



**REPORT FOR THE HEARING**  
in Case E-21/16

REQUEST to the Court pursuant to Article 34 of the Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice by the Princely Court of Appeal (*Fürstliches Obergericht*), in a case pending before it between

**Pascal Nobile**

and

**DAS Rechtsschutz-Versicherungs AG**

concerning the interpretation of Article 201(1)(a) 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).

**I Introduction**

1. By a letter of 20 December 2016, registered at the Court on the same date, the Princely Court of Appeal (*Fürstliches Obergericht*) made a request for an advisory opinion in a case pending before it between Mr Pascal Nobile (“the appellant”) and DAS Rechtsschutz-Versicherungs AG (“DAS” or “the respondent”).

2. The case before the referring court concerns the scope of DAS’s obligation under a legal expenses insurance entered into with Mr Nobile. Under the terms of the insurance, the insurer is released from its obligation under the insurance if the insured person mandates an attorney to represent his interests without first obtaining the consent of the insurer. The referring court wishes to know whether such a contractual agreement is compatible with Article 201(1)(a) 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) (“the Directive”).

## II Legal background

### *EEA law*

3. The Directive was incorporated in the Agreement on the European Economic Area (“the EEA Agreement” or “EEA”) by Joint Committee Decision No 78/2011 of 1 July 2011 (OJ 2011 L 262, p. 45), which added it as point 1 of Annex IX (Financial services). The Directive repeals several directives previously included in Annex IX to the EEA Agreement. The date of repeal, originally set to 1 November 2012, was postponed twice. Most recently, Directive 2013/58/EU (OJ 2013 L 341, p. 1), which was incorporated to the EEA Agreement by Joint Committee Decision No 128/2014 of 27 June 2014 (OJ 2014 L 342, p. 27), set the date of repeal to 1 January 2016. Consequently, 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) was repealed with effect from 1 January 2016. The facts of the present case took place prior to 1 January 2016. However, the relevant provisions of Directive 87/344/EEC and Directive 2009/138/EC are in substance identical.

4. Recitals 82 and 83 in the preamble to the Directive read:

*(82) In the interest of the protection of insured persons, national law concerning legal expenses insurance should be harmonised. Any conflicts of interest arising, in particular, from the fact that the insurance undertaking is covering another person or is covering a person in respect of both legal expenses and any other class of insurance should be precluded as far as possible or resolved. To that end, a suitable level of protection of policy holders can be achieved by different means. Whichever solution is adopted, the interest of persons having legal expenses cover should be protected by equivalent safeguards.*

*(83) Conflicts between insured persons and insurance undertakings covering legal expenses should be settled in the fairest and speediest manner possible. It is therefore appropriate that Member States provide for an arbitration procedure or a procedure offering comparable guarantees.*

5. Title II, Chapter II, Section 4 of the Directive contains provisions on legal expenses insurance. Its scope is defined in Article 198. Paragraph 1 of that provision reads:

*1. This Section shall apply to legal expenses insurance referred to in class 17 in Part A of Annex I whereby an insurance undertaking promises, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with a view to the following:*

- (a) *securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of court or through civil or criminal proceedings;*
- (b) *defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against that person.*

6. Article 200(1) of the Directive obliges the EEA States to ensure that insurance undertakings adopt at least one of three methods for the management of claims as set out in paragraphs 2, 3 and 4 of that provision. The option provided for in Article 200(4) reads:

*The contract shall provide that the insured persons may instruct a lawyer of their choice or, to the extent that national law so permits, any other appropriately qualified person, from the moment that those insured persons have a claim under that contract.*

7. Article 201 of the Directive reads:

*Free choice of lawyer*

1. *Any contract of legal expenses insurance shall expressly provide 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 persons shall be free to choose a lawyer or, where they so prefer and to the extent that national law so permits, any other appropriately qualified person, to serve their interests whenever a conflict of interests arises.*

2. *For the purposes of this Section '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.*

8. Article 203 of the Directive reads:

*Arbitration*

*Member States shall, for the settlement of any dispute between the legal expenses insurance undertaking and the insured and without prejudice to any right of appeal to a judicial body which might be provided for by national law, provide for arbitration or other procedures offering comparable guarantees of objectivity.*

*The insurance contract shall provide for the right of the insured person to have recourse to such procedures.*

### *National law*

9. Article 201 of the Directive is implemented in Liechtenstein law by Article 60 of the Insurance Contracts Act (*Versicherungsvertragsgesetz*, LR 215.229.1), which reads:

*Any contract of legal expenses insurance shall expressly provide that:*

*(a) Where recourse is had to a lawyer or other person appropriately qualified 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 any other appropriately qualified person, to serve his interests whenever a conflict of interests arises.*

### **III Facts and procedure**

10. The respondent, DAS, is a public limited liability company under Swiss law. It entered into a contract for legal expenses insurance with the appellant, Mr Nobile. The contract is subject to the general terms and conditions of insurance of DAS. Under those terms and conditions, DAS grants insurance cover for legal expenses *inter alia* in tenancy disputes with landlords.

11. Article 18 of the terms and conditions obliges the insured person immediately to inform DAS of any legal case that could give rise to its involvement under the insurance contract.

12. Article 19 of the terms and conditions is headed “Conduct of the case” and reads:

*1. The DAS legal service shall advise the insured person as to his rights, and safeguard his interests. The insured person shall provide DAS with all requisite authorisations.*

*2. The insured person shall leave the conduct of the case exclusively to DAS. Without prior consent of DAS, the insured person shall not instruct any attorneys, experts, etc., nor shall he commence proceedings, take any legal steps, or agree to any settlements. The insured person shall not enter into any fee agreement with the instructed attorney.*

...

4. *In the event that there is a conflict of interests (representation of different insured persons with opposing interests) or where, in view of any inquiry or proceedings, it becomes necessary to instruct an external lawyer (Anwaltsmonopol), the insured person shall be free to choose a legal representative with the requisite qualifications, resident in the district of the court. In the event that DAS rejects the suggested attorney, the insured person shall nominate three other attorneys from different law firms, and resident in the district of the court, from whom DAS shall select one. No reason needs to be given for rejecting an attorney.*

...

13. Article 22 of the terms and conditions reads:

*Any culpable breach of contractual duties by the insured person shall entitle DAS to refuse its performance.*

14. From 1 September 2014, Mr Nobile rented a flat in Liechtenstein. The tenancy agreement was terminated by the property owner with effect from 30 September 2015. A dispute arose concerning the financial settlement after the termination.

15. From March 2015 onwards, there had been recurring phone contact between Mr Nobile's spouse and DAS concerning the possible presence of mould in the flat, and subsequently also concerning the property owner's termination of the agreement and the recovery of the deposit of CHF 1 900. DAS also corresponded with the property owner. The latter eventually returned part of the deposit.

16. In autumn 2015, without informing DAS in advance, Mr Nobile provided a lawyer, Mr Antonius Falkner, with a power of attorney. Mr Falkner subsequently requested DAS to cover the costs of legal proceedings against the property owner concerning, first, recovery of the remaining deposit, and second, a retrospective rent reduction of at least CHF 500 per month due to the alleged presence of mould during the tenancy. DAS rejected this request, alleging that Mr Nobile had breached his contractual obligations by not leaving the conduct of the case exclusively to DAS.

17. Mr Nobile then lodged proceedings against DAS before the Princely Court (*Fürstliches Landgericht*), seeking a declaration that DAS was liable to provide legal expenses insurance cover in respect of the proceedings against the property owner. However, the Princely Court dismissed the action by a judgment of 27 July 2016. It held that the contract provision granting DAS an exclusive right to conduct the case was compatible with Article 60 of the Insurance Contracts Act. The free choice of a lawyer only applied, as a rule, in judicial or administrative proceedings. It did not apply at the stage of notification of a claim, for the assessment of the legal and factual situation, or for any efforts to settle matters out of court. In the opinion of the Princely Court, the dispute between Mr Nobile and the property owner was still at the stage where DAS had an

exclusive right to conduct the case. It therefore held that Mr Nobile had no legitimate interest in a judgment declaring DAS liable under the insurance policy.

18. Mr Nobile brought an appeal against that judgment before the Princely Court of Appeal, maintaining that he has a legitimate interest in the declaration sought. The respondent rejects this view.

19. According to the Princely Court of Appeal, the question whether the appellant has a legitimate interest in the declaratory judgment sought depends on whether he has breached his contractual duties by instructing Mr Falkner as attorney. That, in turn, depends on the interpretation of Article 201(1)(a) of the Directive.

20. By letters of 20 and 22 December 2016, the Princely Court of Appeal requested the Court to give an advisory opinion and to apply the accelerated procedure provided for in Article 97a of the Rules of Procedure (“RoP”). The following questions were referred:

- 1. Does Article 201(1)(a) of [Directive 2009/138/EC] preclude a contractual agreement between a legal expenses’ insurer and an insured person, according to which it is a breach of duty of the insured person, releasing the insurance company from its obligations, if the insured person mandates an attorney to represent his interests, without the consent of the provider of the legal expenses insurance, at a point in time when the insured person would be entitled to make a claim according to the legal expenses insurance contract?**
- 2. In the event that Question 1 is answered in the negative: In initiating litigation proceedings, when does an inquiry or do proceedings referred to in Article 201(1)(a) of Directive 2009/138/EC start, leading to the free choice of a lawyer? Is the relevant point in time solely based on the formal commencement of court proceedings (the lawsuit being filed with the court), or are prior steps also included, and, if so, which ones?**

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21. The Princely Court of Appeal also referred a third question. That question raised the issue of the lawfulness of the composition of the Court. The Court decided to consider that question in a separate procedure before answering the first two questions referred. By a decision of 14 February 2017, the Court found that the composition of the Court was lawful.

22. By an order of 20 February 2017, the President of the Court held that a ruling on the remaining questions was not a matter of exceptional urgency and therefore denied the referring court’s request to apply the accelerated advisory opinion procedure.

#### **IV Written observations**

23. In accordance with Article 20 of the Statute of the Court and Article 97 RoP, written observations have been received from:

- the respondent, represented by Batliner Wanger Batliner, Rechtsanwälte AG, Rechtsanwälte;
- the Liechtenstein Government, represented by Dr. Andrea Entner-Koch, Director, and Monika Zelger-Jarnig, Senior Legal Officer, EEA Coordination Unit, acting as Agents;
- the Czech Government, represented by Martin Smolek and Jiří Vláčil, Ministry of Foreign Affairs, acting as Agents;
- the Slovak Government, represented by Iveta Hricová, General Director, Ministry of Foreign and European Affairs, acting as Agent;
- the EFTA Surveillance Authority (“ESA”), represented by Carsten Zatschler and Michael Sánchez Rydelski, members of its Department of Legal & Executive Affairs, acting as Agents; and
- the European Commission (“the Commission”), represented by Markéta Šimerdová and Karl-Philipp Wojcik, members of its Legal Service, acting as Agents.

#### **V Summary of the arguments submitted**

##### *The respondent*

24. The respondent submits that the case merely concerns a disagreement between the parties about the provision of benefits for the commencement of proceedings. The issue of the free choice of a lawyer only arises if such benefits are provided. In the present case, the respondent refused to provide such benefits on the basis of the appellant’s breach of contractual obligations. Consequently, the respondent argues that an answer to the first question is not necessary for the referring court to give judgment.

25. Should the Court consider the first question admissible, the respondent submits that it should be answered in the negative. The provision on the free choice of a lawyer does not answer the question whether an insurer may refuse to provide benefits in the event of a breach of contractual obligations. Nor does such a refusal restrict the free choice of a lawyer in any manner. The respondent has refused to provide benefits for the conduct of proceedings, without the question even arising whether the appellant has the right to specify a legal representative of his own choosing.

26. The respondent emphasises that it has acknowledged and provided general insurance coverage, that is clarification of the factual and legal situation and settlement attempts with the property owner. It only refused the specific benefits related to the conduct of proceedings. The reason for that refusal was that such proceedings were deemed to be unnecessary, disproportionate and premature. For this kind of disagreement, the respondent's terms and conditions provide for an arbitration procedure as envisaged by Article 203 of the Directive. However, this has nothing to do whatsoever with the free choice of lawyer.

27. Turning to the second question referred, the respondent contends that the free choice of lawyer applies in view of any inquiry or proceedings, as clarified in its general terms and conditions. The right freely to choose a lawyer does not apply at the stage where the case is notified, the factual and legal position are assessed and in efforts out of court. Those steps are included in the phase in which the respondent has an exclusive right to conduct the case.

28. The respondent argues that there is no dispute in the main proceedings as to which elements of preparatory work are covered by the free choice of a lawyer. The crucial issue in the main proceedings is whether the appellant breached his contractual obligations entitling the respondent to refuse benefits. In the respondent's view, that question can and must be answered without an interpretation of the Directive. As with the first question, an answer to the second question referred is therefore not necessary to enable the referring court to give judgment.

29. Should the Court consider the second question admissible, the respondent submits that the insured person's right freely to choose a lawyer is not triggered only when the proceedings are formally commenced, but also includes the preparatory work necessary to pursue the appropriate legal claim. However, the insured person cannot determine arbitrarily and without consultation of the insurance undertaking the time from which this right applies. Moreover, the right freely to choose a lawyer cannot come into play until the insurance undertaking has in fact provided an assurance of cost coverage for the commencement of proceedings. It is the prerogative of the insurance undertaking to determine whether to provide such coverage although in the event of a dispute an arbitration procedure is available.

30. The respondent proposes that the Court should:

*... reject as inadmissible or unjustified the questions referred by the Princely Court of Appeal since the requirements of Article 34 SCA (i.e. that an answer to the question is necessary to enable the national court to give judgment and that the legal situation is unclear) are not satisfied. If the EFTA Court chooses to answer both questions, the defendant contends that the first question should be answered in the negative and the second question to the effect that in litigation proceedings an*



*inquiry or proceedings does not begin only on its formal commencement (the filing of the lawsuit with the court) but already with the preparatory work necessary to pursue the appropriate claim.*

*The Liechtenstein Government*

31. The Liechtenstein Government submits that the Directive is governed by the spirit of consumer protection. The free choice of lawyer provided for in Article 201(1)(a) of the Directive is an explicit guarantee that insurers must comply with in all contracts for legal expenses insurance at all times for the protection and benefit of policy holders.<sup>1</sup>

32. The Liechtenstein Government submits that, according to the wording of Article 201(1)(a), the free choice of lawyer applies in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings. This cannot mean that insured persons are entitled to choose their lawyer only once the proceedings have started. The free choice of lawyer in view of representation in court or administrative proceedings implies that the freedom of choice must be assured prior to such proceedings in order to prepare them. The performance of activities such as the collection of information, the assessment of the legal situation and finally the preparation of proceedings or the drafting of a lawsuit are all carried out in order to represent an insured person in civil, criminal, administrative or other proceedings.<sup>2</sup>

33. Consequently, the Liechtenstein Government contends that mandating a lawyer prior to any proceedings in order to prepare them and to protect the rights of the insured person has to be seen as an integral part of the freedom to choose a lawyer under Article 201(1)(a) of the Directive. It would undermine this right if the choice was made subject to the consent of the insurer. On the other hand, the freedom of choice does not necessarily oblige the insurer to offer full coverage when the insured person selects a lawyer who is more expensive than the insurer's own preferred in-house or external lawyer.<sup>3</sup>

34. The Liechtenstein Government submits that the insurance contract in the present case appears not to conform to the requirements of the Directive or Article 60 of the Insurance Contracts Act on the free choice of lawyer. The disputed provisions of the terms and conditions are therefore not valid and cannot release the respondent from its obligations to ensure coverage.

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<sup>1</sup> Reference is made, *inter alia*, to the judgments in *Massar*, C-460/14, EU:C:2016:216, paragraph 23, and *Büyüktipi*, C-5/15, EU:C:2016:218, paragraph 21 and case law cited.

<sup>2</sup> Reference is made to the judgment in *Massar*, cited above, paragraph 20.

<sup>3</sup> Reference is made to the judgment in *Sneller*, C-442/12, EU:C:2013:717, paragraph 27 and case law cited.

35. The Liechtenstein Government proposes that the Court should give the following answer to the questions referred:

1. *Article 201(1)(a) of [Directive 2009/138/EC] must be interpreted as precluding a contractual agreement between a legal expenses insurance and an insured person, according to which it is a breach of duty of the insured person, releasing the insurance company from its obligations, if the insured person mandates a lawyer to represent his interests, without the consent of the legal expenses insurance at a point in time when the insured person would be entitled to make a claim according to the legal expenses insurance contract.*
2. *In the light of the proposed answer to the first of the referred questions, it is no longer necessary to consider the second question.*

#### *The Czech Government*

36. The Czech Government limits its observations to the first question referred. It submits that the Directive precludes contractual agreements of the kind referred to in that question. First, the right of the insured person to choose a lawyer pursuant to Article 201(1)(a) applies, according to its wording, in any inquiry or proceedings. By contrast, the insurance contract at issue allows for the insured person to be represented only by the insurer itself, unless the insurer agrees otherwise. Such a provision completely deprives the insured person of the freedom to choose a lawyer.

37. Second, the Czech Government points to the systemic structure of the Directive. The Directive provides for only one exception to the freedom to choose a lawyer, namely in cases arising from the use of road vehicles, as set out in Article 202.

38. Third, the Czech Government submits that the Directive's purpose of protecting the interests of insured persons, as interpreted by the Court of Justice of the European Union ("the ECJ"), must lead to the conclusion that the Directive precludes the contractual agreement in question.<sup>4</sup>

39. The Czech Government proposes that the Court should give the following answer to the first question:

*Article 201(1)(a) of [Directive 2009/138/EC] precludes a contractual agreement between a legal expenses insurance and an insured person, according to which it is a breach of duty of the insured person, releasing the insurance company from its obligations, if the insured person mandates an attorney to represent his interests, without the consent of the legal expenses insurance, at a point in time when the*

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<sup>4</sup> Reference is made to the judgments in *Eschig*, C-199/08, EU:C:2009:538, paragraph 39, and *Sneller*, cited above, paragraphs 24 and 25.

*insured person would be entitled to make a claim according to the legal expenses insurance contract.*

*The Slovak Government*

40. The Slovak Government acknowledges that the ECJ has ruled several times in favour of an extensive interpretation of Article 4(1)(a) of Directive 87/344/EEC, which corresponds to Article 201(1)(a) of the Directive.<sup>5</sup> According to that interpretation, the free choice of a legal representative is excluded only until the moment when the insured person decides to instruct a chosen lawyer to bring an action. In the present case, the intention of Mr Nobile to instruct his lawyer to bring an action against the property owner appears also to activate his freedom to choose a lawyer.

41. The Slovak Government stresses nonetheless that Article 200(2) to (4) of the Directive sets out three alternative solutions that insurance undertakings may adopt for the avoidance of conflicts of interest. In its view, too extensive an interpretation of Article 201(1)(a) of the Directive puts the independent significance of Article 200(2) and (3) seriously at stake.

*ESA*

42. ESA suggests dealing with the two questions together. The first issue to be considered is whether the right conferred by Article 201(1)(a) of the Directive arises before the formal commencement of court proceedings, which requires an interpretation of the terms inquiry and proceedings under this provision. The second issue is the extent to which contractual provisions such as those at issue, and in particular the requirement for prior consent in order to instruct a lawyer, undermine the free choice of lawyer.

43. ESA submits that Article 201(1)(a) of the Directive should be given a wide interpretation. The wording of that provision indicates that the right to choose a lawyer is not necessarily linked to the beginning of proceedings. Mandating a lawyer for the purpose of bringing an action before a court falls within the wording “in order to defend, represent or serve the interests of the insured person in any ... proceedings”. Neither the Directive nor the former Directive 87/344/EEC distinguishes between the preparatory stage and the decision-making stage of inquiries and proceedings.<sup>6</sup> Therefore, ESA submits that the right freely to choose a lawyer cannot be limited to the decision-making stage of proceedings, but also includes the preparatory stage.

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<sup>5</sup> Reference is made to the judgments in *Eschig*, cited above, *Stark*, C-293/10, EU:C:2011:355, and *Sneller*, cited above.

<sup>6</sup> Reference is made to the judgments in *Massar*, cited above, paragraph 21, and *Büyüktipi*, cited above, paragraph 19.

44. Considering the context and the objectives pursued by the rules of which the free choice of lawyer forms part, ESA observes that Article 201(1)(a) of the Directive seeks to protect broadly the interests of insured persons. The right to a free choice of lawyer is of general application and is obligatory in nature.<sup>7</sup>

45. ESA argues that, to the extent that court proceedings require representation by a qualified lawyer, instructing a lawyer is an indispensable preliminary stage for bringing an action to court. The freedom to choose a lawyer under Article 201(1)(a) of the Directive must therefore apply at the very least from the moment when the insured person instructs a lawyer for the purpose of initiating legal proceedings which require representation by a lawyer. In ESA's view, the freedom should apply even if representation by a lawyer is not formally required in the national procedure concerned.<sup>8</sup>

46. Turning to the contractual provisions at issue, ESA submits that the right to choose a lawyer does not necessarily in itself impinge on the insurer's possibility to impose an obligation on the insured person to obtain its prior consent before taking steps – such as instructing a lawyer – liable to generate costs. Such a requirement may serve the interests of controlling costs, and it may enable the insurer to make non-binding recommendations to the insured person based on its expert knowledge of the market for lawyers' services. However, the insurer cannot purport to exercise a contractual prerogative to control the conduct of the case if that has the effect of depriving the insured person of his ability to determine his legal representation freely.<sup>9</sup>

47. In ESA's view, the insurance contract at issue appears to be in clear breach of the Directive, as well as Article 60 of the Insurance Contracts Act. The policy's terms and conditions do not provide expressly, or even implicitly, for the insured person's right freely to choose a lawyer. On the contrary, Article 19(4) of its terms and conditions of insurance allows DAS to reject any lawyer proposed. From a list of three provided by the insured person, it is then for DAS to choose the lawyer. In other words, the right freely to choose a lawyer is reversed to the benefit of DAS. In that context, ESA submits that to enforce a term requiring prior consent from DAS before instructing a lawyer would undermine the effectiveness of the right guaranteed by Article 201(1)(a) of the Directive, all the more so if accompanied by a right for the insurer to decline cover in case of non-compliance, as envisaged in Article 22 of the terms and conditions of insurance.

48. ESA proposes that the Court should give the following answers to the questions referred:

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<sup>7</sup> Reference is made to the judgments in *Eschig*, cited above, paragraph 47; *Stark*, cited above, paragraph 29 and *Sneller*, cited above, paragraph 25.

<sup>8</sup> Reference is made to the judgment in *Sneller*, cited above, paragraphs 30 to 32.

<sup>9</sup> Reference is made to the judgment in *Sneller*, cited above, paragraph 23.

1. Article 201(1)(a) of [Directive 2009/138/EC] must be interpreted as guaranteeing a free choice of lawyer from the moment when an insured person has a need of legal protection in an indispensable stage of proceedings or an inquiry.
2. Article 201(1)(a) of Directive 2009/138/EC must be interpreted as precluding the enforcement of contractual provisions which fail to expressly provide that the insured person shall be free to choose a lawyer, which purport to impose limitations on the freedom to choose a lawyer, and which purport to release the insurance company from its obligations if the insured person instructs a lawyer without prior consent of the insurer.

### *The Commission*

49. As regards the first question, the Commission submits that a broad interpretation of Article 201(1)(a) of the Directive is called for, bearing in mind the provision's purpose. Consequently, an insured person must have the freedom to choose his own lawyer for the purpose of any judicial or administrative proceedings. This freedom protects broadly the interests of insured persons, is of general application and is obligatory in nature.<sup>10</sup>

50. On the Commission's understanding, the contractual agreement at issue appears to require the insured person to notify the insurer of the claim and the intention to instruct an external lawyer, after which the insurer can give or withhold its consent to mandate an external lawyer and to the particular lawyer proposed.

51. In relation to these elements of the agreement, the Commission submits, first, that it is not compatible with Article 201(1)(a) of the Directive to let the insurer decide whether recourse to an external lawyer is necessary in order for the requisite cover to be provided under the contract.<sup>11</sup>

52. Moreover, the Commission contends that a contractual clause imposing a system whereby the insurer can veto a proposed lawyer and instead chooses a lawyer from three others proposed by the insured person, which the insured person must comply with in order to obtain insurance cover, is precluded by Article 201(1)(a) of the Directive. Such a system would in the Commission's view generate the same effects already addressed in *Sneller*.

53. The Commission finally observes that notification requirements are not normally as such automatically precluded by Article 201(1)(a) of the Directive. Nevertheless, such requirements are only permissible to the extent that they do not render the principles laid

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<sup>10</sup> Reference is made to the judgments in *Eschig*, paragraphs 45 to 47, *Stark*, paragraphs 28 and 29, *Sneller*, paragraphs 24 and 25, *Massar*, paragraphs 22 and 23, and *Büyüktipi*, paragraph 21, all cited above.

<sup>11</sup> Reference is made to the judgment in *Sneller*, cited above.

down by the Directive meaningless.<sup>12</sup> In particular, they must not *de facto* render impossible a reasonable choice of lawyer or representative by the insured person.<sup>13</sup>

54. Turning to the second question, the Commission submits that it does not follow from the wording of Article 201(1)(a) of the Directive that proceedings have to already have commenced for the right freely to choose a lawyer to be triggered. Article 201(1)(a) does not distinguish between the preparatory stage and the decision-making stage of an inquiry or proceedings.<sup>14</sup> The words “in order to” suggest that free recourse to a lawyer must be possible when the objective for the involvement of a qualified person was, in the mind of the insured person, to defend, represent or serve his interests.

55. In the Commission’s view, such an interpretation is also supported by the objective of Article 201(1)(a) of the Directive.<sup>15</sup> Bringing an action to a civil court requires a fair amount of preparation and the determination of a number of legal questions, which is dependent on legal knowledge. It would be neither procedurally economic, nor would it sufficiently protect the interests of the insured if during the decisive phase of the preparation of an action the insured could not freely choose his lawyer or representative, but was only entitled to do so once the lawsuit had been filed.

56. On the other hand, the Commission submits that a purely subjective interpretation of when the right freely to choose a lawyer starts could lead to an unwarranted overextension of the scope of this right. In the Commission’s view, recourse may be had to a lawyer only when there are objectively identifiable factors indicating that the legal issue for which the insured person needs protection could, with a reasonable degree of probability, result in formal administrative or legal proceedings. Consequently, the extent to which “proceedings” should be interpreted as encompassing matters occurring before the formal commencement of legal proceedings might vary from case to case. However, the right freely to choose a lawyer should at a minimum include all indispensable preliminary stages to formal legal proceedings, where the insured person has a need for legal protection.

57. The Commission proposes that the Court should give the following answers to the questions referred:

1. *Article 201(1)(a) of [Directive 2009/138/EC] should be interpreted as precluding a contractual agreement concerning legal expenses insurance according to which it is a breach of contract, releasing the insurer from*

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<sup>12</sup> Reference is made to the judgments in *Eschig*, paragraphs 65 and 66, *Massar*, paragraph 27, and *Büyüktipi*, paragraph 25, all cited above.

<sup>13</sup> Reference is made to the judgments in *Stark*, paragraph 33, and *Sneller*, paragraph 27, both cited above.

<sup>14</sup> Reference is made to the judgments in *Massar*, paragraph 21, and *Büyüktipi*, paragraph 19, both cited above.

<sup>15</sup> Reference is made to the judgment in *Massar*, cited above, paragraph 23.

*performance of its obligations, if the insured mandates an external lawyer to represent his or her interests without the consent of the insurer, at a point in time when the insured person would be entitled to make a claim under that legal expenses insurance.*

2. *Article 201(1)(a) of [Directive 2009/138/EC] should be interpreted in that sense that the right freely to choose a lawyer does not take effect only at the moment of the commencement of formal legal proceedings through for instance filing a lawsuit in court, but already starts whenever an insured person would reasonably have recourse to a lawyer or representative with the intention to defend, represent or serve his interests in proceedings when there are objectively identifiable factors that the issue for which the insured person has a need for legal protection could with a reasonable degree of probability result in formal administrative or legal proceedings.*

Per Christiansen  
Judge-Rapporteur