



## Reports of Cases

### JUDGMENT OF THE COURT (Eighth Chamber)

7 November 2013\*

(Legal expenses insurance — Directive 87/344/EEC — Article 4(1) — Insured persons' freedom to choose a lawyer — Clause in the standard terms and conditions of a contract guaranteeing legal assistance in any inquiry or proceedings by one of the insurer's employees — Costs relating to legal assistance provided by an external legal adviser reimbursed only where the insurer decides that it is necessary to entrust handling of the case to an external legal adviser)

In Case C-442/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decision of 28 September 2012, received at the Court on 3 October 2012, in the proceedings

**Jan Sneller**

v

**DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV,**

THE COURT (Eighth Chamber),

composed of C.G. Fernlund, President of the Eighth Chamber, acting as President of the Chamber, C. Toader (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: M. Ferreira, Administrator,

having regard to the written procedure and further to the hearing on 19 September 2013,

after considering the observations submitted on behalf of:

- DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV, by J.W.H. van Wijk and B.J. Drijber, advocaten,
- the Italian Government, by G. Palmieri, acting as Agent, and W. Ferrante, avvocato dello Stato,
- the Austrian Government, by A. Posch, acting as Agent,
- the European Commission, by F. Wilman and K.-P. Wojcik, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

\* Language of the case: Dutch.

gives the following

### Judgment

- 1 This request 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), applicable *rationae temporis* to the case in the main proceedings.
- 2 The request has been made in proceedings between Mr Sneller and DAS Nederlandse Rechtsbijstand Verzekeringsmaatschappij NV ('DAS'), an insurance company, concerning cover for the costs of legal assistance provided by a lawyer chosen by the insured person.

### Legal context

#### *European Union law*

- 3 The eleventh recital in the preamble to Directive 87/344 states 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.'

- 4 Article 1 of that directive provides as follows:

'The purpose of this Directive is to coordinate the provisions laid down by law, regulation or administrative action concerning legal expenses insurance ... in order to facilitate the effective exercise of freedom of establishment and preclude as far as possible any conflict of interest arising in particular out of the fact that the insurer is covering another person or is covering a person in respect of both legal expenses and any other class ... and, should such a conflict arise, to enable it to be resolved.'

- 5 Article 2(1) of that directive is worded as follows:

'This Directive shall apply to legal expenses insurance. Such consists in undertaking, 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:

- securing compensation for the loss, damage or injury suffered by the insured person, by settlement out of court or through civil or criminal proceedings,
- defending or representing the insured person in civil, criminal, administrative or other proceedings or in respect of any claim made against him.'

- 6 Article 4(1) of the directive provides as follows:

'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.'

7 Article 5 of Directive 87/344 provides as follows:

'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).'

#### *Netherlands law*

8 Article 4:67 of the Law on financial supervision (Wet op het financieel toezicht) reads as follows:

'A legal expenses insurer shall ensure that, in the contract for legal assistance cover, it is expressly provided that the insured person is free to choose a lawyer or other practitioner authorised by law where:

- a. recourse is had to a lawyer or other practitioner authorised by law in order to defend, represent or serve the interests of the insured person in any inquiry or proceedings of a judicial or administrative nature; or
- b. a conflict of interests arises.'

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

9 It is apparent from the order for reference that Mr Sneller took out legal expenses insurance with Reaal Schadeverzekeringen NV. The insurance contract provides that DAS is the company responsible for providing legal assistance cover.

10 That contract also provides that cases are to be dealt with by DAS's own staff. However, if, according to the contract or in DAS's opinion, a case must be delegated to external counsel, the insured person has the right to instruct a lawyer or legal practitioner of his own choosing.

11 In the case in the main proceedings, Mr Sneller wishes to bring legal proceedings against his former employer in order to claim damages on the ground of unfair dismissal. To that end, he intends to be assisted by a lawyer of his choosing and to have the costs of legal assistance covered by his legal

expenses insurer. DAS has indicated its agreement to such legal proceedings being brought, but considers that the contract entered into by Mr Sneller does not provide, in such a case, cover for the costs of legal assistance provided by a lawyer chosen by the insured person. DAS indicated that it was prepared to provide legal assistance to Mr Sneller only through one of its own employees, who is not a lawyer.

- 12 In that regard, the referring court indicates that, in accordance with Netherlands law, in the proceedings which Mr Sneller wishes to bring against his former employer, legal assistance is not compulsory.
- 13 Following DAS's refusal to cover the costs of assistance provided by a lawyer chosen by Mr Sneller, Mr Sneller requested the *voorzieningenrechter te Amsterdam* (the court hearing applications for interim relief in Amsterdam) to order DAS to bear those costs. By decision of 8 March 2011, the *voorzieningenrechter te Amsterdam* rejected that request.
- 14 That decision was upheld by judgment of the *Gerechtshof te Amsterdam* (Court of Appeal, Amsterdam) of 26 July 2011. The *Gerechtshof te Amsterdam* considered that Article 4:67(1)(a) of the Law on financial supervision must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which the purpose of the agreement is the provision of legal services in kind, the right freely to choose a lawyer is not triggered merely as a result of the decision to initiate proceedings for the benefit of the insured person; it is also necessary for the legal expenses insurer to decide that legal assistance must be provided by an external lawyer and not by one of its employees. It is only in such a case that a conflict of interests would arise, which Article 4(1)(a) of Directive 87/344 was intended to prevent.
- 15 Mr Sneller contested that judgment before the referring court. According to that court, both the analysis of the various linguistic versions of Article 4(1) of Directive 87/344 and the judgments in Cases C-199/08 *Eschig* [2009] ECR I-8295 and C-293/10 *Stark* [2011] ECR I-4711 provide substantive support for the view that, if judicial or administrative proceedings are brought, the contract terms must always offer the insured person the right freely to choose his legal representative.
- 16 The referring court considers that the reply which it is called upon to give in the case in the main proceedings could have certain social consequences, since, if such an interpretation of Article 4(1) of Directive 87/344 were to be accepted, that would inevitably lead to an increase in insurance premiums, probably of a considerable amount.
- 17 In those circumstances, the *Hoge Raad der Nederlanden* (Supreme Court of the Netherlands) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:
  - '(1) Does Article 4(1) of Directive [87/344] allow a legal expenses insurer, which stipulates in its policies that legal assistance in inquiries or proceedings will in principle be provided by employees of the insurer, also to stipulate that the costs of legal assistance provided by a lawyer or legal representative freely chosen by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer?
  - (2) Will the answer to Question 1 differ depending on whether or not legal assistance is compulsory in the inquiry or proceedings concerned?

## Consideration of the questions referred

### *The first question*

- 18 By its first question, the referring court asks, in essence, whether Article 4(1)(a) of Directive 87/344 must be interpreted as meaning that it precludes a legal expenses insurer which stipulates in its insurance contracts that legal assistance will in principle be provided by its employees from also providing that the costs of legal assistance provided by a lawyer or legal representative chosen freely by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer.
- 19 In that regard, it must be noted that, according to DAS, the passive form used in Article 4(1)(a) of Directive 87/344 in the expression ‘where recourse is had to a lawyer’, which is also used in the German, French and Dutch versions of that provision, demonstrates that that provision does not determine whether, in proceedings, it is for the insurer or the insured person to decide whether it is necessary to have recourse to an external lawyer. It follows that DAS is free to determine this issue in its insurance contracts, as that provision could be understood to provide that ‘where [the insurer decides that it is necessary to] have recourse to a lawyer ..., the insured person shall be free to choose such lawyer or other person.’
- 20 Such a restrictive interpretation of Article 4(1)(a) of Directive 87/344 cannot be accepted.
- 21 In the first place, although it is true that a reading of Article 4(1)(a) of Directive 87/344 does not make it possible, in itself, to determine the full significance of the words ‘where recourse is had to a lawyer ... the insured person shall be free to choose such lawyer or other person’, the fact remains that, in interpreting a provision of EU 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 (*Eschig*, paragraph 38).
- 22 In that regard, it follows from both the eleventh recital in the preamble to Directive 87/344 and Article 4(1) of that directive that the interest of persons covered by legal expenses insurance means that the insured person must have the freedom to choose his own lawyer or other person appropriately qualified under national law for the purpose of any judicial or administrative proceedings (*Stark*, paragraph 28).
- 23 Accordingly, it follows from a reading of Article 4(1)(a) of Directive 87/344 in conjunction with the eleventh recital in the preamble to that directive that the insured person’s right to choose his lawyer cannot be restricted to situations in which the insurer decides that recourse should be had to an external lawyer.
- 24 In second place, as the European Commission argues, it must be noted that the objective pursued by Directive 87/344, in particular Article 4 thereof, broadly to protect the interests of insured persons (see, to that effect, *Eschig*, paragraph 45) is incompatible with a restrictive interpretation of Article 4(1)(a) of that directive, such as that proposed by DAS.
- 25 In that regard, it must be borne in mind that Article 4(1) of Directive 87/344, which concerns the right freely to choose a representative, is of general application and is obligatory in nature (see *Eschig*, paragraph 47, and *Stark*, paragraph 29).
- 26 In third place, as regards the question of the amount of insurance premiums, it should be noted that the various methods by which the insured person may exercise the right to choose his representative do not rule out the possibility that, in certain cases, limitations may be imposed on the costs to be borne by the insurer.

- 27 According to the Court's case-law, freedom of choice, within the terms of Article 4(1) of Directive 87/344, does not mean that Member States are obliged to require insurers, in all circumstances, to cover in full the costs incurred in connection with the defence of an insured person, on condition that that freedom is not rendered meaningless. That would be the case if the restriction imposed on the payment of those costs were to render *de facto* impossible a reasonable choice of representative by the insured person. In any event, it is for the national courts, if an action is brought before them in this regard, to determine whether or not there is any such restriction (see, to that effect, *Stark*, paragraph 33).
- 28 Furthermore, the contracting parties remain free to agree cover for a higher level of legal assistance costs, possibly against payment of a higher premium by the insured person (see, to that effect, *Stark*, paragraph 34).
- 29 In view of the foregoing considerations, the reply to the first question is that Article 4(1)(a) of Directive 87/344 must be interpreted as precluding a legal expenses insurer which stipulates in its insurance contracts that legal assistance will in principle be provided by its employees from also providing that the costs of legal assistance provided by a lawyer or legal representative chosen freely by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer.

#### *The second question*

- 30 By its second question, the referring court asks, in essence, whether the answer to question 1 will differ depending on whether or not legal assistance is compulsory under national law in the inquiry or proceedings concerned.
- 31 Since, first, as noted at paragraph 25 above, the right freely to choose a representative is of general application and is obligatory in nature, and second, Directive 87/344, as is apparent in particular from recital 11 in the preamble to and Article 4(1)(a) of the directive, does not make the right to choose a representative and the scope of that right subject to national rules on legal representation, such national rules cannot affect the answer given to the first question.
- 32 In the light of those considerations, the answer to the second question is that the answer to question 1 will not differ depending on whether or not legal assistance is compulsory under national law in the inquiry or proceedings concerned.

#### **Costs**

- 33 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 (Eighth 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 precluding a legal expenses insurer which stipulates in its insurance contracts that legal assistance will in principle be provided by its employees from also providing that the costs of legal assistance provided by a lawyer or legal representative chosen freely by the insured person will be covered only if the insurer takes the view that the handling of the case must be subcontracted to an external lawyer.**

- 2. The answer to question 1 will not differ depending on whether or not legal assistance is compulsory under national law in the inquiry or proceedings concerned.**

[Signatures]