Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

29 April 2015 *

(Reference for a preliminary ruling — Direct life assurance — Directive 92/96/EEC — Article 31(3) — Information to be provided to the policyholder — Obligation for the insurer to provide further information on costs and premiums under general unwritten rules of national law)

In Case C-51/13,

REQUEST for a preliminary ruling from the Rechtbank te Rotterdam (Netherlands), made by decision of 28 November 2012, received at the Court on 31 January 2013, in the proceedings

Nationale-Nederlanden Levensverzekering Mij NV

v

Hubertus Wilhelmus Van Leeuwen,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda, A. Rosas, E. Juhász and D. Šváby (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 19 March 2014,

after considering the observations submitted on behalf of:

— Nationale-Nederlanden Levensverzekering Mij NV, by B. Jonk-van Wijk and G. van der Wal, advocaten,

— Mr Van Leeuwen, by D. Beljon and P. Boeken, advocaten,

— the Netherlands Government, by B. Koopman and M. Bulterman, acting as Agents,

— the Czech Government, by M. Smolek, acting as Agent,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by F. Wilman and K.-P. Wojcik, acting as Agents,

* Language of the case: Dutch.

after hearing the Opinion of the Advocate General at the sitting on 12 June 2014,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 31(3) of 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 (third life assurance directive; OJ 1992 L 360, p. 1).

2 The request has been made in proceedings between Nationale Nederlanden Levensverzekering Mij NV ('NN') and Mr Van Leeuwen concerning the amount of costs and death risk cover premiums forming part of the life assurance policy taken out by Mr Van Leeuwen with NN.

Legal context

EU law

3 The third life assurance directive was repealed and replaced by Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1), which was then itself repealed and replaced, with effect from 1 November 2012, by Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and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). However, in view of the date on which the life assurance contract at issue in the main proceedings was concluded, the provisions of the third life assurance directive remain relevant for the resolution of this case.

4 Recitals 9 and 23 in the preamble to the third life assurance directive are worded as follows:

'(9) … certain provisions of this Directive define minimum standards; … a home Member State may lay down stricter rules for assurance undertakings authorised by its own competent authorities;

…

(23) … in a single assurance market the consumer will have a wider and more varied choice of contracts; … 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; … 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 as well as the particulars of the bodies to which any complaints of policyholders, assured persons or beneficiaries of contracts may be addressed;

…'

5 Article 31 of that directive provides:

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

2. The policyholder shall be kept informed throughout the term of the contract of any change concerning the information listed in Annex II(B).

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 policyholder 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.'

6 Annex II to that directive, entitled 'Information for policyholders', states:

'The following information, which is to be communicated to the policyholder 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.

However, such information may be in another language if the policyholder so requests and the law of the Member State so permits or the policyholder is free to choose the law applicable.

A. Before concluding the contract

Information about the assurance undertaking	Information about the commitment
…	(a) 4. Definition of each benefit and each option
…	(a) 5. Contract term
…	(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, both main benefits and supplementary benefits, where appropriate
…	…'

7 Annex II(B) of that directive lists the information to be provided to the policyholder during the term of the contract. That provision provided that, in addition to the policy conditions, both general and special which must be sent to him, the policyholder must receive, firstly, all the information listed in points (a) 4 to (a) 12 of Title A in the event of a change in the policy conditions or amendment of the law applicable to the contract and, secondly, every year, information on the state of bonuses.

Netherlands law

8 Article 2 of the Regulation regarding the provision of information to policyholders 1998 (Regeling informatieverstrekking aan verzekeringsnemers 1998; 'RIAV 1998') transposed into domestic law Article 31 of the third life assurance directive. In the version applicable to the facts of the main proceedings, that provision reads as follows:

'1. An insurer which proposes a life assurance contract to a policyholder residing or established in the Netherlands shall ensure that the policyholder is in possession of the policy conditions, both general and special.

2. The insurer shall ensure, in addition, in so far as it is not clear from the policy conditions, whether general or special, that the policyholder is informed in writing of the following information:

…

q. the impact of costs and deductions charged to the policyholder on the yield and benefit associated with the contract;

r. if applicable, the costs which may be charged in addition to the gross premium;

…'

9 In accordance with the grounds of RIAV 1998, its application is governed by the Law on supervision of the insurance industry 1993 (Wet toezicht verzekeringsbedrijf 1993; 'the WTV 1993') and by the national civil law in force, including the requirements of reasonableness and fairness (Article 2 of Book 6 of the Civil Code).

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

10 During 1999, Mr Van Leeuwen took out with NN assurance forming part of an investment, known as 'flexibly insured investing'. It was a life assurance policy under which the accumulated value at the end date of which is not guaranteed but depends on the results of investments. Furthermore, during the term of the assurance contract, payment of a fixed and guaranteed capital is provided for should the policyholder die before the end of the contract.

11 It follows from the information provided by NN in its written observations that, under the assurance contract, a premium, the amount of which is agreed in advance, designated as the 'gross premium' is paid in advance and periodically. That premium is invested in investment funds chosen by the policyholder. Costs are periodically deducted from the value thus determined, as are premiums for the death cover included. The latter premiums are therefore not accounted for separately, but form an integral part, like those costs, of the gross premium.

12 Before the life assurance policy was taken out, NN provided Mr Van Leeuwen with a 'flexibly insured investing proposal'. Three examples of capital amounts were set out therein, based on different yields and management costs of 0.3%. Furthermore, under the heading 'Product yield' the following is stated: 'The difference between the fund return and the product yield is dependent on the risks insured, the costs payable as well as any additional coverage'.

13 After the end of the assurance contract, a dispute arose between NN and Mr Van Leeuwen concerning the amount of the costs and premiums deducted by the insurer in respect of the death risk cover.

14 Part of the dispute in the main proceedings relates to whether NN gave sufficient information concerning those costs and the risk premiums before the assurance contract was taken out. In particular, the fact that Mr Van Leeuwen was not sent a summary or full overview of the actual and/or absolute costs and their composition is in dispute.

15 According to the referring court, there are grounds for considering that, by providing the policyholder with only information on the impact of costs and risk premiums on the yield, NN met the requirements referred to in Article 2(2)(q) and (r) of RIAV 1998, but infringed the 'open and/or unwritten rules' of Netherlands law which include, in this case, the duty of care of the insurance company, pre-contractual good faith and requirements of reasonableness and fairness.

16 The referring court notes that the information referred to in paragraph 14 of the present judgment do not include those set out in Annex II to the third life assurance directive. NN is, however, of the opinion that EU law, in particular Article 31(3) of that directive, prohibits requiring insurance companies to send policyholders information covered by those 'open and/or unwritten rules'.

17 It was in those circumstances that the Rechtbank Rotterdam decided to stay the proceedings and to refer to the Court the following questions for a preliminary ruling:

'(1) Does EU law, and in particular Article 31(3) of the third life assurance directive, preclude an obligation on the part of a life assurance provider on the basis of the "open and/or unwritten rules" of Netherlands law — such as the reasonableness and fairness which govern the (pre-)contractual relationship between a life assurance provider and a prospective policyholder, and/or a general and/or specific duty of care — to provide policyholders with more information on costs and risk premiums of the insurance than was prescribed in 1999 by the provisions of Netherlands law by which the third life assurance directive was implemented (in particular, Article 2(2)(q) and (r) of the RIAV 1998)?

(2) Are the consequences, or possible consequences, under Netherlands law, of a failure to provide that information relevant for the purposes of answering question 1?'

Consideration of the questions referred

The first question

18 By its first question the referring court asks, in essence, whether Article 31(3) of the third life assurance directive is to be interpreted as precluding an insurance company, on the basis of general principles of domestic law such as the 'open and/or unwritten rules' at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive.

19 It is apparent from recital 23 in the preamble to the third life assurance directive that the latter seeks, inter alia, to coordinate the minimum provisions in order for the consumer to receive clear and accurate information on the essential characteristics of assurance products proposed to him. As is pointed out in the same recital, if he is to profit fully from the greater choice and diversity in the single market for assurance, and from increased competition, the consumer must be provided with whatever information is necessary to enable him to choose the contract which best meets his requirements.

20 Article 31(1) of the directive provides to that end that at least the information listed in point A of Annex II must be communicated to the policyholder before the conclusion of the assurance contract and Article 31(2) thereof provides that the policyholder must be kept informed throughout the term

of the contract of any change concerning the information listed in point B of that annex. Article 31(3) of the third life assurance directive, the only provision referred to in the request for a preliminary ruling, provides that the Member State of the commitment may require assurance undertakings to furnish information in addition to that listed in Annex II thereto only if it is necessary for a proper understanding by the policyholder of the essential elements of the commitment which he is making.

21 In that regard, the Court has held that it is apparent from the express wording of Article 31(3), Annex II and recital 23 in the preamble to the third life assurance directive that the additional information Member States may require in accordance with that article must be clear, accurate and necessary for a proper understanding of the essential characteristics of assurance products proposed to the policyholder (judgment in *Axa Royale Belge*, C-386/00, EU:C:2002:136, paragraph 24).

22 An obligation to provide additional information can therefore be imposed only where it is necessary to achieving the objective of informing the policyholder and where the information required is clear and accurate in order to achieve that objective and thus, in particular, in order to guarantee the insurance companies a sufficient level of legal certainty (see, to that effect, judgment in *Parliament* v *Council*, C-48/14, EU:C:2015:91, paragraph 45 and the case-law cited). As the Advocate General noted in point 60 of her Opinion, if information is general and vague, it will not be 'information that is necessary' for the purposes described in Article 31(3) of the third life assurance directive.

23 Although the EU legislature thus sought to restrict the type of additional information which, in the interest of consumers, Member States may require from insurance companies in order to enable them to profit fully from the choice of insurance products proposed in the single insurance market, Article 31(3) of that directive, however, has neither prescribed nor limited the manner in which the Member States may exercise that right.

24 In that regard, it must be borne in mind that the Member States are not bound to require insurance companies to provide information additional to that which is to be provided to policyholders under Article 31(1) of the third life assurance directive, set out in Annex II(A) thereto, but that Article 31(3) gives the Member States the choice of doing so or not.

25 In addition, it is apparent from Article 31(4) of the third life assurance directive that the detailed rules for implementing the obligation to provide additional information provided for in national legislation are to be laid down by the Member State of the commitment.

26 Although the third life assurance directive provides for the minimum of harmonisation as regards the information to be provided to policyholders, Article 31(3) of the directive nevertheless delimits the possibility set out in paragraph 24 of this judgment by stating, firstly, that that information must enable the policyholder to understand the essential elements of the commitment. Secondly, that provision restricts the additional information which may be required from insurance companies by the Member State of commitment to what is necessary to achieve that end.

27 Accordingly, it is for the Member State concerned to determine, on the basis of the characteristics of its legal order and the specific features of the situation which it seeks to regulate, the legal basis of the obligation to provide additional information in order to ensure both effective understanding by the policyholder of the essential elements of the insurance products proposed to him and a sufficient level of legal certainty.

28 The legal basis of such an obligation to provide additional information and particularly whether that obligation follows from general principles of domestic law such as the 'open and/or unwritten rules', to which the referring court refers, is, in principle, irrelevant as regards its conformity with the directive, provided that that obligation meets the requirements of Article 31(3) of the third life assurance directive referred to in paragraphs 21 and 27 of the present judgment.

29 It follows therefrom that the legal basis for the use by the Member State concerned of the possibility provided for in Article 31(3) of the third life assurance directive must be such that, in accordance with the principle of legal certainty, it enables insurance companies to identify with sufficient foreseeability what additional information they must provide and which the policyholder may expect.

30 In that regard, when assessing the requirements to be laid down as regards the foreseeability of such an obligation to provide additional information, the national court may take into consideration the fact that it is for the insurance company to determine the type and characteristics of the insurance products which it offers, so that, in principle, it should be able to identify the characteristics which its products offer and which are likely to justify a need to provide additional information to policyholders.

31 In the present case, it must be noted that, in accordance with the description of the grounds of RIAV 1998, its application is governed, in particular, by the national civil law in force, 'including the requirements of reasonableness and fairness' set out in Article 2 of Book 6 of the Civil Code.

32 None the less, the referring court has not provided the Court with a detailed explanation as to the exact nature, in Netherlands law, of the obligation to provide additional information nor as to the exact role played and scope, in national law, of the 'open and/or unwritten rules' of Netherlands law, merely referring to the duty of care of the insurance company, pre-contractual good faith and/or the requirements of reasonableness and fairness which must preside over the conclusion of assurance contracts.

33 In any event, it is for the referring court to assess whether the 'open and/or unwritten rules' at issue in the main proceedings meet the requirements of Article 31(3) of the third life assurance directive.

34 Consequently, the answer to the first question is that Article 31(3) of the third life assurance directive must be interpreted as not precluding an insurance company, on the basis of general principles of domestic law such as the 'open and/or unwritten rules' at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive, provided that the information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment and that it ensures a sufficient level of legal certainty, which it is for the referring court to ascertain.

The second question

35 By its second question, the referring court asks whether the consequences, under Netherlands law, of a failure to provide additional information for the purposes of Article 31(3) of the third life assurance directive are relevant for the purposes of answering the first question.

36 It follows from the answer to the first question that the consequences under domestic law of a failure to provide that information are, in principle, irrelevant as regards the conformity of the obligation to provide information with Article 31(3) of the directive.

Costs

37 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **Article 31(3) of 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 (third life assurance directive) must be interpreted as not precluding an insurance company, on the basis of general principles of domestic law such as the 'open and/or unwritten rules' at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive, provided that the information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment and that it ensures a sufficient level of legal certainty, which it is for the referring court to ascertain.**

2. **The consequences under domestic law of a failure to provide that information are, in principle, irrelevant as regards the conformity of the obligation to provide information with Article 31(3) of Directive 92/96.**

[Signatures]