JUDGMENT OF THE COURT (Second Chamber)

10 September 2009*

In Case C-199/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 23 April 2008, received at the Court on 15 May 2008, in the proceedings

Erhard Eschig

v

UNIQA Sachversicherung AG,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot, J. Makarczyk, P. Kūris and C. Toader (Rapporteur), Judges,

* Language of the case: German.

Advocate General: V. Trstenjak,
Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 11 March 2009,

after considering the observations submitted on behalf of:

— Mr Eschig, by E. Salpius, Rechtsanwalt,

— UNIQA Sachversicherung AG, by M. Paar, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer and J. Bauer, acting as Agents,

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

— the Commission of the European Communities, by N. Yerrell and G. Braun, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 14 May 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 4(1) of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance (OJ 1987 L 185, p. 77).

2 The reference was made in the course of proceedings between Dr Eschig and the insurance company UNIQA Sachversicherung AG ('UNIQA') concerning the cover of certain lawyers' fees and the validity of a clause included in the general conditions applicable to legal expenses insurance that entitles the insurer, where the interests of several insured persons are directed against the same opponents and are based on the same or a similar cause, to limit its performance to the bringing of test cases or, where appropriate, to collective redress or other ways of asserting legal interests by legal representatives selected by it.

Legal context

Community legislation

3 The 11th and 12th recitals in the preamble to Directive 87/344 are worded as follows:

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

Whereas Member States should be given the option of exempting undertakings from the obligation to give the insured person this free choice of lawyer if the legal expenses insurance is limited to cases arising from the use of road vehicles on their territory and if other restrictive conditions are met.'

4 Article 3 of Directive 87/344 provides:

'(1) Legal expenses cover shall be the subject of a contract separate from that drawn up for the other classes of insurance or shall be dealt with in a separate section of a single policy in which the nature of the legal expenses cover and, should the Member State so request, the amount of the relevant premium are specified.

(2) Each Member State shall take the necessary measures to ensure that the undertakings established within its territory adopt, in accordance with the option imposed by the Member State, or at their own choice, if the Member State so agrees, at least one of the following solutions, which are alternatives:

(a) the undertaking shall ensure that no member of the staff who is concerned with the management of legal expenses claims or with legal advice in respect thereof carries on at the same time a similar activity:

— if the undertaking is a composite one, for another class transacted by it,

— irrespective of whether the undertaking is a composite or a specialised one, in another having financial, commercial or administrative links with the first undertaking and carrying on one or more of the other classes of insurance set out in Directive 73/239/EEC;

(b) the undertaking shall entrust the management of claims in respect of legal expenses insurance to an undertaking having separate legal personality. That undertaking shall be mentioned in the separate contract or separate section referred to in paragraph 1. If the undertaking having separate legal personality has links with an undertaking which carries on one or more of the other classes of insurance referred to in point A of the Annex to Directive 73/239, members of the staff of the undertaking who are concerned with the processing of claims or with legal advice connected with such processing may not pursue the same or a similar activity in the other undertaking at the same time. In addition, Member States may impose the same requirements on the members of the management body;

(c) the undertaking shall, in the contract, afford the insured person the right to entrust the defence of his interests, from the moment that he has the right to claim from his

insurer under the policy, to a lawyer of his choice or, to the extent that national law so permits, any other appropriately qualified person.

(3) Whichever solution is adopted, the interest of persons having legal expenses cover shall be regarded as safeguarded in an equivalent manner under this Directive.'

5 Article 4 of Directive 87/344 is worded as follows:

'(1) Any contract of legal expenses insurance shall expressly recognise that:

(a) where recourse is had to a lawyer or other person appropriately qualified according to national law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings, that insured person shall be free to choose such lawyer or other person;

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

(2) Lawyer means any person entitled to pursue his professional activities under one of the denominations laid down in Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services.'

6 Article 5 of Directive 87/344 provides:

'(1) Each Member State may provide exemption from the application of Article 4(1) for legal expenses insurance if all the following conditions are fulfilled:

(a) the insurance is limited to cases arising from the use of road vehicles in the territory of the Member State concerned;

(b) the insurance is connected to a contract to provide assistance in the event of accident or breakdown involving a road vehicle;

(c) neither the legal expenses insurer nor the assistance insurer carries out any class of liability insurance;

(d) measures are taken so that the legal counsel and representation of each of the parties to a dispute is effected by completely independent lawyers when these parties are insured for legal expenses by the same insurer.

(2) The exemption granted by a Member State to an undertaking pursuant to paragraph 1 shall not affect the application of Article 3(2).'

7 Article 6 of Directive 87/344 provides:

‘Member States shall adopt all appropriate measures to ensure that, without prejudice to any right of appeal to a judicial body which might be provided for by national law, an arbitration or other procedure offering comparable guarantees of objectivity is provided for whereby, in the event of a difference of opinion between a legal expenses insurer and his insured, a decision can be taken on the attitude to be adopted in order to settle the dispute.

The insurance contract must mention the right of the insured person to have recourse to such a procedure.’

8 Article 7 of Directive 87/344 is worded as follows:

‘Whenever a conflict of interests arises or these is disagreement over the settlement of the dispute, the legal expenses insurer or, where appropriate, the claims settlement office shall inform the person insured of:

— the right referred to in Article 4,

— the possibility of having recourse to the procedure referred to in Article 6.’

National legislation

9 The right of insured persons to choose their own lawyer is laid down in Paragraph 158k of the Austrian Law of 2 December 1958, as amended by the Versicherungsvertragsgesetz (Law on insurance contracts) ('the VersVG'), adopted in order to transpose Article 4 of Directive 87/344.

10 Paragraph 158k of the VersVG provides:

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

(2) It may be stipulated in the insurance contract that the insured person may select to represent him in judicial or administrative proceedings only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted. Where in such place at least four such persons do not have chambers the right to choose must extend to persons in the district of the court of first instance in which the authority concerned is situated.

(3) The right conferred on the insured person under the first sentence of subparagraph 1 must be mentioned if the insured person requests the attendance of a legal representative in judicial or administrative proceedings; attention is to be drawn to the aforementioned right on the occurrence of a conflict of interests. If the insurer has instructed another undertaking in connection with the settlement of losses, the duty to provide such information passes to that undertaking.'

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

11 Mr Eschig, an Austrian national, took out legal expenses insurance with UNIQA, to which the Allgemeine Bedingungen für die Rechtsschutz Versicherung (general conditions applicable to legal expenses insurance) ('the ARB 1995') were expressed to apply.

12 Article 6.7.3 of the ARB 1995 provides:

'Where several insured persons enjoy insurance cover under one or more contracts of insurance in order to assert their legal interests and where their interests are directed against the same opposing party or parties, on the basis of the same or a similar cause, the insurer is entitled initially, in the performance of its contractual bargain, merely to assert the legal interests of the insured persons extra-judicially and to have test cases brought as necessary by legal representatives selected by it.

If or as soon as the insured persons are not adequately protected by those measures against a loss of their claims, in particular as a result of an impending time-bar, the insurer shall in addition be liable for the costs of class actions or other ways of asserting legal interests by means of joint extra-judicial and judicial action taken by legal representatives selected by it.'

13 Mr Eschig, together with several thousand other investors, some of whom had taken out legal expenses insurance with UNIQA, invested money with the investment undertakings AMIS Financial Consulting AG and AMIS Asset Management Services AS, which subsequently became insolvent.

14 Mr Eschig therefore instructed the law firm Salpius Rechtsanwalts GmbH to represent him in several proceedings including bankruptcy proceedings against those companies, criminal proceedings against their executive organs, and proceedings against the Republic of Austria for failures in the supervision of the financial markets.

15 Mr Eschig sought from UNIQA an assurance that it would cover legal expenses for action already taken by lawyers chosen by him and for action to be taken by those lawyers in the future.

16 UNIQA refused the request, relying on the provisions of Article 6.7.3 of the ARB 1995.

17 Mr Eschig brought an action before the Landesgericht Salzburg for a declaration, first, that UNIQA was liable to bear the expenses incurred as a result of his lawyers' activity in the past and future proceedings and, secondly, that Article 6.7.3 of the ARB 1995 was invalid and thus did not form part of the legal expenses insurance policy.

18 That court dismissed the action, noting that Article 6.7.3 of the ARB 1995 did not infringe paragraph 158k of the VersVG interpreted in the light of Article 4(1) of Directive 87/344 but, rather, supplemented it and provided a solution to cases of collective loss.

19 Mr Eschig lodged an appeal against that decision, which was rejected by the Oberlandesgericht Linz. The appeal court noted, in particular, that the restriction under Article 6.7.3 of the ARB 1995 complied with Directive 87/344.

20 Hearing an appeal on a point of law against that decision, the Oberster Gerichtshof raises the question of the interpretation of Article 4 of Directive 87/344.

21 On the one hand, the referring court notes that the literal interpretation of Article 4 of that directive and the fact that Article 5 thereof provides for a single derogation from the principle of free choice of a representative support Mr Eschig.

22 On the other hand, according to that court, a teleological interpretation of Article 4 indicates several reasons why the insurer should be enabled to select a legal representative on behalf of the insured persons where a large number of them suffer loss as a result of the same event.

23 Thus, as the cost of a collective action is considerably lower than of a multitude of individual actions, there would be a risk that insurance undertakings would agree to cover collective losses only on condition that they could themselves select the legal representative of all the insured persons.

24 Furthermore, Article 6.7.3 of the ARB 1995 supports the principle of free choice of a representative laid down in Directive 87/344.

25 The referring court also questions the appropriate criteria for defining the concept of collective loss. According to it, a clause which enables the insurer to select the legal representative as soon as several insured persons are affected would seem to be incompatible with the aims and requirements of Directive 87/344.

26 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 4(1) of Council Directive 87/344 … to be interpreted to the effect that it precludes a clause, contained in the standard terms and conditions of insurance of a legal expenses insurer, which entitles the insurer, in respect of insurance claims concerning losses suffered by a large number of insured persons as a result of the same event (for example the insolvency of an investment services undertaking), to select a legal representative and which thereby restricts the right of the individual insured person to choose his own lawyer (so-called "mass torts clause")?

2. If the first question is answered in the negative: What are the requirements for the existence of a "mass tort" which, in accordance with (or as a complement to) Directive 87/344 …, confers on the insurer instead of the insured person the right to select the legal representative?'

The questions referred for a preliminary ruling

The first question

27 By its first question, the referring court asks, in essence, whether Article 4(1)(a) of Directive 87/344 is to be interpreted as entitling the legal expenses insurer to reserve the right, where a large number of insured persons suffer losses as a result of the same event, itself to select the legal representative of all the insured persons concerned.

Observations submitted to the Court

28 Mr Eschig and the Austrian and Czech Governments are of the view that Article 4(1)(a) of that directive should be interpreted as precluding a national provision according to which the insurer may reserve the right to select the representative where several insured persons suffer loss as a result of the same event.

29 Article 4(1)(a) of that directive is of general application and provides for a special guarantee in favour of persons with legal expenses insurance, without connection with the prevention or removal of conflicts of interest. Therefore, a teleological limitation, or one based on the financial interests of the insurers, such as that at issue in the main proceedings, is inadmissible.

30 UNIQA and the Commission take the contrary view.

31 They are of the opinion, in essence, that Article 4(1)(a) of Directive 87/344 does not grant the person with legal expenses insurance an independent right to freely choose his representative. Therefore, that right is liable to be subject to limitations, in particular where a large number of insured persons suffer loss as a result of the same event. They base their argument on the aim and context of Directive 87/344 and on the reading of Article 4(1)(a) in conjunction with Articles 3(2) and 5 of that directive, in the light of the recitals in the preamble thereto.

32 Therefore, UNIQA and the Commission contend that Directive 87/344 aims essentially to avoid or remove conflicts of interest between persons with legal expenses insurance and insurers and, accordingly, it offers the Member States the choice between three possibilities. The latter could opt for a system of compulsory specialisation, referred to in the eighth recital in the preamble to Directive 87/344, adapt the contracts in

accordance with Article 3(1) of Directive 87/344 or apply one of the solutions provided for in Article 3(2) of that directive.

33 The right to freely choose a legal representative provided for in Article 4(1)(a) of Directive 87/344 applies only to the situation provided for in Article 3(2)(c) of that directive.

34 According to the Commission, if Article 4(1)(a) of that directive applied to all the solutions provided for in Article 3(2) thereof, the first two would be irrelevant and reduced to mere supplementary provisions, because the solution laid down in Article 3(2)(c) would still be achieved.

35 UNIQA also bases its argument on the wording of the 11th recital in the preamble to Directive 87/344, which recognises the right to freely choose one's representative every time there is a conflict of interests. It should, consequently, be concluded that, in the absence of a conflict of interests, there is no right to freely choose one's representative.

36 UNIQA further argues that, during 1987, the year in which Directive 87/344 was adopted, attention was focused only on individual accidents and on the protection of those who were victims thereof, with the result that group claims are not covered by that directive.

37 Furthermore, the derogation provided for in Article 5 of Directive 87/344 provides proof that the derogations to the free choice of a representative are possible and legal. According to UNIQA, that article does not constitute an absolute, but rather a simple, exemption. It is of the view therefore that the failure to take group claims into

consideration requires, in the interests of persons having legal expenses insurance, that an interpretation by analogy of Article 5 of that directive be made.

Answer of the Court

38 It should be recalled, at the outset, that according to the settled case-law of the Court, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (see Case 292/82 *Merck* [1983] ECR 3781, paragraph 12; Case 337/82 *St Nikolaus Brennerei und Likörfabrik* [1984] ECR 1051, paragraph 10; Case C-223/98 *Adidas* [1999] ECR I-7081, paragraph 23; Case C-191/99 *Kvaerner* [2001] ECR I-4447, paragraph 30; and Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 41).

39 In that regard, it should be pointed out that it follows from the preamble to Directive 87/344 that that directive seeks, first, to encourage the freedom of establishment of insurance undertakings by the removal of barriers resulting from national legislation prohibiting the combination of legal expenses insurance with other types of insurance and, secondly, to protect the interests of insured persons in particular by removing as far as possible potential conflicts of interest and by making the solution of disputes between insurers and insured persons possible.

40 Accordingly, that directive creates, first, organisational and contractual measures and, secondly, a certain number of specific guarantees in favour of insured persons.

41 As regards the organisational and contractual measures, Article 3(2) of Directive 87/344 gives insurers the possibility to employ separate staff within the same undertaking to

manage claims or to subcontract the management of the claims to a legally separate undertaking. Furthermore, Article 3(2)(c) of that directive allows conflicts of interests to be avoided by granting the insured person the freedom to choose his representative as soon as an insured claim is made.

42 Under Article 3(3) of Directive 87/344, each of those solutions is regarded as guaranteeing in an equivalent manner the interest of persons having legal expenses insurance. It is for every Member State to ensure that the insurance undertakings established in its territory adopt at least one of those alternative solutions. The Member State may either impose one of those solutions or leave the undertakings free to choose amongst several alternative solutions.

43 Moreover, Article 3(1) of Directive 87/344 provides that the legal expenses insurance must be covered by a separate contract from that created for the other types of insurance or by a separate chapter of a special policy with an indication of the contents of the insurance. The Member States can oblige the insurers also to mention the premium for the legal expenses insurance.

44 As regards specific guarantees, that directive gives insured persons the right freely to choose a representative in the procedures referred to in Article 4(1)(a) or, in accordance with Article 4(1)(b), where a conflict of interests arises.

45 As is apparent from the entirety of Articles 4, 6 and 7 of Directive 87/344, the rights of insured persons recognised by those articles seek to broadly protect the interests of the insured person without being restricted to situations in which a conflict of interests arises.

46 It should also be noted that it follows from the wording of Articles 3, 4 and 5 of Directive 87/344 and from the context of that directive that the right to freely choose a representative is granted to every insured person in a general and independent way, within the limits set by each of those articles.

47 Therefore, it should be noted, first of all, that Article 4(1) of Directive 87/344 recognises the right of the insured person to choose his representative but, other than in cases where a conflict of interests arises, restricts that right to inquiries and proceedings. The use of the adjective 'any' as well as the tense of the verb 'to recognise' demonstrate the general application and obligatory nature of that rule.

48 It should be noted, secondly, that that provision lays down the minimum level of freedom which must be granted to the insured person whatever the option provided for in Article 3(2) of that directive with which the insurance undertaking complies.

49 In that regard, it should be noted that the measures provided for in Article 3(2)(a) and (b) of Directive 87/344 retain their scope of application even where an independent right on the part of the person with legal expenses insurance to freely choose his representative is inferred from Article 4(1)(a) of that directive.

50 The solution provided for in Article 3(2)(c) of Directive 87/344 grants more extensive rights to insured persons than Article 4(1)(a) of that directive. Thus, the latter provision provides for the right to freely choose a representative only where an inquiry or proceedings are initiated. By contrast, according to the solution provided for in Article 3(2)(c) of that directive, the insured person has the right to entrust the defence of his interests to a representative from the moment that he has the right to claim from his insurer under the insurance policy, therefore prior to any legal or administrative procedure.

51 Furthermore, the interpretation proposed by UNIQA and the Commission would have the result of eradicating the scope of application of Article 4(1)(a) of Directive 87/344. Where the option provided for in Article 3(2)(c) of that directive is exercised, the right to freely choose a representative would exist even prior to any inquiry or proceedings. If Article 4(1)(a) of that directive applied only if that first proposal were actually adopted, Article 4(1)(a) of Directive 87/344 would lose its normative substance.

52 In addition, the 11th recital in the preamble to Directive 87/344 confirms that the right to freely choose a representative in the context of an inquiry or proceedings is not connected to the occurrence of a conflict of interests.

53 In that regard, it is true that the words 'und zwar immer' in the German-language version of that recital in the preamble to Directive 87/344 could be interpreted as tying the right to freely choose a representative to the occurrence of a conflict of interests. However, such an interpretation cannot be relied upon in support of a restrictive reading of Article 4(1)(a) of that directive.

54 First, it is settled case-law that the need for a uniform interpretation of Community directives makes it impossible for the text of a provision to be considered, in case of doubt, in isolation; on the contrary, it requires that it be interpreted and applied in the light of the versions existing in the other official languages (see, to that effect, Case C-296/95 *EMU Tabac and Others* [1998] ECR I-1605, paragraph 36; Case C-321/96 *Mecklenburg* [1998] ECR I-3809, paragraph 29; and Case C-498/03 *Kingscrest Associates and Montecello* [2005] ECR I-4427, paragraph 26).

55 As noted by the Advocate General in point 71 of her Opinion, it is apparent from the comparison of those different language versions that the right to freely choose a representative in the context of any inquiry or proceedings is recognised independently of the occurrence of a conflict of interests.

56 Secondly, as the Commission has pointed out, if the words 'und zwar immer' were interpreted in the way suggested by UNIQA, the provisions of Article 4(1)(a) of Directive 87/344 would be denied of substance, as their normative substance has already been reproduced in Article 4(1)(b) thereof.

57 Thirdly, as the Advocate General noted in point 73 of her Opinion, there are no indications either in the original Commission proposal for a directive or in other documents in the Community legislative procedure that Article 4(1)(a) of Directive 87/344 was intended merely to create a further mechanism for the avoidance of a conflict of interests and not an independent right to choose one's legal representative.

58 On the contrary, the drafting history of that directive supports the conclusion that the original objective of guaranteeing the freedom to choose one's legal representative in all legal expenses insurance contracts, which is not dependent on the occurrence of a conflict of interests, has been maintained, although restricted to legal and administrative procedures.

59 It should be noted, fourthly, that, whilst Article 5 of Directive 87/344 authorises the Member States to provide exemption from the application of Article 4(1) of that directive to certain cases arising from the use of road vehicles, that exception to the right to freely choose one's representative must be interpreted restrictively and cannot therefore serve as a basis for reasoning by analogy.

60 It is, furthermore, common ground that the Community legislature did not provide for a derogation in cases where a large number of insured persons suffer loss as a result of the same event.

61 UNIQA and the Commission contend, in that regard, that, at the time Directive 87/344 was adopted, the concept of group claims was still unknown. Consequently, they argue, the right to freely choose one's representative under Article 4(1)(a) of that directive cannot be applied to group claims.

62 Those arguments cannot be accepted.

63 First, the fact that events affect a large number of persons in the same way is not new. As Dr Eschig pointed out, several cases had been recorded prior to the adoption of Directive 87/344.

64 Secondly, even supposing that new situations, at Member State level, were to lead to an increase in the number of actions seeking to protect the collective interests of members of a group of persons, such situations cannot, as Community law currently stands, restrict the freedom of persons with legal expenses insurance to either participate or not in such an action and to choose, where appropriate, a legal representative.

65 It is useful to point out, finally, that Directive 87/344 does not seek to completely harmonise the Member States' legal expenses insurance contracts and that, as Community law currently stands, those States remain free to determine the body of rules applicable to those contracts.

66 However, the Member States must exercise their powers in this field in compliance with Community law and, in particular, with Article 4 of Directive 87/344.

67 Furthermore, it should be noted that it is for the national court to interpret the provisions of the VersVG, as far as possible in the light of the wording and the purpose of Directive 87/344, taking into account the interpretation given above of Article 4(1) thereof, in order to achieve the result sought by that directive and, consequently, comply with the third paragraph of Article 249 EC (see, to that effect, inter alia, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 113).

68 Consequently, the answer to the first question is that Article 4(1)(a) must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned.

The second question

69 In the light of the answer given to the first question, there is no need to answer the second question.

Costs

70 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 (Second Chamber) hereby rules:

1. **Article 4(1)(a) of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons concerned.**

[Signatures]