Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

2 April 2020*

(Reference for a preliminary ruling – Freedom to provide services – Direct life assurance – Directive 2002/83/EC – Articles 35 and 36 – Right of cancellation and cancellation period – Incorrect information concerning the detailed rules for exercising the right of cancellation – Formal requirements for the declaration of cancellation – Lapse of the right of cancellation – Relevance of the policy holder's status as a 'consumer')

In Case C-20/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), made by decision of 20 December 2018, received at the Court on 15 January 2019, in the proceedings

**kunsthaus muerz gmbh**

v

**Zürich Versicherungs AG,**

THE COURT (Eighth Chamber),

composed of L.S. Rossi (Rapporteur), President of the Chamber, J. Malenovský and F. Biltgen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– kunsthaus muerz gmbh, by D. Koch, Rechtsanwalt,

– Zürich Versicherungs AG, by P. Konwitschka, Rechtsanwalt,

– the Austrian Government, by J. Schmoll, acting as Agent,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by G. Braun and H. Tserepa-Lacombe, acting as Agents,

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

* Language of the case: German.

gives the following

## Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 35 and 36 of 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).

2 The request has been made in proceedings between kunsthaus muerz gmbh and Zürich Versicherungs AG ('Zürich') concerning the scope of the right of cancellation in life assurance contracts.

## Legal context

### *European Union law*

3 Recitals 2, 5, 45 and 52 of Directive 2002/83, repealed by Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and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), were worded as follows:

'(2) In order to facilitate the taking-up and pursuit of the business of life assurance, it is essential to eliminate certain divergences which exist between national supervisory legislation. In order to achieve this objective and at the same time ensure adequate protection for policy holders and beneficiaries in all Member States, the provisions relating to the financial guarantees required of life assurance undertakings should be coordinated.

…

(5) This Directive therefore represents an important step in the merging of national markets into an integrated market and that stage must be supplemented by other Community instruments with a view to enabling all policy holders to have recourse to any assurer with a head office in the Community who carries on business there, under the right of establishment or the freedom to provide services, while guaranteeing them adequate protection.

…

(45) For life assurance contracts the policy holder should be given the opportunity of cancelling the contract within a period of between 14 and 30 days.

…

(52) In an internal market for assurance the consumer will have a wider and more varied choice of contracts. If he/she is to profit fully from this diversity and from increased competition, he/she must be provided with whatever information is necessary to enable him/her to choose the contract best suited to his/her 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/her as well as the particulars of the bodies to which any complaints of policy holders, assured persons or beneficiaries of contracts may be addressed.

4 Under Article 1(1)(g) of that directive:

‘For the purposes of this Directive:

…

(g) “Member State of the commitment” shall mean the Member State where the policy holder has his/her habitual residence or, if the policy holder is a legal person, the Member State where the latter’s establishment, to which the contract relates, is situated.’

5 Article 32(2) of the directive provided:

‘Where the policy holder is a natural person and has his/her habitual residence in a Member State other than that of which he/she is a national, the parties may choose the law of the Member State of which he/she is a national.’

6 Article 35 of the same directive stated:

‘1. 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/she 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/her from any future obligation arising from the contract.

The other legal effects and the conditions of cancellation shall be determined by the law applicable to the contract as defined in Article [32], notably as regards the arrangements for informing the policy holder that the contract has been concluded.

2. The Member States need not apply paragraph 1 to contracts of six months’ duration or less, nor where, because of the status of the policy holder or the circumstances in which the contract is concluded, the policy holder does not need this special protection. Member States shall specify in their rules where paragraph 1 is not applied.’

7 Article 36(1) of Directive 2002/83 provided:

‘Before the assurance contract is concluded, at least the information listed in Annex III(A) shall be communicated to the policy holder.’

8 Under point (a)13 of Part A of Annex III to that directive, the ‘Arrangements for application of the cooling-off period’ formed part of the information about the commitment which had to be communicated to the policy holder before the contract was concluded.

### *Austrian law*

9 Paragraph 165a of the Versicherungsvertragsgesetz (Law on insurance contracts), in the version applicable to the contract at issue in the main proceedings, provides:

‘(1) The policy holder is entitled, within 30 days after the contract has been oncluded, to withdraw therefrom. If the insurer has granted provisional cover he is entitled to the premium corresponding to the duration thereof.

(2) If the insurer has not complied with the obligation to disclose its address …, the period for cancellation under subparagraph 1 does not begin to run before the policy holder has been informed of this address.

(3) The above paragraphs do not apply to group insurance policies and policies with a duration of six months or less.'

10 Paragraph 9a of the Versicherungsaufsichtsgesetz (Law on the supervision of insurance undertakings), in the version applicable to the contract at issue in the main proceedings, provides:

'(1) In the event of conclusion of an insurance policy relating to a risk situated in Austria, prior to submission of his contractual declaration, the policy holder must be informed in writing of:

1. the name, the address of the head office and the legal form of the insurance company, and, where appropriate, of the branch concluding the contract, …

…

6. the circumstances in which the policy holder can cancel the conclusion of the insurance policy or withdraw therefrom. …

…

(3) If, owing to the manner in which the contract is concluded, it is not possible to inform the policy holder in writing prior to submission of his contractual declaration, the obligation to provide information shall be fulfilled by virtue of the policy holder receiving the information together with the policy document at the latest.

(4) In any event, the information pursuant to point 1 of subparagraph 1 must also be stated in the insurance application and the policy document and all other documents granting cover. …'

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

11 kunsthaus muerz is a company incorporated under Austrian law. On 27 April 2005, it took out, as policy holder, a life assurance policy with Zürich.

12 In the application form, kunsthaus muerz was informed that notice of cancellation of the contract had to be given in writing.

13 On 9 October 2017, kunsthaus muerz declared that it was cancelling that contract. For that purpose, it considered that that information was incorrect in so far as it imposed, for the exercise of that right, formal requirements which were in fact not required by the applicable national law. Therefore, since such information was not capable of triggering the cooling-off period provided for in Article 35 of Directive 2002/83, that period is unlimited in time.

14 Zürich rejected that declaration on the ground that it was under no obligation to inform kunsthaus muerz in order to trigger the cooling-off period. That information is provided only for a policy holder having the status of a consumer, not for a policy holder which is a professional undertaking.

15 kunsthaus muerz then brought an action before the Handelsgericht Wien (Commercial Court, Vienna, Austria) seeking repayment of the premiums paid and statutory interest of 4% per annum.

16 By judgment of 13 August 2018, that court dismissed that application, inter alia, on the ground that, where the policy holder is a trader, incorrect information regarding the right of cancellation cannot lead to an indefinite right of cancellation, because such a perpetual right of cancellation has its basis in consumer protection legislation.

17 kunsthaus muerz appealed against that decision before the referring court, arguing, inter alia, that EU law does not make an express distinction between policy holders according to whether or not they are consumers and that, therefore, a right of cancellation should be conferred, on the same terms, on all life assurance policy holders.

18 Zürich, on the other hand, takes the view that, in the present case, the policy holder was correctly informed of its right of cancellation and that merely citing a requirement for that right to be exercised in writing – which, moreover, is beneficial to the policy holder itself and serves the principle of legal certainty – does not make the information incorrect. In any event, where the policy holder is a trader, the cancellation period expires entirely irrespective of whether information has been provided in that respect. The spirit and purpose of the right of cancellation provided for by EU law relate only to consumer protection.

19 The referring court has doubts in that regard concerning the scope of the conclusions to be drawn from the judgment of 19 December 2013, *Endress* (C-209/12, EU:C:2013:864).

20 In that judgment, the Court held that Article 15(1) of Council Directive 90/619/EEC 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), as amended by Council Directive 92/96/EEC of 10 November 1992 (OJ 1992 L 360, p. 1), read in conjunction with Article 31 of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1) – provisions reproduced, in essence, in Articles 35 and 36 of Directive 2002/83 – must be interpreted as precluding a national provision under which a right of cancellation lapses one year at the latest after payment of the first premium, where the policy holder has not been informed about the right of cancellation.

21 The referring court notes that, in order to reach that solution, the Court relied on recital 23 of Directive 90/619, reproduced, in essence, in recital 52 of Directive 2002/83, and on the case-law concerning the right of cancellation of every consumer in accordance with Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ 1985 L 372, p. 31), and especially on the judgment of 13 December 2001, *Heininger* (C-481/99, EU:C:2001:684).

22 In particular, the Court took into account the fact that the policy holder is at a disadvantage vis-a-vis the insurer, a situation which is similar to that of a consumer concluding a contract away from business premises. That stems from the fact that insurance contracts are legally complex financial products, capable of differing considerably depending on the insurer offering those products and of involving significant and potentially very long-term financial commitments.

23 In the present case, kunsthaus muerz is not a ‘consumer’. Although there is not a uniform definition of the concept of ‘consumer’ in EU law, it can be gathered from the majority of the legal acts on consumer protection that a consumer is a natural person who, in his or her market activities, does not act for professional or commercial purposes and thus only for private purposes.

24 In those circumstances, the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Directive 2002/83/EC – in particular Article 35 and Article 36 – to be interpreted as precluding a national provision under which, irrespective of a (correct) notice before conclusion of the contract regarding the right of cancellation, the cancellation period comes to an end within 30 days after the contract has been concluded, (even) if the policy holder is not a consumer?'

## The question referred for a preliminary ruling

25 By its question, the referring court is asking, in essence, whether Articles 35 and 36 of Directive 2002/83 are to be interpreted as precluding national legislation under which, even if the policy holder is not a consumer, the period for exercising the right of cancellation in respect of a life assurance contract begins to run from the date on which that contract was concluded, even though the information concerning the detailed rules for exercising that right of cancellation provided by the insurance company to the policy holder indicates formal requirements which are in fact not required by the national law applicable to that contract.

26 It should be pointed out, first of all, that the Court has already had occasion to state that Articles 35 and 36 of Directive 2002/83 are to be interpreted as meaning that the period for exercising the right to cancel a life assurance contract begins to run from the moment when the policy holder is informed that the contract is concluded, even though the information provided by the insurance company to that policy holder indicates formal requirements that are in reality not required by the national law applicable to that contract or by the clauses set out in that contract, provided that such an indication does not essentially limit the circumstances in which the policy holder can exercise his or her right of cancellation as compared with the circumstances in which he or she could have done so if that information had been correct. It is for the referring court to assess, on the basis of an overall assessment taking into account, in particular, the national legislative context and the facts in the main proceedings, whether the error contained in the information provided to the policy holder created such a limitation (see, to that effect, judgment of 19 December 2019, *Rust-Hackner and Others*, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraph 82).

27 Thus, in order to answer the question referred, it is necessary to ascertain whether that interpretation of Articles 35 and 36 of the directive depends on whether or not the policy holder is a consumer.

28 In that regard, according to settled case-law, for the purpose of 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 objectives pursued by the rules of which it forms part (judgments of 19 December 2013, *Koushkaki*, C-84/12, EU:C:2013:862, paragraph 34, of 16 November 2016, *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27, and of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 30).

29 It should be stated, first of all, that neither the wording of Articles 35 and 36 nor, moreover, that of recital 45 of Directive 2002/83, which introduces the right of cancellation enshrined in Article 35 of the directive, draws a distinction between policy holders according to whether or not they are consumers.

30 Next, it should be noted that the referring court considers that kunsthaus muerz cannot be classified as a 'consumer' since it is a legal person and only natural persons may be classified as such. However, without it being necessary to rule on the scope of the notion of 'consumer' in EU law, it is sufficient, in order to answer the question referred, to point out that, in any event, it is apparent from the context of Article 35 of Directive 2002/83 that the policy holder, within the meaning of that provision, may be both a natural person and a legal person.

31 First, Article 1(1)(g) of that directive defines 'Member State of the commitment' as being 'the Member State where the policy holder has his or her habitual residence or, if the policy holder is a legal person, the Member State where the latter's establishment, to which the contract relates, is situated'.

32 Second, according to Article 32(2) of that directive, it is only where the policy holder is a natural person and has his or her habitual residence in a Member State other than that of which he/she is a national that the parties may choose the law of the Member State of which he/she is a national.

33 Moreover, Article 35(2) of that directive gives the Member States the option of limiting that protection 'where, because of the situation of the policy holder or the circumstances in which the contract is concluded, the policy holder does not need to benefit from [that] special protection'. Thus, the protection provided for by the directive necessarily extends to any category of policy holder, unless the Member States avail themselves of that option, for example by excluding that protection for policy holders which are professional undertakings. However, in accordance with paragraph 2, such a limitation should be provided for by the national law applicable to the contract, which, in the present case, it is for the referring court to ascertain in the light of Austrian law.

34 Lastly, that interpretation of Articles 35 and 36 of Directive 2002/83 is confirmed by the objectives of that directive, stated, inter alia, in recitals 2 and 5 of the directive, according to which the directive seeks to ensure adequate protection for insured persons and beneficiaries in all the Member States and to contribute to enabling all policy holders to have recourse to any insurer having its head office in the European Union.

35 To draw a distinction between insured persons according to their personal characteristics and, in particular, depending on whether or not they have the status of 'consumers', would run counter to those objectives because it would entail a limitation of the protection afforded by Directive 2002/83.

36 That interpretation of Articles 35 and 36 of Directive 2002/83 cannot, contrary to Zürich's observations, be called into question by the fact that recital 52 of that directive uses the term 'consumer'. There is nothing in that recital to suggest that the need for information concerning the right of cancellation applies exclusively to a policy holder who is a consumer.

37 The same applies to the references to consumers made by the Court in its judgment 19 December 2013, *Endress* (C-209/12, EU:C:2013:864), in order to rule that, if the policy holder has not received any information regarding the existence of the right of cancellation, the period laid down for the exercise of that right cannot begin to run.

38 It is true that, to reach that conclusion, the Court relied on recital 23 of Directive 90/619, which corresponds, in essence, to recital 52 of Directive 2002/83, and transposed to the insurance provisions the considerations set out in the judgment of 13 December 2001, *Heininger* (C-481/99, EU:C:2001:684), which concerns a reference for a preliminary ruling relating to the provisions of Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises (see also, to that effect, judgment of 19 December 2019, *Rust-Hackner and Others*, C-355/18 to C-357/18 and C-479/18, EU:C:2019:1123, paragraph 63).

39 However, it should be pointed out that, as is apparent from paragraphs 28 and 29 of the judgment of 19 December 2013, *Endress* (C-209/12, EU:C:2013:864), the comparison between policy holders and consumers carried out by the Court in that judgment is based solely on the existence of factors common to their contractual position, namely the risks connected with the conclusion of an insurance contract in the absence of information which complies with the requirements laid down by EU law, and the potentially weak position of the policy holder vis-a-vis the insurer, in view of the fact that insurance contracts are legally complex financial products and that those contracts involve significant and potentially very long-term financial commitments. It cannot be considered that those factors cannot exist with regard to policy holders who are not consumers.

40 That being so, whether or not the policy holder is a consumer must be taken into consideration by the national court where, as pointed out in paragraph 26 of this judgment, it assesses, on the basis of an overall assessment taking into account, inter alia, the national legislative context and the facts in the main proceedings, whether the error in the information provided to the policy holder deprived it of the option to exercise its right of cancellation, in essence, under the same conditions as those which would have prevailed if the information had been correct.

41 In the light of all the foregoing considerations, the answer to the question referred is that Articles 35 and 36 of Directive 2002/83 must be interpreted as meaning that they are also applicable to a policy holder who does not have the status of consumer and that they do not preclude national legislation under which the period for exercising the right to cancel the effects of a life assurance contract starts to run from the date on which that contract was concluded, even though the information concerning the detailed rules for exercising that right of cancellation provided by the insurance company to that policy holder indicates formal requirements which are in fact not required by the national law applicable to the contract, provided that such information does not deprive that policy holder of the option of exercising that right, in essence under the same conditions as those which would have prevailed if the information had been correct. It is for the national court to assess, on the basis of an overall assessment taking into account, inter alia, the national legislative context and the facts in the main proceedings, including that the policy holder may be a consumer, whether the error contained in the information provided to the policy holder deprived it of that option.

## Costs

42 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:

**Articles 35 and 36 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance must be interpreted as meaning that they are also applicable to a policy holder who does not have the status of consumer and that they do not preclude national legislation under which the period for exercising the right to cancel the effects of a life assurance contract starts to run from the date on which that contract was concluded, even though the information concerning the detailed rules for exercising that right of cancellation provided by the insurance company to that policy holder indicates formal requirements which are in fact not required by the national law applicable to the contract, provided that such information does not deprive that policy holder of the option of exercising that right, in essence under the same conditions as those which would have prevailed if the information had been correct. It is for the national court to assess, on the basis of an overall assessment taking into account, inter alia, the national legislative context and the facts in the main proceedings, including that the policy holder may be a consumer, whether the error contained in the information provided to the policy holder deprived it of that option.**

[Signatures]