveness of the obligation referred to in Article 36(1) of Directive 2002/83, the information that must be communicated to any consumer considering acceding to a contract must therefore include information about the characteristics of the underlying assets.

101 Nonetheless, it is clear from a combined reading of recital 52 of, and Annex III(A) to that directive that this information must not only be sufficiently clear, accurate and comprehensible for the consumer to be able to make a properly informed choice of the insurance product that best suits his or her needs, but must also be objectively necessary in order for such a choice to be made, as the Advocate General observed, in essence, in point 96 of his Opinion.

102 It must therefore be held that the expression 'indication of the nature of the underlying assets' in point (a)(12) of Annex III(A) to that directive refers solely to information about the characteristics of such underlying assets which is essential for that purpose. In particular, that information must include, as the Advocate General observed in points 100 and 102 of his Opinion, a clear, accurate and comprehensible description of their economic and legal nature, including general principles governing their yield.

103 That information must also include, in addition, clear, accurate and comprehensible information about the structural risks associated with the underlying assets, which is to say the risks which are inherent in the nature of those assets and may directly affect the rights and obligations arising from the assurance relationship, such as the risk of depreciation of the units of the investment fund to which the unit-linked contract is tied or the credit risk of the issuer of the financial instruments which comprise those same underlying assets.

104 That information need not, on the other hand, necessarily include a detailed and exhaustive description of the nature and extent of all of the investment risks associated with the assets underlying the unit-linked contract, such as those arising from the type specification of the various financial instruments comprising those assets or the technical rules for calculating the value of the index on which the payout of those financial instruments is based.

105 Similarly, the information about the essential characteristics of the underlying assets, for the purposes of point (a)(12) of Annex III(A) to Directive 2002/83, need not necessarily include the same information as the issuer of those financial instruments is required, as a financial services provider, to communicate to its customers in accordance with Article 19(3) of Directive 2004/39.

106 According to that provision, that information is specifically intended to enable recipients of investment services to understand the nature of those services and the specific type of financial instrument that is being offered to them by the issuer, and so that information is not necessary in order for a consumer to be able to choose the insurance product that best suits his or her needs, as explained in paragraph 101 of the present judgment.

107 Furthermore, to require the assurance undertaking and the policy-holding undertaking under a group unit-linked contract to communicate that information to the consumer before he or she accedes to that contract would amount to bringing within the scope of Directive 2004/39 persons expressly excluded from its scope as a result of a deliberate decision of the EU legislature regarding both assurance undertakings and insurance intermediaries, as enacted respectively in Article 2(1)(a) and Article 2(1)(c) of that directive, as interpreted by the Court in its judgment of 31 May 2018, *Länsförsäkringar Sak Försäkringsaktiebolag and Others* (C-542/16, EU:C:2018:369, paragraphs 61 to 69).

108 That being so, the answer to the first and second questions referred in Case C-143/20 and to the second and third questions referred in Case C-213/20 is that Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, must be interpreted as meaning that the indication of the nature of the underlying assets which must be communicated to a consumer prior to his or her accession to a group unit-linked contract must include information about the essential characteristics of those underlying assets. That information:

– must include clear, accurate and comprehensible information about the economic and legal nature of those underlying assets and about the structural risks associated with them; but

– need not necessarily include exhaustive information about the nature and extent of all of the risks associated with investment in those underlying assets, and need not necessarily include the same information that the issuer of the financial instruments comprising those underlying assets has communicated to the assurance undertaking pursuant to Article 19(3) of Directive 2004/39.

The fourth question referred in Case C-213/20

109 By the fourth question referred in Case C-213/20, the national court asks, in essence, whether Article 36(1) of Directive 2002/83 is to be interpreted as meaning that the information referred to in point (a)(12) of Annex III(A) to that directive must necessarily be communicated to a consumer acceding, as an assured person, to a group unit-linked contract in a separate pre-contractual procedure, and that it therefore precludes a provision of national law under which it is sufficient for that information to be mentioned in that contract.

110 In answering that question it is necessary to point out, first, that it is clear from recitals 44 and 52 of Directive 2002/83 that that directive does not completely harmonise the law governing assurance contracts and, in particular, that it is intended solely to coordinate the minimum provisions relating to pre-contractual information disclosure, affording the Member States the opportunity of imposing the application of their own law to assurance contracts covering commitments within their territory.

111 Second, Article 36(1) of that directive merely provides that the information listed in Annex III(A) thereto must be communicated to the policy holder 'before the assurance contract is concluded', without further specifying when that communication is to take place or, in particular, that it must take place in the context of a separate pre-contractual procedure.

112 Third, Article 36(4) of that directive provides that the detailed rules for implementing that article and Annex III to the same directive are to be laid down by the Member State of the commitment.

113 It follows, first, that, in the case of a group unit-linked contract, the information referred to in Article 36(1) of Directive 2002/83 must be communicated to the consumer before he or she signs the declaration of accession to that contract whereby, as explained in paragraphs 80 and 81 of the present judgment, that consumer expresses his or her intention to be bound by that contract and so becomes a party to a contractual insurance relationship with the assurance undertaking.

114 Second, in the absence of harmonised rules, it is for the Member States to determine the precise manner in which the pre-contractual information disclosure obligation laid down in Article 36(1) of that directive is to be discharged. In doing so, the Member States are nevertheless required to ensure the effectiveness of that directive, taking account of its aims (see, to that effect, judgment of 19 December 2013, *Endress*, C-209/12, EU:C:2013:864, paragraph 23 and the case-law cited).

115 In that regard, as the Advocate General observed, in essence, in point 111 of his Opinion, it is clear from a combined reading of Article 36(1) of Directive 2002/83 and recital 52 thereof that, in distinguishing the moment when the information listed in Annex III(A) to that directive must be communicated from the moment when the assurance contract is concluded, or acceded to, the objective pursued by that directive is for the consumer to be allowed a certain amount of time in which to choose from among the various insurance contracts available the one which best suits his or her needs and to take an informed decision as to whether he or she wishes to be contractually bound.

116 In order for the consumer to be able to benefit from that information to that end, he or she must receive that information in good time before acceding to the contract, and not simply at the stage of acceding to the contract (see, by analogy, judgments of 18 December 2014, *CA Consumer Finance*, C-449/13, EU:C:2014:2464, paragraph 46, and of 25 June 2020, *Bundesverband der Verbraucherzentralen und Verbraucherverbände*, C-380/19, EU:C:2020:498, paragraph 34), failing which the pre-contractual information disclosure obligation laid down in Article 36(1) of Directive 2002/83 would be deprived of its effectiveness.

117 It is for the competent national courts to assess, having regard to the context of the case and the characteristics of the group unit-linked contract in question, whether the manner in which that obligation was performed enabled the consumer to make a properly informed choice of the insurance product that best suits his or her needs.

118 Having regard to all the foregoing, the answer to the fourth question referred in Case C-213/20 is that Article 36(1) of Directive 2002/83 must be interpreted as meaning that the information referred to in point (a)(12) of Annex III(A) to that directive need not necessarily be communicated to a consumer who accedes, as an assured person, to a group unit-linked contract in the context of a separate pre-contractual procedure and that it does not preclude a provision of national law in accordance with which it is sufficient for that information to be mentioned in the

contract, provided that the contract is given to the consumer prior to his or her accession to it, in good time, so that he or she is able to make a properly informed choice of the insurance product that best suits his or her needs.

The fifth question referred in Case C-213/20

119 By the fifth question referred in Case C-213/20, the national court seeks to ascertain, in essence, whether Article 36(1) of Directive 2002/83 is to be interpreted as meaning that it must be held that the incorrect performance of the obligation to communicate the information referred to in point (a)(12) of Annex III(A) to that directive has the effect of rendering the group unit-linked contract invalid or ineffective *ab initio* or a declaration of accession to that contract invalid or ineffective, and thus conferring on a consumer who has acceded to that contract the right to reimbursement of the assurance premiums paid.

120 It is clear from the considerations set out in paragraphs 110 to 114 of the present judgment that Directive 2002/83 does not govern the legal consequences of non-performance or incorrect performance of the pre-contractual information disclosure obligation laid down in that directive and that it is therefore for the Member States to regulate those aspects of their law governing assurance contracts, while at the same time ensuring the effectiveness of that directive, taking account of its aims.

121 That conclusion is corroborated by the interpretation which the Court has given of other provisions which, like Article 36(1), appear in Chapter 4 of Title III of Directive 2002/83, entitled 'Contract law and conditions of assurance', in particular, Article 35(1) and Article 36(3) of that directive.

122 With regard, first of all, to the information additional to that listed in Annex III to Directive 2002/83, which Member States may require to be furnished in accordance with Article 36(6) of that directive, the Court has held that the consequences under domestic law of a failure to provide that information are, in principle, irrelevant as regards the conformity of national rules with the obligation to provide information laid down in that provision (see, by analogy, judgment of 29 April 2015, *Nationale-Nederlanden Levensverzekering Mij*, C-51/13, EU:C:2015:286, paragraph 36).

123 Second, with regard to the right of the policy holder to cancel an assurance contract, enshrined in Article 35(1) of Directive 2002/83, the Court has held, in essence, that it is for the Member States to regulate the legal effects of cancellation other than those referred to in that provision, while at the same time ensuring the effectiveness of that directive, taking account of its aims, and that it is for the national courts to ascertain whether the procedural rules laid down in domestic law are not such as to undermine the effectiveness of the right of cancellation by discouraging policy holders from exercising that right (see, to that effect, judgment of 19 December 2019, *Rust-Hackner and Others*, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraphs 100, 104 and 117, and order of 28 May 2020, *WWK Lebensversicherung auf Gegenseitigkeit*, C-803/19, not published, EU:C:2020:413, paragraphs 28 and 37).

124 That stated, it must also be noted that, as explained in paragraph 54 of the present judgment, the referring court is of the view that national law provides no basis for finding the legal relationship between an assurance undertaking and an assured person to be invalid on the basis of a possible finding of incorrect performance of the information disclosure obligation laid down by Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto,

inasmuch as national law contains no specific rules to that effect and the application of the general rules relating to the nullity of legal acts and errors vitiating consent is excluded by way of interpretation or subject to strict conditions.

125 In those circumstances, it is thus for the national court to determine whether the legal consequences which the applicable provisions of national law attach to incorrect performance of that information disclosure obligation are regulated in such a way as to ensure the effectiveness of that obligation. In doing so, the national court is required to interpret those provisions as far as possible in the light of the wording and purpose of Directive 2002/83 and, to that end, to assess in particular whether – having regard to the cardinal importance which information about the essential characteristics of the assets underlying a unit-linked contract has in enabling a consumer to make an informed choice of the insurance product which best meets his or her needs and, consequently, in the formation of his or her intention to accede to that contract – the incorrect performance of that information disclosure obligation is liable to vitiate the consumer's consent to be bound by that contract.

126 Having regard to all the foregoing considerations, the answer to the fifth question referred in Case C-213/20 is that Article 36(1) of Directive 2002/83 must be interpreted as not requiring the incorrect performance of the obligation to communicate the information referred to in point (a)(12) of Annex III(A) to that directive to be held to result in the nullity or invalidity of a group unit-linked contract or of a declaration of accession to such a contract and thus to confer on a consumer who has acceded to such a contract the right to reimbursement of the assurance premiums paid, provided that the procedural rules under national law governing the exercise of the right to rely on that information disclosure obligation are not such as to undermine the effectiveness of that right by discouraging the consumer from exercising it.

The fourth, fifth and sixth questions referred in Case C-143/20

127 By the fourth, fifth and sixth questions referred in Case C-143/20, the national court is essentially seeking to establish whether Article 7 of Directive 2005/29 is to be interpreted as meaning that the failure to communicate to a consumer acceding to a group unit-linked contract the information referred to in Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, constitutes a misleading omission within the meaning of that provision.

128 In answering those questions, it is appropriate to begin by observing that, under Article 3(1) of Directive 2005/29, that directive applies to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

129 The Court has already observed that the concept of 'commercial practices' is defined, in Article 2(d) of that directive, by means of a particularly broad formulation, the practices covered by it having to be commercial in nature, that is to say, originating from traders, and directly connected with the promotion, sale or supply of their products to consumers (see, to that effect, judgment of 25 July 2018, *Dyson*, C-632/16, EU:C:2018:599, paragraph 30 and the case-law cited). Second, the words 'directly connected with the sale of a product', appearing in Article 2(d) of that directive, cover any measure taken in relation to, inter alia, the conclusion of a contract (see, to that effect, judgment of 20 July 2017, *Gelvora*, C-357/16, EU:C:2017:573, paragraph 21). In that connection, a 'product' within the meaning of Article 2(c) of that directive refers to any goods or services, with no business sector being excluded (see, to that effect, judgment of 3 October 2013, *Zentrale zur Bekämpfung unlauteren Wettbewerbs*, C-59/12, EU:C:2013:634, paragraph 29). Third, it is clear from Article 2(b) of the same directive that a 'trader' is 'any natural or legal

person' who carries on a gainful activity, provided that the commercial practice is amongst the activities that a person provides in the course of his or her trade, business or profession (see, to that effect, judgment of 4 October 2018, *Kamenova*, C-105/17, EU:C:2018:808, paragraphs 30 and 35 and the case-law cited), including where the practice is put to use by another undertaking, acting in the name or on behalf of that person (see, to that effect, judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraph 38).

130 In the present case, in the first place, it is clear from the considerations set out in paragraphs 86 to 91 of the present judgment that the communication of the information referred to in Article 36(1) of Directive 2002/83 prior to a consumer's accession to a group unit-linked contract emanates from the assurance undertaking and the policy-holding undertaking acting as an insurance intermediary and is among the activities which those undertakings carry out in the course of their business. Second, as was pointed out in paragraphs 80 and 81 of the present judgment, that communication is directly related to the conclusion, by the consumer, of an assurance contract within the meaning of the Directive 2002/83. That communication therefore constitutes a 'commercial practice' within the meaning of Directive 2005/29.

131 Next, it must be recalled that, under Article 7(1) of Directive 2005/29, a commercial practice is to be regarded as misleading, and will therefore constitute an unfair commercial practice in accordance with Article 5(4) of that directive, if, when considered in its factual context and taking account of all its features and circumstances and the limitations of the communication medium, two conditions are met. First, the practice must omit material information that the average consumer needs, according to the context, to take an informed transactional decision. Second, the commercial practice must cause or be likely to cause the average consumer to take a transactional decision that he or she would not have taken otherwise.

132 In addition, in accordance with Article 7(2) of that directive, provided that the second condition mentioned in the preceding paragraph is met, a commercial practice is also to be regarded as a misleading omission when a trader hides such material information or provides it in an unclear, unintelligible, ambiguous or untimely manner.

133 From a combined reading of Article 7(5) of Directive 2005/29 and Annex II thereto it is clear that both the information referred to in Article 36(1) of Directive 2002/83 and the information referred to in Article 12(3) of Directive 2002/92 constitute material information for the purposes of Article 7 of Directive 2005/29.

134 In the second place, having regard to the fundamental importance which the communication of clear, accurate and comprehensible information about the essential characteristics of the assets underlying a group unit-linked contract has in enabling a consumer who intends to accede to that contract to make a properly informed choice of the insurance product which best meets his or her needs, as emphasised in paragraphs 96 to 101 of the present judgment, and given the requirement, stated in recital 10 of Directive 2005/29, to provide protection for consumers in connection with complex products with high levels of risk to consumers, such as certain financial services products, a failure to communicate that information, hiding it or providing it in an unclear, unintelligible, ambiguous or untimely manner would seem likely to cause the consumer to take a transactional decision that he or she would not have taken otherwise.

135 In those circumstances, and subject to the assessment which it is for the national court to carry out in that regard, a failure to communicate the information referred to in Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, would appear to come within the concept of 'misleading omission', within the meaning of Article 7 of Directive 2005/29.

136 Lastly, it should also be made clear that the exclusion clause in Article 3(4) of that directive is not likely to apply to the rules on pre-contractual information disclosure laid down in Article 36(1) of, and Annex III(A) to, Directive 2002/83.

137 The Court has already held that a conflict such as that envisaged in Article 3(4) of Directive 2005/29 is present only where provisions, other than those of that directive, which regulate specific aspects of unfair business practices, impose on undertakings, in such a way as to leave them no margin for discretion, obligations which are incompatible with those laid down in Directive 2005/29 (judgment of 13 September 2018, *Wind Tre and Vodafone Italia*, C-54/17 and C-55/17, EU:C:2018:710, paragraph 61).

138 As the Advocate General noted in point 132 of his Opinion, since Directive 2002/83 does not govern the consequences of non-performance or incorrect performance of the pre-contractual information disclosure obligation referred to in Article 36(1) thereof, there is no conflict between the provisions of that directive and those of Directive 2005/29, those two directives in fact being complementary (see, to that effect, judgment of 16 July 2015, *Abcur*, C-544/13 and C-545/13, EU:C:2015:481, paragraphs 78 and 82).

139 Having regard to all of the foregoing considerations, the answer to the fourth, fifth and sixth questions referred in Case C-143/20 is that Article 7 of Directive 2005/29 must be interpreted as meaning that the failure to communicate to a consumer acceding to a group unit-linked contract the information referred to in Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, is liable to constitute a misleading omission within the meaning of that provision.

Costs

140 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:

1. **Article 36(1) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance**

   must be interpreted as meaning that the information referred to in that provision must be communicated to any consumer who accedes, as an assured person, to a group unit-linked life assurance contract concluded between an assurance undertaking and an undertaking which is the policy holder. The assurance undertaking must communicate that information to the undertaking that is the policy holder, which must transmit it to the consumer before his or her accession to the contract, together with any further details which prove necessary in light of the requirements and needs of the

consumer, in accordance with that provision, read together with Article 12(3) of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation.

2. Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto,

must be interpreted as meaning that the indication of the nature of the underlying assets which must be communicated to a consumer prior to his or her accession to a group unit-linked life assurance contract must include information about the essential characteristics of those underlying assets. That information:

– must include clear, accurate and comprehensible information about the economic and legal nature of those underlying assets and about the structural risks associated with them; but

– need not necessarily include exhaustive information about the nature and extent of all of the risks associated with investment in those underlying assets, and need not necessarily include the same information that the issuer of the financial instruments comprising those underlying assets has communicated to the assurance undertaking pursuant to Article 19(3) of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.

3. Article 36(1) of Directive 2002/83

must be interpreted as meaning that the information referred to in point (a)(12) of Annex III(A) to that directive need not necessarily be communicated to a consumer who accedes, as an assured person, to a group unit-linked life assurance contract in the context of a separate pre-contractual procedure and that it does not preclude a provision of national law in accordance with which it is sufficient for that information to be mentioned in the contract, provided that the contract is given to the consumer prior to his or her accession to it, in good time, so that he or she is able to make a properly informed choice of the insurance product that best suits his or her needs.

4. Article 36(1) of Directive 2002/83

must be interpreted as not requiring the incorrect performance of the obligation to communicate the information referred to in point (a)(12) of Annex III(A) to that directive to be held to result in the nullity or invalidity of a group unit-linked life assurance contract or of a declaration of accession to such a contract and thus to confer on a consumer who has acceded to such a contract the right to reimbursement of the assurance premiums paid, provided that the procedural rules under national law governing the exercise of the right to rely on that information disclosure obligation are not such as to undermine the effectiveness of that right by discouraging the consumer from exercising it.

5. Article 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

must be interpreted as meaning that the failure to communicate to a consumer acceding to a group unit-linked life assurance contract the information referred to in Article 36(1) of Directive 2002/83, read together with point (a)(12) of Annex III(A) thereto, is liable to constitute a misleading omission within the meaning of that provision.

[Signatures]