OPINION OF ADVOCATE GENERAL JACOBS

delivered on 15 November 2001 [1]

1. In this case the Cour d'Appel (Court of Appeal), Brussels, has asked the Court whether Community law, in particular the Third Life Assurance Directive, [2] precludes national legislation which provides that a life-assurance proposal or, in the absence of a proposal, a life-assurance policy must inform a policy-holder that cancellation, reduction or surrender of an existing life-assurance contract for the purpose of subscribing to another life-assurance contract will generally be detrimental to that policy-holder.

The Community legislation

2. The Third Life Assurance Directive seeks to complete the internal market in direct life assurance to make it easier for assurance undertakings with head offices in the Community to cover commitments situated within the Community. [3]

3. The preamble to the Directive includes the following recitals:

'9. Whereas certain provisions of this Directive define minimum standards; whereas a home Member State [4] may lay down stricter rules for assurance undertakings authorised by its own competent authorities;

...

1 — Original language: English.

2 — Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC, OJ 1992 L 360, p. 1.

3 — Recital 1 in the preamble. Progress had already been made in this direction by the First and Second Life Assurance Directives (First Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance, OJ 1979 L 63, p. 1, and Council Directive 90/619/EEC of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC, OJ 1990 L 330, p. 50).

4 — Defined in Article 1(d) of the Directive as the Member State in which the head office of the assurance undertaking covering the commitment is situated.

19. Whereas the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance; whereas, 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 policyholders;

20. Whereas within the framework of an internal market it is in the policyholder's interest that he should have access to the widest possible range of assurance products available in the Community so that he can choose that which is best suited to his needs; whereas it is for the Member State of the commitment [5] to ensure that there is nothing to prevent the marketing within its territory of all the assurance products offered for sale in the Community as long as they do not conflict with the legal provisions protecting the general good in force in the Member State of the commitment and in so far as the general good is not safeguarded by the rules of the home Member State, provided that such provisions must be applied without discrimination to all undertakings operating in that Member State and be objectively necessary and in proportion to the objective pursued;

...

23. Whereas in a single assurance market the consumer will have a wider and more varied choice of contracts; whereas, if he is to profit fully from this diversity and from increased competition, he must be provided with whatever information is necessary to enable him to choose the contract best suited to his needs; whereas the information requirement is all the more important as the duration of commitments can be very long; whereas 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 as well as the particulars of the bodies to which any complaints of policyholders, assured persons or beneficiaries of contracts may be addressed'.

4. Article 31 of the Directive provides:

'1. Before the assurance contract is concluded, at least the information listed in point A of Annex II shall be communicated to the policy-holder.

5 — Defined in Article 2(e) of the Second Life Assurance Directive, cited in note 3, as the Member State where the policy-holder has his habitual residence or, if the policy-holder is a legal person, the Member State where the latter's establishment to which the contract relates is situated.

2. The policy-holder shall be kept informed throughout the term of the contract of any change concerning the information listed in point B of Annex II.

3 The Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II 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 II shall be laid down by the Member State of the commitment.'

5. Annex II is headed 'Information for policy-holders'. It is prefaced by the following statement:

'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....'

6. Point A of Annex II lists detailed information about the assurance undertaking and about the commitment, including:

'(a)4. Definition of each benefit and each option.

(a)5. Term of the contract.

(a)6. Means of terminating the contract.

(a)7. Means of payment of premiums and duration of payments.

(a)8. Means of calculation and distribution of bonuses.

(a)9. Indication of surrender and paid-up values and the extent to which they are guaranteed.

(a)10. Information on the premiums for each benefit...'.

7. Point B of Annex II states that the policy-holder must be given (1) details of any change in the information about the assurance undertaking, (2) all the information about the commitment listed in point A in the event of a change in the policy conditions or amendment of the law applicable to the contract and (3) annual information on the state of bonuses.

8. It may be helpful to explain at this point the various means of terminating a life assurance policy (or contract, in the terminology of the Directive) at issue in the present case. A policy-holder who wishes to pay no further premiums on an existing life assurance policy has a number of options. Where the policy has no surrender value he may simply cancel it by stopping paying premiums. Where however the policy has a surrender value, he may surrender it and the assurance undertaking will pay him that amount. Alternatively a policy-holder may wish to stop paying premiums or reduce their amount but keep the policy on foot, in which case the sum insured will be reduced to take account of the fact that less has been or will be paid by way of premium than originally anticipated; that is known as reduction.

The national legislation at issue

9. The national legislation at issue is Article 4(2)(b) of the Royal Decree of 17 December 1992 on activities relating to life assurance. Article 4(2)(b) of that Royal Decree provides: 'the proposal or, in the absence of a proposal, the policy must inform the policy-holder that cancellation, reduction or surrender of an existing life-assurance contract for the purpose of subscribing to another life-assurance contract is generally detrimental to the policy-holder'.

10. The referring court states in the order for reference that the Royal Decree of 17 December 1992 on life assurance was adopted in implementation of the Third Life Assurance Directive. The Commission has stated in its written observations, however, that according to information provided to it by the Belgian authorities the Directive was implemented by three royal decrees adopted in 1994. [6] In particular, Article 31 of and Annex II to the Directive were transposed verbatim by two of those later decrees. [7]

The proceedings

11. The order for reference simply states that in the main proceedings Axa Royale

6 — Royal Decree of 12 August 1994 amending the Law of 9 July 1975 on the supervision of insurance undertakings, Royal Decree of 12 August 1994 amending the Royal Decree of 22 February 1991 regulating the supervision of insurance undertakings and Royal Decree of 22 November 1994 amending the Royal Decree of 22 February 1991 regulating the supervision of insurance undertakings.

7 — In Article 20(2) of the Law of 9 July 1975 as amended and Article 15 of the Royal Decree of 22 February 1991 as amended.

Belge SA seeks (i) a declaration that, by acting contrary to the provisions of Article 4(2)(b) of the Royal Decree of 17 December 1992, Stratégie Finance Sprl has infringed national rules on fair trading [8] and (ii) an order requiring it to cease such practice. It appears that the dispute arose out of the conduct of an insurance broker who deleted from life assurance proposals the warning required by Article 4(2)(b) and thereby allegedly encouraged policy-holders to replace existing life-assurance policies previously taken out with AXA.

12. Before it rules on the application before it, the Cour d'Appel would like guidance from the Court of Justice on the question whether, in the light of the objectives of Directive 92/96/EEC, Member States may require that consumers who are contemplating cancelling, reducing or surrendering an existing life-assurance policy with a view to subscribing to another life-assurance contract be informed of the generally detrimental nature of such an action.

13. AXA has observed that the Cour d'Appel is mistaken in stating that Article 4(2)(b) of the Royal Decree applies where consumers are contemplating cancelling, reducing or surrendering an existing life assurance policy, since on its terms that article in fact applies to anyone who is proposing to take out a life assurance policy. That interpretation may well be correct, but I cannot see that it makes any difference to the referring court's analysis, since clearly the practical impact of Article 4(2)(b) will be limited to cases where the consumer is contemplating terminating an existing policy in order to replace it with a new one.

14. In its order for reference the Cour d'Appel raises the question whether Article 4(2)(b) of the Royal Decree is compatible with the Directive in so far as:

— a consumer who has been informed of the generally detrimental nature of cancellation, reduction or surrender of an existing life-assurance policy is not encouraged to compare the various assurance products available in the Community so that he can choose from among them that which best suits his needs but is encouraged rather to maintain his existing policy, whereas it follows precisely from the recitals in the preamble to the Directive that its

8 — Articles 93 and 94 of the Law of 14 July 1991 on commercial practices and the protection of and provision of information to consumers.

purpose is to offer the policy-holder access to the widest possible range of assurance products available in the Community so that he can choose that which best suits his needs, in particular by ensuring that the policy-holder receives clear and accurate information on the essential characteristics of the products proposed to him;

— the obligation to inform policy-holders of the generally detrimental nature of cancellation, reduction or surrender of an existing life assurance policy for the purpose of taking out a new policy is liable to confer a competitive advantage on assurers operating within the national territory when the Royal Decree entered into force, whereas it is clear from the recitals in the preamble to the Directive that it is for the Member State of the commitment to ensure that there is nothing to prevent the marketing within its territory of all the assurance products offered for sale in the Community; and

— the general good in informing consumers of the consequences which cancellation, reduction or surrender of an existing life assurance policy with a view to taking out a new policy may have does not appear to be adequately addressed by a mere warning as to the generally detrimental nature of such action, whereas, as the recitals in the preamble to the Directive point out, provisions in the general good must be objectively necessary and in proportion to the objective pursued.

15. The Cour d'Appel accordingly referred the question set out in paragraph 1 above.

16. Written observations have been submitted by both parties to the main proceedings, the Austrian, Belgian, Greek and Spanish Governments and the Commission. The parties and the Commission were represented at the hearing.

Compatibility of Article 4(2)(b) of the Royal Decree with the Directive

17. Essentially, AXA and the Austrian, Belgian and Greek Governments are of the view that the national legislation at issue is compatible with Community law and that the question referred should accordingly be answered in the negative. Stratégie Finance and the Commission are of the opposite view. The Spanish Government falls somewhere between those two positions, considering that the legislation is

compatible with Community law to the extent that the prescribed caveat refers to the generally detrimental consequences of cancellation or reduction but incompatible to the extent that it refers to the consequences of surrender.

18. The Commission submits that Article 4(2)(b) of the Royal Decree is in very general and abstract terms. While the requirements of the Directive apply to all possible circumstances in which a life assurance policy may be cancelled, reduced or surrendered, Article 4(2)(b) applies only where a policy-holder so acts with a view to taking out a new policy. The Commission doubts whether such a warning is sufficient to protect policy-holders, who benefit from the much greater protection afforded by the Directive. Although Member States may improve consumer information in accordance with Article 31 of the Directive, that information must not confer an advantage on existing assurers or policies. However, the information required pursuant to Article 4(2)(b) is not additional information within the meaning of Article 31, since if the policy-holder already has the specific information required by the Directive (and the Belgian implementing legislation), the simple warning required by Article 4(2)(b) does not appear to supplement that information in such a way as to facilitate the proper understanding by the policy-holder of the essential elements of the contract within the meaning of Article 31.

19. The Commission also considers that Article 4(2)(b) is incompatible with the objectives of the Directive: it may dissuade policy-holders from changing their life assurance, and hence benefiting from the range and variety of available products, by a generally worded warning which does not enable the policy-holder to evaluate the consequences of changing his policy.

20. The Austrian, Belgian, Greek and Spanish Governments all refer to recital 20 of the Directive in support of the argument that Article 4(2)(b) of the Royal Decree, being for the general good, non-discriminatory, objectively necessary and proportionate, is compatible[9] with the Directive. The Austrian Government submits that the aim of Article 4(2)(b) is consumer protection and it thus reflects one of the objectives of the Directive, namely to enable the consumer to weigh up the advantages and disadvantages of taking out a new policy and thus to choose the contract best suited to his needs;[10] the Court of Justice has accepted that consumer protection legislation may be an imperative requirement in the general interest justifying restrictions on fundamental freedoms.[11] The Belgian Government submits that the provision is objectively necessary to ensure consumer protection in the sector, where the terminology is technical and the consumer is the weaker party;

9 — In part, in the case of the Spanish Government.

10 — See recital 23.

11 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755.

moreover the mere provision of information is the least restrictive means of protecting the consumer. The Greek Government considers that the consumer informed in accordance with Article 4(2)(b) of the Royal Decree will be in a position to compare the advantages and disadvantages of terminating an existing policy. The Spanish Government similarly considers that provisions such as Article 4(2)(b) are lawful provided that they do not restrict the policy-holder's access to the widest range of life assurance products offered within the Community so that he may choose the contract which is best suited to his needs.

21. Clearly a provision of national law intended to protect consumers may be for the general good [12] and hence a national restriction on marketing life assurance products may be compatible with the Directive provided that it is also non-discriminatory and proportionate. That is expressly provided by Article 28 of the Directive, which states that the Member State of the commitment may not prevent a policy-holder from concluding a contract with an assurance undertaking authorised in accordance with the First Life Assurance Directive 'as long as that does not conflict with legal provisions protecting the general good in the Member State of the commitment'. That wording closely reflects that of recital 20 in the preamble, invoked by the Governments submitting observations, and I accordingly consider that that recital is concerned with Article 28. Moreover the scheme of the preamble supports that view: recital 18 is clearly linked to Article 27, recitals 21 and 22 to Article 29, recital 23 to Article 31 and recital 24 to Article 41.

22. The present case however in my view concerns the scope of Article 31 of the Directive rather than Article 28, since it concerns the specific type of restriction regulated by Article 31. It is common ground that Article 4(2)(b) of the Royal Decree requires that, before an assurance contract is concluded, the prospective policy-holder should be given prescribed information over and above the information required by Article 31(1) of the Directive. Article 31(1) is manifestly a minimum standards provision: Article 31(3) permits the Member State of the commitment to require assurance undertakings to furnish information beyond that prescribed by Article 31(1). However, such further information may be prescribed under that provision 'only if it is necessary for a proper understanding by the policy-holder of the essential elements of the commitment'. The starting point for an evaluation of the lawfulness of Article 4(2)(b) of the Royal Decree is thus to my mind Article 31(3) of the Directive.

12 — *Commission* v *Germany*, cited in note 11, paragraphs 30 to 33 of the judgment.

23. Whether Article 4(2)(b) of the Royal Decree is compatible with the Directive accordingly depends on whether the information which it requires to be given on life assurance proposals or policies is 'necessary for a proper understanding by the policy-holder of the essential elements of the commitment' within the meaning of Article 31(3).

24. That provision plainly suggests that only specific information directly relevant to the particular commitment may be required. A general warning as to the possibly detrimental consequences of surrendering, reducing or cancelling an existing policy with a view to replacing it cannot in my view constitute such information.

25. That interpretation is borne out by the statement in recital 23 in the preamble to the Directive, which states that '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*'. [13]

26. It is also corroborated by the explanation of the first published version of Article 31, Article 27 of the Proposal for the Third Life Assurance Directive. [14] Article 27(1), (2) and (3) are in substantially identical terms to Article 31(1), (2) and (3) of the Directive; Annex 2 to the Proposal is similarly substantially identical to Annex II to the Directive. In its Explanatory Memorandum, the Commission states:

'The list set out in Annex 2 is a minimum list which Member States may add to in respect of commitments concerning their residents, although it must be understood that the aim of the obligation to provide information is to protect the consumer through a better understanding by the policy-holder of the essential elements of his particular contract, and not to limit the choice of products available.'

27. Admittedly a warning such as that required by Article 4(2)(b) of the Royal Decree may appear to be in the interests of consumer protection. However, even if such a generalised warning is correctly regarded as genuinely protecting consumers, it concerns only one aspect of the consumer's interest. Without information on alternative possibilities, enabling the consumer to assess the advantages and disadvantages of the various options open

13 — Emphasis added.

14 — Proposal for a Third Council Directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC, COM(91) 57 of 22 March 1991, OJ 1991 C 99, p. 2.

to him, any consumer protection in fact provided by Article 4(2)(b) is manifestly incomplete. It is clear that, by regulating the information to be provided to policy-holders, the Directive not only strikes what the Community legislature regarded as the correct balance between consumer protection on the one hand and opening up the market in life assurance products on the other but also does so in terms which exclude a requirement such as that imposed by Article 4(2)(b) of the Royal Decree.

Conclusion

28. I am accordingly of the opinion that the question referred by the Cour d'Appel, Brussels, should be answered as follows:

Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC precludes national legislation which provides that a life-assurance proposal or, in the absence of a proposal, a life-assurance policy must inform a policy-holder that cancellation, reduction or surrender of an existing life-assurance contract for the purpose of subscribing to another life-assurance contract will generally be detrimental to that policy-holder.