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OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 12 June 2014 [1]

Case C-51/13

Nationale-Nederlanden Levensverzekering Mij NV
v
Hubertus Wilhelmus van Leeuwen

(Request for a preliminary ruling from the Rechtbank Rotterdam (Netherlands))

(Life assurance — Duty to provide information — Information on the premium)

[1] – Original language: English.

1. Nationale-Nederlanden Levensverzekering Mij NV ('Nationale-Nederlanden' or 'the assurer') and Mr Van Leeuwen have concluded a life assurance contract ('the life assurance contract') which was signed on 29 February 2000 but took effect as of 1 May 1999. Mr Van Leeuwen is the policy-holder and the assured person. Under the life assurance contract, the premium is to be used both for life assurance and for investment. What part of the premium is invested is determined by the other uses of the premium to cover costs and the risk assured. The value of participations in the investment funds in turn affects the benefit that will be obtained from the contract. A dispute has arisen as to whether, prior to the conclusion of the life assurance contract, Mr Van Leeuwen received sufficient information regarding those other uses of the premium and the part to be invested. In that context, the Court is asked to interpret Article 31 of Council Directive 92/96/EEC ('the Third Life Assurance Directive'), [2] which applied at the time when the life assurance contract was concluded.

EU life assurance directives

Second Life Assurance Directive

2. Council Directive 90/619/EEC ('the Second Life Assurance Directive') [3] amended and supplemented First Council Directive 79/267/EEC ('the First Life Assurance Directive'), [4] which covered 'life assurance', defined as 'the class of insurance which comprises, in particular, assurance on survival to a stipulated age only, assurance on death only, assurance on survival to a stipulated age or on earlier death, life assurance with return of premiums, marriage assurance, [and] birth

[2] – Council Directive 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). This directive was amended several times before being repealed by Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1). The latter directive was in turn repealed 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). Attached to the request for a preliminary ruling were two interlocutory judgments of the referring court of 14 March and 11 July 2012 on which I have also relied in setting out the factual background (see points 11 to 23 below).

[3] – Council Directive 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). The Second Life Assurance Directive was amended by the Third Life Assurance Directive and was subsequently repealed by Directive 2002/83. Article 36 and item a(10) under point A of Annex III to Directive 2002/83 are similar to Article 31 and item a(10) under point A of Annex II to the Third Life Assurance Directive. Whilst Article 185 of Directive 2009/138 restructured and widened an assurer's pre-contractual obligation to provide information to the policy-holder, Article 185(3)(g) and (7) contains language similar to that found in Article 31 and item a(10) under point A of Annex II to the Third Life Assurance Directive. Because the Third Life Assurance Directive has been repealed, I refer to it in the past tense in this Opinion.

[4] – First Council Directive 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), as amended (and subsequently repealed by Directive 2002/83).

assurance'. [5] Article 1(c) of the First Life Assurance Directive defined 'supplementary insurance carried on by life assurance undertakings' as 'in particular, insurance against personal injury including incapacity for employment, insurance against death resulting from an accident and insurance against disability resulting from an accident or sickness, where these various kinds of insurance are underwritten in addition to life assurance'.

3. As amended by Article 30 of the Third Life Assurance Directive, Article 15(1) of the Second Life Assurance Directive was worded as follows:

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

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

…'

Third Life Assurance Directive

4. The Third Life Assurance Directive was, like the Second Life Assurance Directive, [6] primarily aimed at establishing an internal market in life assurance, including the freedom to provide life assurance services. [7]

5. Recital 9 in the preamble to the Third Life Assurance Directive stated that '… certain provisions of this Directive define minimum standards …' and that '… a home Member State [8] may lay down stricter rules for assurance undertakings authorised by its own competent authorities'. According to recital 19, '… the harmonisation of assurance contract law is not a prior condition for the achievement of the internal market in assurance …'.

6. Recital 23 concerned the information to be provided to the consumer: [9]

5 – Article 1(1)(a) of the First Life Assurance Directive.

6 – See, for example, the first and second recitals in the preamble to the Second Life Assurance Directive.

7 – See, for example, recitals 1 and 2 in the preamble to the Third Life Assurance Directive.

8 – Article 1(d) of the Third Life Assurance Directive defined the 'home Member State' as 'the Member State in which the head office of the assurance undertaking covering the commitment is situated'.

9 – See also recital 20 in the preamble to the Third Life Assurance Directive, which referred to the fact that '… within the framework of an internal market it is in the policy-holder's interest that he should have access to the widest possible range of assurance products available in the [European Union] so that he can choose that which is best suited to his needs'.

'… 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 ...'.

7. Article 1(c) defined the term 'commitment' as 'a commitment represented by one of the kinds of insurance or operations referred to in Article 1 of [the First Life Assurance Directive]'. Article 2(1) made it clear that the Third Life Assurance Directive applied to the commitments and undertakings to which Article 1 of the First Life Assurance Directive referred. [10]

8. Article 31 set out the obligation to communicate information to the policy-holder:

'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.

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.'

9. Annex II listed the 'information, which is to be communicated to the policy-holder before the contract is concluded (A) or during the term of the contract (B)'. That information had to be 'provided in a clear and accurate manner, in writing, in an official language of the Member State of the commitment'. Annex II contained a table (only point A is reproduced here):

[10] – See point 2 above.

A. **Before concluding the contract**

Information about the assurance undertaking	Information about the commitment
(a) 1. The name of the undertaking and its legal form	(a) 4. Definition of each benefit and each option
(a) 2. The name of the Member State in which the head office and, where appropriate, the agency or branch concluding the contract is situated	(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) 3. The address of the head office and, where appropriate, of the agency or branch concluding the contract	(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
	(a) 11. For unit-linked policies, definition of the units to which the benefits are linked
	(a) 12. Indication of the nature of the underlying assets for unit-linked policies
	(a) 13. Arrangements for application of the cooling-off period
	(a) 14. General information on the tax arrangements applicable to the type of policy
	(a) 15. The arrangements for handling complaints concerning contracts by policy-holders, lives assured or beneficiaries under contracts including, where appropriate, the existence of a complaints body, without prejudice to the right to take legal proceedings
	(a) 16. Law applicable to the contract where the parties do not have a free choice or, where the parties are free to choose the law applicable, the law the assurer proposes to choose

Netherlands law

10. At the time when the contract at issue was concluded, [11] the Wet toezicht verzekeringsbedrijf 1993 ('Law on supervision of the insurance industry 1993') and the Regeling Informatiestrekking aan verzekeringsnemers 1998 ('Regulation regarding the provision of information to policy-holders 1998') ('RIAV 1998') applied. The RIAV 1998 laid down the information which the assurer had to provide to the prospective policy-holder prior to the conclusion of the contract and that had to be included in the insurance policy. Those specific information requirements applied in conjunction with general principles of contract law. In particular, under the RIAV 1998, the information to be provided related to 'the impact of costs and deductions charged to the policy-holder on the yield and benefit associated with the contract' (Article 2(2)(q)) and 'if applicable, the costs which may be charged in addition to the gross premium' (Article 2(2)(r)). It appears from the request for a preliminary ruling that Article 2(2)(q) did not require the assurer to provide a

[11] – See point 1 above.

separate overview of, or insight into, the actual and/or definitive costs and their structure — which is the type of information which Mr Van Leeuwen argues he should have obtained. [12] In 2008, the relevant legislation was amended so as to impose stricter requirements in this regard.

Factual background, questions referred and procedure

11. In setting out the factual background, I have drawn on the national file to supplement the limited description of facts contained in the request for a preliminary ruling.

12. Prior to the conclusion of the life assurance contract, Nationale-Nederlanden gave Mr Van Leeuwen a document entitled 'Voorstel voor flexibel verzekerd beleggen' ('Proposal for Flexibly Insured Investing') dated 11 June 1999. An explanatory note was attached to it.

13. Under the contract, Mr Van Leeuwen was to pay a single premium of NLG 8 800 at the start of the contract and then monthly premiums of NLG 200 (According to Mr Van Leeuwen, this corresponds to monthly payments of EUR 90.76 or yearly payments of EUR 1 089.12). It appears from the national file that 1 December 2033 is the last date on which a premium is due.

14. During the duration of the contract, Mr Van Leeuwen is free to take up part of the value of his investment(s) in cash subject to the conditions in the contract.

15. If Mr Van Leeuwen dies before 1 December 2033, the contract offers two options in terms of benefit. Benefit A is a guaranteed and fixed amount of NLG 255 000 (approximately EUR 116 000). Benefit B is the (variable) sum of the value of his participations in investment funds (based on the value of those participations) as of the date of his death, plus 10% thereof. If, at the time of his death, benefit B is greater than benefit A, then the higher sum is to be paid to the beneficiaries of Mr Van Leeuwen's life assurance. Thus, benefit A sets a minimum level for the benefit to be paid out in case of death prior to 1 December 2033.

16. If Mr Van Leeuwen dies on or after 1 December 2033, benefit B is to be paid out. Benefit A then no longer serves as a minimum guaranteed benefit.

17. Mr Van Leeuwen could choose in what funds to invest. Before concluding the contract, he was given illustrations of the anticipated return (on an annual basis) depending on different predictions for how the investment would perform and taking into account the need to pay management costs of 0.3%. Those examples, which were included in the Proposal for Flexibly Insured Investing, expressed performance levels both in percentage terms and as capital sums. Mr Van Leeuwen was told that the amounts included in these examples were 'net', that is, they also took into account premiums for assured risks and costs that would be withheld by the assurer during the duration of the contract. The proposal included information on the

[12] – See point 19 below.

average annual benefits likely to be obtained on the basis of premiums actually paid. In that context, the information provided pointed out that differences between the return to be expected from the investments in general and the return calculated using the actual premiums paid depended on the risks assured and the costs payable as well as any additional coverage.

18. The life assurance contract and the Proposal for Flexibly Insured Investing stated that the investment risk lay with the assured. The letter attached to the proposal to Mr Van Leeuwen explained (as did the proposal itself and the explanatory note thereto) that under Flexibly Insured Investing, a part of the premium paid was used for buying participations in one or more investment funds.

19. Mr Van Leeuwen states that in 2008, after receiving a summary statement from Nationale-Nederlanden, he discovered that almost 60% of the premium he had paid had not been used for investment: a large part was used for various types of cost (other than the management costs of 0.3%) and the other part for the risk premium. Mr Van Leeuwen complains that nothing in the information he received suggested that Nationale-Nederlanden could withhold (and hence not invest) such a large part of the premium. In particular, that information did not include a separate overview of, or insight into, the actual and/or definitive costs and their structure.

20. The national file contains documents giving information on Mr Van Leeuwen's life assurance for the periods of, respectively, 10 April 2007 to 10 April 2008 and 10 April 2008 to 10 April 2009. If that is also the type of information which Mr Van Leeuwen received in 2008, the following method was applied for determining the value of the participations in investments made. Thus, for the period 10 April 2007 to 10 April 2008, the starting point was the value of the participations in investment funds as of 10 April 2007. To that amount were added the premiums paid during that 12 month period. From that sum, deductions were then made for the risk premium, the first and recurring costs of the assurance undertaking and the assurance advisor or agent, management costs, and costs for buying and selling (I assume, participations). The value of the participations as of 10 April 2008 was the result of that sum and the losses or gains made from the participations during the period of 10 April 2007 to 10 April 2008. That figure then served as the starting point for determining the value of the participations in investment funds as of 10 April 2009 (applying the same method).

21. In the request for a preliminary ruling, the Rechtbank Rotterdam (Netherlands) ('the referring court') states that, whilst Nationale-Nederlanden complied with Article 2(2)(q) and (r) of the RIAV 1998, it infringed so-called 'open rules of law', in particular the general and/or special duty of care in the context of contractual relationships and of pre-contractual good faith and/or the requirements of reasonableness and fairness, by failing to give information on the impact of costs and risk premiums on the value of the investment.

22. The referring court has stayed the proceedings and referred the following questions to the Court 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 policy-holder, and/or a general and/or specific duty of care — to provide policy-holders with more information on costs and risk premiums of the assurance 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?’

23. Nationale-Nederlanden, Mr Van Leeuwen, the Austrian, Czech and Netherlands Governments and the European Commission filed written observations. The same parties, except for the Austrian and Czech Governments, appeared at the hearing held on 19 March 2014.

Analysis

Preliminary remarks

24. The questions referred ask the Court to interpret Article 31(3) of the Third Life Assurance Directive, which concerned a Member State’s facility to require assurance undertakings to furnish information in addition to that listed in Annex II. However, if that information had to be provided anyway, pursuant to Article 31(1) and point A of Annex II, it is no longer necessary to consider Article 31(3). Thus, if the information at issue was already covered by an item under point A of Annex II, the questions referred are hypothetical and, since the Court does not give advisory opinions, it may refuse to rule on such a reference. [13]

25. If the missing information was not covered by one of the items under point A of Annex II, the Court is asked to consider whether Article 31(3) precluded a Member State from using ‘open’ and/or unwritten rules under national law for the purposes of exercising the option under that provision; and that question would then no longer be hypothetical. The second question is about whether consequences under national law of the failure to provide information must be taken into account in answering the first question; it can conveniently be considered with the first question.

26. I confess that, even after consulting the national file, I find it difficult to understand precisely how the assurance here at issue operated. Thankfully, I do not think that it is in fact necessary to strive for complete understanding. As I see it, the essential fact to keep in mind in interpreting Article 31(1) of the Third Life Assurance Directive in the context of the present case is that the benefit to be

[13] – See, for example, *Kamberaj*, C-571/10, EU:C:2012:233, paragraphs 41 and 42 and case-law cited.

obtained from the contract depends (in part) on the premium paid and the purposes for which that premium is used.

Article 31(1) of the Third Life Assurance Directive

27. Whether the missing information should have been provided to Mr Van Leeuwen pursuant to Article 31(1) of the Third Life Assurance Directive was discussed in particular at the hearing. With the exception of the Netherlands Government, all parties appearing took the view that that information was not covered by Article 31(1) and, in particular, by item a(10) under point A of Annex II. [14]

28. Article 31 contained four paragraphs. The first two set out, respectively, obligations as regards the information to be provided prior to the conclusion of the contract (Article 31(1), which refers to information listed in point A of Annex II) and during the term of the contract (Article 31(2), which refers to information listed in point B of Annex II). Article 31(3) concerned the conditions under which the Member States could opt to require assurers to provide additional information to that listed in Annex II. Article 31(4) addressed the detailed rules for implementing Article 31(1) to (3) and Annex II.

29. Insurance contracts in general are legally complex financial products that can differ considerably depending on the insurer and that involve significant and potentially very long-term financial commitments. It is a contractual relationship in which 'the policy-holder is at a disadvantage vis-à-vis the insurer'. [15]

30. The purpose of the information requirements in Article 31 was to enable a prospective policy-holder to choose the contract best suited to his needs: he was to receive clear and accurate information on the essential characteristics of the products proposed to him. [16] The policy-holder must receive precise information. [17] As I understand it, based on that information he should have been able to understand the benefits and risks attached to a specific product proposed to him and to compare them with those associated with other products.

31. The explanatory memorandum to the proposal for a Third Life Assurance Directive stated that the proposal did '… not undertake any harmonisation of the

14 – In its written observations, the Commission appeared to accept that the information might be covered by item a(10); but it reversed its position at the hearing.

15 – *Endress*, C-209/12, EU:C:2013:864, paragraph 29. See also point 45 of my Opinion in that case (EU:C:2013:472). As part of the protection of that weaker party, a right of cancellation is available: see Article 15 of the Second Life Assurance Directive.

16 – Recital 23 in the preamble to the Third Life Assurance Directive. See also *Axa Royale Belge*, C-386/00, EU:C:2002:136, paragraph 20. See also point 59 of my Opinion in *Endress*, EU:C:2013:472, cited in footnote 15 above.

17 – *Endress*, EU:C:2013:864, cited in footnote 15 above, paragraph 25.

substantive law applicable to contracts and policy conditions'. [18] As regards the provision on transparency (Article 27 of the proposal), the explanatory memorandum stated that if the consumer was '… to profit fully from increased competition between a growing number of contracts, [he] must be provided with clear and accurate information about the essential characteristics of products offered to him, both during the pre-contractual phase in order to guide him in his choice, and during the term of the contract in the event of any change or amendment'. [19] The list of information in Annex II was a minimum list and the obligation to provide information was not intended to limit the choice of products available. [20]

32. Thus, the legislator prepared a list of items of information about the insurance undertaking and the commitment which must be provided to the prospective policy-holder. When Article 31(1) is read together with recital 23 and Article 31(3), it becomes clear that that list (in the right column of the table under point A of Annex II) covers information about essential elements of the commitment. The text of Article 31(1) made it clear that 'at least' that information must be provided. However, there could be other information that was 'necessary' within the meaning of Article 31(3) for understanding the essential elements of commitments. Subject to the conditions there laid down, Member States had the option of requiring that such information should also be given to a prospective policy-holder.

33. Against that background, I turn to the categories of information that were listed under point A of Annex II. As I see it, two items are relevant.

34. Pursuant to items a(4) and a(10), the information about the commitment had to contain a '[d]efinition of each benefit and each option' and '[i]nformation on the premiums for each benefit, both main benefits and supplementary benefits, where appropriate'.

35. Consistent with the distinction made between life assurance and supplementary insurance underwritten in addition to life assurance, [21] both items a(4) and a(10) foresaw that a life assurance contract might provide for multiple benefits. Each benefit had to be defined and, in relation to each, information on the premium had to be provided.

36. However, the Third Life Assurance Directive did not define the words 'benefit' and 'premiums'. Nor did the text of the items under point A of Annex II refer to 'costs' or 'risk premiums'.

18 – Explanatory memorandum to the Proposal for a Third Council Directive on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/2677/EEC and 90/619/EEC, COM(91) 57 final (OJ 1991 C 99, p. 2), at p. 6 ('the explanatory memorandum').

19 – Explanatory memorandum, cited in footnote 18 above, p. 29.

20 – Explanatory memorandum, cited in footnote 18 above, p. 29.

21 – See Article 1(c) of the Third Life Assurance Directive read together with Article 1(a) and (c) of the First Life Assurance Directive. See also point 2 above.

37. As I understand it, in its simplest form, life assurance is a contract under which the assurer is liable to pay the beneficiary a guaranteed amount (and possibly cover certain expenses) if the assured (who may, but need not, be the policy-holder) dies during the duration of the assurance. The benefit to be obtained from life assurance is the insurance cover for the period of the life assurance, which thus includes that payment in case of death. Unlike most other types of insurance contract, life assurance does not insure against an uncertain risk: everyone dies. The uncertainty concerns whether death occurs during the period of the insurance cover. The insurance provides some level of financial compensation to cover the financial detriment resulting from that death.

38. The premium is the agreed price to be paid at once or from time to time in return for the insurance cover. If the amount of the guaranteed benefit is fixed, the separate uses of parts of the premium are unlikely to be essential to the choice of what life assurance product to buy. The premium might cover, for example, the profit which the assurer wishes to make, costs and the amount needed to fund claims upon death according to the technical provisions of the assurer. [22] However, such aspects affect the risk to be borne by the assurer rather than by the policy-holder. For example, as the assured lives longer, in principle the risk of imminent death increases. At the same time, more capital is accumulated to finance payment of the benefit and the financial cost (to the assurer) associated with bearing that risk is likely to diminish. Thus, the risk premium in itself might decrease. However, if the contract provides for fixed and regular payments of the premium, information on the evolution of the use of one part of the premium (in relation to other parts used for other reasons) is unlikely to affect the policy-holder's choice of insurance product, because the premium to be paid and the benefit to be received remain constant throughout the duration of the contract. Prospective policy-holders do not always need to know how the uses of the different parts of the premium evolve in order to be able to compare life assurance products and make an informed decision as to which product to purchase.

39. On that basis, I do not consider that items a(4) and a(10) under point A of Annex II could be read as meaning that information about the different purposes for which the premium is used constitutes information on an essential element of the commitment that had to be provided to the policy-holder in all circumstances and with respect to all types of contract. I see no textual basis for such a generally applicable obligation. Nor does it follow from the general objective of the information requirements in Article 31.

40. However, the fact that that obligation does not apply in all circumstances does not mean that it cannot apply in some circumstances.

41. That is especially so here because the text of item a(10) qualified the requirement to provide information on the premium for each benefit, of which a

22 – See, for example, Article 17 of the First Life Assurance Directive as amended by Article 18 of the Third Life Assurance Directive.

definition had to be given pursuant to item a(4), by the phrase 'where appropriate'. Whether information on the premium to be paid for a defined benefit was 'appropriate' must, in my opinion, have depended on what was specifically necessary to enable the prospective policy-holder to understand the essential elements of the particular product being offered and thus to decide whether or not to buy it. [23] Thus, the design and character of the proposed product must be considered in determining the scope of the obligation under item a(10), when read together with item a(4), with respect to the product on offer.

42. What does that mean for a life assurance contract of the type concluded by Mr Van Leeuwen?

43. The design of Mr Van Leeuwen's life assurance contract is different from the simple model which I have described. In essence, his contract combines life assurance and investment, bundled together in the same product. (In the present case, the life assurance element is itself also tied to a mortgage taken out by Mr Van Leeuwen.) The Court has already held — and it is not contested here — that a contract linking life assurance with an investment falls within the class of life assurance. [24]

44. All parties appear to agree also that Mr Van Leeuwen's life assurance contract covers one risk and guarantees one benefit, and that the amount of the latter can vary depending on when he dies. Thus, this is not a situation where there are main and supplementary benefits within the meaning of item a(10). There is a single benefit in relation to a single risk. However, there are two alternative methods of determining the level of the benefit: benefit A is a fixed and guaranteed amount (the simple model of life assurance) whereas benefit B is variable.

45. As I see it, the definition of the scope of obligation under item a(10), read together with item a(4), under point A of Annex II, with respect to life assurance of the type signed by Mr Van Leeuwen does not depend on a detailed understanding of the exact method used for determining benefit B.

46. Based on the request for a preliminary ruling and the observations made at the hearing, I initially understood the method to consist of deducting each month several types of costs and the risk premium from the premium paid and paying the balance into the chosen investment funds. However, after I had examined the information on the 2007-2009 period in the national file, it appeared to me that a different method was applied: these deductions were made from the value of participations in

[23] – In that regard, recital 23 in the preamble to the Third Life Assurance Directive refers to the products *proposed* to a consumer. See also the Opinion of Advocate General Jacobs in *Axa Royale Belge*, EU:C:2011:612, judgment cited in footnote 16 above, points 25 and 26.

[24] – See, for example, *González Alonso*, C-166/11, EU:C:2012:119, paragraphs 29 to 31. Point A of Annex II confirms that the Third Life Assurance Directive applies to such mixed products: according to items a(11) and a(12) under point A of Annex II, the definition of the units to which the benefits are linked and an indication of the nature of underlying assets is information that must be given to prospective policy-holders.

investment funds plus the premiums paid during a year; and then the losses or gains from investments during that year were added to determine the new value of participations.

47. Whatever the precise method used, it seems clear to me — and this is the essential point — that the different uses made of the premium may affect the level of benefit B.

48. Leaving aside the general risks to which each investment is subject, it is clear that how much is invested (the capital) is likely to affect the value of the investments made and eventually the magnitude of the gains (or losses) to expect. Where that capital depends on what other uses were made of the premium paid and the value of those investments determines the benefit of life assurance, Article 31(1) of the Third Life Assurance Directive, together with items a(4) and a(10) under point A of Annex II, required that the information on the premium and the definition of the benefit be sufficiently detailed to enable the prospective policy-holder to understand the connection between the premium and the benefit, the different uses of the premium and the criteria that affect the amount of the premium that was used, respectively, for investment and for other purposes.

49. As I see it, without that clear and accurate information a prospective policy-holder could not have made an informed decision on what contract best suited his needs, could not have appreciated the investment risk which in turn affected the benefit he (or the beneficiaries of his life assurance) could expect to obtain from the life assurance and could not, where relevant, have compared such risks and benefits with other similarly designed products on offer.

50. The prospective policy-holder therefore had to be informed on how the assurer could, pursuant to the contract, use the premium and decide what part was invested. Because of the design and character of the contract, those uses were *at his risk* and not solely at the risk of the assurer.

51. I conclude that in circumstances where the uses made of the premium cannot be defined by reference to absolute amounts or percentages, the criteria used to determine the amount of the premium used for one purpose or for another must be clearly and precisely set out in the information given prior to the conclusion of the life assurance contract as required by Article 31(1) of the Third Life Assurance Directive and items a(4) and a(10) under point A of Annex II. National law must be interpreted in the light of these considerations.

52. In case the Court disagrees with this conclusion, I now turn to Article 31(3) (which is the subject of the specific questions referred).

Article 31(3) of the Third Life Assurance Directive

53. By its questions, the referring court asks whether Article 31(3) of the Third Life Assurance Directive precludes recourse to ‘open’ and/or unwritten rules of

national law obliging the assurer to provide information other than that listed under point A of Annex II. [25]

54. The referring court has not clearly defined or distinguished 'open' rules and/or 'unwritten' rules under Netherlands law. It has identified, by way of illustration, 'the reasonableness and fairness which govern the (pre-)contractual relationship between a life assurance provider and a prospective policy-holder, and/or a general and/or specific duty of care'. For the purposes of the present case, I shall take such rules to be rules of law other than those found in legislation, bearing in mind that such rules can have different functions and legal value in the legal systems of the different Member States.

55. Some parties have understood the first question to refer to the issue of whether general principles are a form of *implementation* capable of fully implementing the content of the obligation under Article 31(3) of the Third Life Assurance Directive.

56. I see the issue differently.

57. Article 31(3) did not call for implementation as such. Member States were under no obligation to transpose Article 31(3) into national law; but if they took advantage of the option it offered them, they had also to respect the limits laid down in that provision. The issue here is therefore whether that option could be exercised through the application of rules of law other than legislation.

58. In *Axa Royale Belge*, the Court held that, taking into account the intention of the legislator not to restrict unduly the choice of assurance products on offer on the internal market, 'the additional information Member States may require in accordance with [Article 31(3)] must be clear, accurate and necessary for a proper understanding of the essential characteristics of assurance products proposed to the policy-holder'. [26]

59. Thus, the right of a policy-holder to receive (and the corresponding obligation of the assurer to provide) information other than that described in Article 31(1) and listed under point A of Annex II depended on a Member State's decision to exercise the option under Article 31(3) in conformity with the conditions stated therein.

60. In particular, a Member State's right to require such additional information depended on (i) the objective of the information (whether the information required was 'necessary' for a proper understanding of the essential characteristics of

[25] – Related questions were addressed by the EFTA Court in Case E-11/12 *Koch* [2013] (EFTA Court Reports, not yet reported), where it held that: '… without prejudice to other provisions, and as long as their effectiveness is not effected, [the Third Life Assurance Directive] and Directive 2002/83 do not prevent the EEA States from applying general principles of national contract law to establish an obligation to provide advice concerning complex financial instruments, such as life assurance, sold to consumers …' (paragraph 77).

[26] – *Axa Royale Belge*, EU:C:2002:136, cited in footnote 16 above, paragraph 24.

assurance products offered to the prospective policy-holder) and (ii) the content of the information (whether the information which it requires is 'clear' and 'accurate'). The two conditions are related. If information is general and vague, it will not be information that was necessary for the purposes described in Article 31(3). This was shown in *Axa Royale Belge* itself. [27]

61. As I see it, the text of Article 31(3) did not limit or prescribe the *form* of the measure through which the option under that provision could be exercised.

62. The source of national law used to exercise the option in Article 31(3) thus had to be such as to make it possible to establish the objective and the content of the information. Otherwise it would be impossible to verify Member States' compliance with the conditions set out in Article 31(3) and to guarantee sufficient legal certainty. Thus national law had to identify with clarity and certainty the information that an assurer was to provide and a policy-holder could expect to receive. Provided those conditions were met, the text of Article 31(3) of the Third Life Assurance Directive did not limit Member States' choice so as to exclude rules of law other than legislation.

63. That position is unaffected by the consequences under national law of the failure to provide information to the policy-holder. An interpretation in the present case of Article 31 of the Third Life Assurance Directive will 'clarif[y] and [define] its meaning and scope as it should have been understood and applied from the time of its entry into force'. [28] That interpretation of EU law must be distinguished from the effect to be given to that interpretation under EU law and national law. [29] EU directives must be given a uniform and autonomous interpretation throughout the European Union. [30] Unless they refer to or otherwise rely on national law, the consequences under national law of preferring one interpretation of those directives to another are not relevant to their interpretation. Were that not so, the uniform interpretation and the primacy of EU law would be put at risk. In my opinion, the answer to the second question is thus 'no'.

64. Whether or not 'open' and/or 'unwritten' rules of national law could delineate, for the purposes of Article 31(3), additional information that was 'clear, accurate and necessary for a proper understanding of the essential characteristics of assurance products proposed to the policy-holder' (the test in *Axa Royale Belge*) is not, it seems to me, a question that can be answered in the abstract. Such rules may (for example) be general principles of law within a given legal system, or specific

27 – *Axa Royale Belge*, EU:C:2002:136, cited in footnote 16 above, paragraphs 27 to 30.

28 – *Endress*, EU:C:2013:864, cited in footnote 15 above, paragraph 35 and case-law cited.

29 – In exceptional circumstances the implications of that interpretation may result in a limitation of the temporal effects of a judgment of the Court. However, in the present case, no evidence showing the need to do so has been put to the Court. See, for example, *Endress*, EU:C:2013:864, cited in footnote 15 above, paragraph 36 and case-law cited.

30 – See, for example, *Malaysia Dairy Industries*, C-320/12, EU:C:2013:435, paragraph 25 and case-law cited.

rules for a particular type of transaction (such as the principle, present in a number of EU legal systems, that insurance contracts are *uberrimae fidei*). They are unlikely, in the literal sense, to be 'unwritten' rules; but they may well be 'uncodified rules' and/or rules derived from case-law. How specifically they operate, and with what degree of clarity, precision and foreseeability they will impose obligations on either party to a transaction will depend on the particular legal system involved. In the present case, the referring court has not provided the Court with a detailed explanation of what '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 policy-holder, and/or a general and/or specific duty of care' mean in legal terms or how they operate in national law. In those circumstances, I take no position as to whether those specific rules can, or cannot, satisfy the conditions under Article 31(1) of the Third Life Assurance Directive.

Conclusion

65. In the light of all the foregoing considerations, I am of the opinion that the Court should answer the questions raised by the Rechtbank Rotterdam (Netherlands) to the following effect:

Pursuant to Article 31(1) and item a(10) read together with item a(4) under point A of Annex II 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, a prospective policy-holder seeking to buy a life assurance product with an investment component, under which part of the premium is invested, had to be given, prior to the conclusion of the life assurance contract, information on the premium and the definition of the benefit so as to enable him to understand the connection between the premium and the benefit, the different uses of the premium and the criteria that affect the amount of the premium that is used for investment and for other purposes.

Article 31(3) of Council Directive 92/96 did not preclude Member States from exercising the option stated therein through 'open' and/or unwritten rules provided that the conditions set out in that provision are satisfied. That conclusion is not affected by the consequences under national law of the failure to provide the required information prior to the conclusion of the life assurance contract.