Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

2 February 2023*

(Reference for a preliminary ruling – Consumer protection – Directive 93/13/EEC – Unfair terms in consumer contracts – Article 5 – Obligation to draft contractual clauses in plain intelligible language – Directive 2005/29/EC – Unfair business-to-consumer commercial practices – Article 3 – Scope – Article 7 – Misleading omission – Article 13 – Penalties – 'Unit-linked' life assurance contracts linked to investment funds – Information on the nature and structure of the assurance product and the risks associated with that product – Misleading standard contracts – Entity that is responsible – Legal consequences)

In Case C-208/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland), made by decision of 1 June 2020, received at the Court on 23 March 2021, in the proceedings

K.D.

v

Towarzystwo Ubezpieczeń Ż S.A.

THE COURT (Ninth Chamber),

composed of L.S. Rossi (Rapporteur), President of the Chamber, J.-C. Bonichot and S. Rodin, Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Towarzystwo Ubezpieczeń Ż S.A., by A. Ciechowicz-Jaworska and B. Ślażyński, radcy prawni,

– the Polish Government, by B. Majczyna, acting as Agent,

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

* Language of the case: Polish.

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Santini, avvocato dello stato,

– the European Commission, by S.L. Kalėda and N. Ruiz García, acting as Agents,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 5 of Council Directive 93/13/EEC of 5 April 1993, on unfair terms in consumer contracts (OJ 1993 L 95, p. 29), and of Article 2(d), and of Article 3(1) and (2) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') (OJ 2005 L 149, p. 22).

2 The request has been made in proceedings between K.D. and Towarzystwo Ubezpieczeń Ż S.A. ('TUŻ'), concerning the reimbursement of assurance premiums paid in respect of a group life assurance contract linked to an investment fund ('the unit-linked group contract') to which K.D. acceded.

Legal context

European Union law

Directive 93/13

3 Article 5 of Directive 93/13 provides:

'In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in plain, intelligible language. …'

Directive 2002/83/EC

4 Article 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), repealed and replaced, from 1 January 2016, 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), as amended by Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 (OJ 2013 L 341, p. 1), provided, in paragraph 1, as follows:

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

Directive 2005/29

5 Recitals 7 and 9 of Directive 2005/29 are worded as follows:

(7) This Directive addresses commercial practices directly related to influencing consumers' transactional decisions in relation to products. …

…

(9) This Directive is without prejudice to individual actions brought by those who have been harmed by an unfair commercial practice. It is also without prejudice to Community and national rules on contract law … Financial services and immovable property, by reason of their complexity and inherent serious risks, necessitate detailed requirements, including positive obligations on traders. For this reason, in the field of financial services and immovable property, this Directive is without prejudice to the right of Member States to go beyond its provisions to protect the economic interests of consumers. …'

6 Under Article 2 of that directive:

'For the purposes of this Directive:

…

(b) "trader" means any natural or legal person who, in commercial practices covered by this Directive, is acting for purposes relating to his trade, business, craft or profession and anyone acting in the name of or on behalf of a trader;

(c) "product" means any goods or service including immovable property, rights and obligations;

(d) "business-to-consumer commercial practices" (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

…'

7 Article 3 of the directive provides, in paragraphs 1 and 2:

'1. This Directive shall apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product.

2. This Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation or effect of a contract.'

8 Article 5 of the directive provides:

'1. Unfair commercial practices shall be prohibited.

…

4. In particular, commercial practices shall be unfair which:

(a) are misleading as set out in Articles 6 and 7,

or

(b) are aggressive as set out in Articles 8 and 9.

…’

9 According to Article 7 of Directive 2005/29:

‘1. A commercial practice shall be regarded as misleading if, in its factual context, taking account of all its features and circumstances and the limitations of the communication medium, it omits material information that the average consumer needs, according to the context, to take an informed transactional decision and thereby causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

2. It shall also be regarded as a misleading omission when, taking account of the matters described in paragraph 1, a trader hides or provides in an unclear, unintelligible, ambiguous or untimely manner such material information as referred to in that paragraph or fails to identify the commercial intent of the commercial practice if not already apparent from the context, and where, in either case, this causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

…

5. Information requirements established by Community law in relation to commercial communication including advertising or marketing, a non-exhaustive list of which is contained in Annex II, shall be regarded as material.’

10 The first subparagraph of Article 11(1) of that directive provides:

‘Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.’

11 Article 13 of the directive is worded as follows:

‘Member States shall lay down penalties for infringements of national provisions adopted in application of this Directive and shall take all necessary measures to ensure that these are enforced. The penalties provided for must be effective, proportionate and dissuasive.’

12 Under Annex II to that directive, the information which is deemed to be material, within the meaning of Article 7 thereof, is that referred to in Article 36(1) of Directive 2002/83.

13 Directive 2005/29 was amended by Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 (OJ 2019 L 328, p. 7). The latter directive, the period for transposition of which expired on 28 November 2021, in accordance with Article 7(1) thereof, inserted an Article 11a into Directive 2005/29, which is worded as follows:

'1. Consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, a price reduction or the termination of the contract. Member States may determine the conditions for the application and effects of those remedies. Member States may take into account, where appropriate, the gravity and nature of the unfair commercial practice, the damage suffered by the consumer and other relevant circumstances.

2. Those remedies shall be without prejudice to the application of other remedies available to consumers under Union or national law.'

Polish law

14 Directive 2005/29 was transposed into Polish law by the ustawa o przeciwdziałaniu nieuczciwym praktykom rynkowym (Law on combating unfair commercial practices) of 23 August 2007 (Dz. U. No 171, item 1206). Article 12(1) of that law, in the version applicable to the facts of the main proceedings, provides:

'In the case of unfair commercial practices, a consumer whose interests have been threatened or infringed may seek:

…

(4) compensation for damage caused on the basis of general principles, in particular by requiring the termination of the contract with the obligation of mutual restitution of the services and reimbursement by the trader of the costs associated with the purchase of the product; …'

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

15 By a declaration taking effect from 10 January 2012, K.D. acceded, as an assured person for a period of 15 years, to the unit-linked group contract concluded between TUŻ, an assurance undertaking, and Y, a bank acting as the policyholder.

16 The purpose of that contract was the collection and investment of assurance premiums paid monthly by the assured persons, through an investment fund whose capital was established on the basis of those premiums. After being converted into units of the investment fund, the amount corresponding to those premiums was invested in certificates issued by an investment company ('the assets underlying the unit-linked group contract'), the value of which was calculated on the basis of an index.

17 In return, TUŻ undertook to provide benefits in the event of the death or survival of the assured person, at the end of the assurance period. The amount of those benefits was not to be less than the nominal value of the premiums paid by the assured person, together with any positive variation in the value of the investment fund units. By contrast, in the event of termination of the

assurance contract before the expiry of its validity period, TUŻ undertook to reimburse the assured person an amount equal to the present value of his or her units in the investment fund, after deduction of a termination fee.

18 The unit-linked group contract was governed by general assurance conditions, a table of fees and premium limits and a set of investment fund rules, which constitute standard contractual clauses drafted by TUŻ. Those documents did not specify the rules governing the conversion of monthly premiums into units of the investment fund and the valuation of those units, the valuation of the net assets of that fund in its entirety and the valuation of the certificates in which the fund assets were invested, or the method for calculating the value of the index on which the payment of those certificates was based. However, the investment fund rules stated that the investment was exposed inter alia to the credit risk of the issuer of those certificates and to the risk of losing part of the premiums paid, in the event of early termination of that contract.

19 The unit-linked group contract was marketed to consumers and managed by bank Y, which received a commission from TUŻ for its intervention. Although Y did not participate in the design of the assurance product, which was entirely designed by TUŻ, Y trained its employees to offer that product and prepared training materials for that purpose, validated by TUŻ.

20 In the present case, K.D.'s accession to the unit-linked group contract at issue was processed by an employee of Y who, according to K.D., presented the assurance product in question as an investment product offering guaranteed capital at the end of the validity period of that contract. The accession offer was based on the general assurance conditions and the investment fund rules drafted by TUŻ, which were given to K.D. by the employee of Y.

21 When she learned that the value of her units in the investment fund was significantly lower than the amount of the assurance premiums which she had paid, K.D., by letter of 4 April 2017, terminated her assurance contract and requested TUŻ to refund all of those assurance premiums. By letter of 25 April 2017, TUŻ refused that request.

22 By an action brought on 10 January 2018 before the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland) which is the referring court, K.D. requested that TUŻ be ordered to pay it an amount corresponding, in essence, to the difference between the surrender value of the assurance contract on the day that the contract was terminated, amounting, after deduction of the termination costs, to approximately one third of the assurance premiums paid by K.D. and the entirety of those premiums.

23 In support of that action, K.D. relies on several pleas in law, alleging, inter alia, that her declaration of accession to the unit-linked group contract was null and void and that TUŻ engaged in an unfair commercial practice consisting of the sale of goods not adapted to consumer needs and the provision of misleading information to the consumer at the time of entering into that contract. In support of those pleas, K.D. claims, in essence, that the standard contractual terms of the contract contain unclear, imprecise and therefore misleading provisions which do not enable the consumer to determine the nature and structure of the assurance product offered and the related risks.

24 TUŻ contends that the allegedly unfair practices claimed by K.D. relate to the process of selling the assurance product, which was carried out by Y, in the course of its economic activity, on its own behalf and in its own name. Furthermore, TUŻ claims to have fulfilled its obligations to provide information, since all the information relating to that assurance product was contained in the documents received by K.D. at the time of her accession to the unit-linked group contract.

25 It is in that context that the referring court raises the question of the interpretation of several provisions of Directive 2005/29 and Directive 93/13 in order to resolve the dispute before it. It notes, first, that, according to a literal interpretation of Article 3(1) of Directive 2005/29, read in the light of recital 7 thereof, the concept of 'unfair commercial practice', within the meaning of that directive, refers only to the circumstances relating to the conclusion of the agreement and the presentation of the product to the consumer, and not the earlier stage relating to the design of that product and the drawing up of the content of the standard assurance contract.

26 According to the referring court, however, account must be taken of the specific features of a tripartite legal relationship, such as that at issue in the main proceedings. In such a relationship, the offer of the assurance product conceived by the assurance undertaking and distributed by the policyholder is based on a standard assurance contract formulated by that assurance undertaking, which determines the scope of its obligations and those of the consumer.

27 Thus, where such a standard contract is not drafted in an intelligible manner, in that it does not enable the average consumer to determine the essential characteristics of the assurance product offered, the concept of 'unfair commercial practice' could also be interpreted as referring to the conduct of a trader who, although not involved in the marketing of that product, drafted a misleading standard assurance contract which forms the basis of a commercial offer prepared and offered to consumers by another trader.

28 Secondly, if that were the case, the question also arises as to whether the trader responsible for that unfair commercial practice is the person who drew up the misleading standard assurance contract or the one who presented the product based on that standard contract to the consumer and who is directly responsible for marketing it, or whether both traders must be held responsible for such a practice.

29 In that regard, the referring court observes that, since the policyholder is responsible for proposing accession to the unit-linked group contract and, on that basis, receives commission from the assurance undertaking, and that the concept of 'trader', within the meaning of Article 2(b) of Directive 2005/29, also refers to any person acting in the name and on behalf of a trader, both operators could be held liable.

30 Thirdly, the referring court has doubts as to the compatibility of Article 12(1)(4) of the Law on combating unfair commercial practices with Directive 2005/29. That provision, as interpreted by the Polish courts, would indeed allow for the annulment of a contract concluded as a result of an unfair commercial practice.

31 It is clear from Article 3(2) of Directive 2005/29 that a finding that a commercial practice is unfair does not directly affect the validity of the contract. In addition, it follows from Article 13 of that directive that the penalties laid down by the Member States for infringements of the provisions of national law transposing it must be effective, proportionate and dissuasive. Those penalties should therefore be fixed taking into account the delimiting rule referred to in Article 3(2) of that directive.

32 According to the referring court, Directive 2005/29 cannot serve as a basis for a finding that a contract is invalid. It follows that a provision of national law transposing that directive and providing for the cancellation of a contract concluded as a result of an unfair commercial practice constitutes a disproportionate penalty. It was not until Directive 2019/2161 that the EU legislature provided, by way of exception, for the possibility of seeking the termination of a contract thus concluded, by inserting a new Article 11a into Directive 2005/29, after the entry into force of Article 12(1)(4) of the Law on combating unfair commercial practices.

33 Fourthly, in the event that Directive 2005/29 precludes an unfair commercial practice from being penalised by the annulment of the contract, as is the case under Polish law, the referring court asks whether Article 5 of Directive 93/13 constitutes an appropriate legal basis for seeking such annulment.

34 In that regard, the national court considers that the use of an unintelligible and unclear standard assurance contract, which does not enable the consumer to understand the essential characteristics of the product marketed or the apportionment and scale of the investment risk borne by him or her, fails to comply with the obligation to draft contractual terms in a plain and intelligible manner laid down in Article 5 of Directive 93/13. Such a finding could, under certain conditions, allow national courts to invalidate some of the terms of such a standard contract on the grounds that they are unfair within the meaning of Article 3(1) of the Directive.

35 Accordingly, the Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 3(1) [of Directive 2005/29, read in conjunction with Article 2(d) thereof,] be interpreted as concentrating the meaning of the term “unfair commercial practice” only around the circumstances relating to the conclusion of a contract and the presentation of the product to the consumer, or must the formulation, by the trader who is creator of the product, of the misleading standard contract which underlies the functioning of the sales offering prepared by another trader, and is therefore not directly related to the marketing of the product, also be understood as falling with the scope of the directive and thus the term “unfair commercial practice”?

(2) If the first question is answered in the affirmative, must it be concluded that the trader responsible under [Directive 2005/29] for the use of an unfair commercial practice is the trader responsible for formulating the misleading standard contract or the trader who, on the basis of those contractual clauses, presents the product to the consumer and is directly responsible for marketing the product, or must it be concluded that both traders bear responsibility under [Directive 2005/29]?

(3) Does Article 3(2) of [Directive 2005/29] preclude a rule of national law (interpretation of national law), which confers on the consumer the right to apply for annulment by a national court of a contract concluded with a trader, with mutual refund of payments, where the consumer’s declaration of intent to conclude the contract was made under the influence of the trader’s unfair commercial practice?

(4) If the third question is answered in the affirmative, must it be held that the appropriate legal basis for assessing the action of a trader, consisting in the use of an unintelligible and unclear standard contract in relation to a consumer, will be Directive 93/13, and consequently must the requirement that contractual terms be drafted in plain, intelligible language, laid down in Article 5 of Directive 93/13, be interpreted as meaning that in unit-linked life assurance contracts concluded with consumers this requirement is met by a non-individually negotiated contractual term which does not expressly define the scale of the investment risk during the term of the assurance contract and merely provides information about the possibility of the loss of part of the first premium paid and on-going premiums in the event of withdrawal from the assurance before the end of the liability period?'

Procedure before the Court

36 By decision of the President of the Court of 28 December 2021, the proceedings in the present case were stayed, pursuant to Article 55(1)(b) of the Rules of Procedure of the Court of Justice, pending delivery of the judgment in Joined Cases C-143/20 and C-213/20, *A and Others ('Unit-linked' assurance contracts)*.

37 By decision of the President of the Court of 25 February 2022, the judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)* (C-143/20 and C-213/20, EU:C:2022:118), was notified to the referring court in order for it to clarify whether it wished to maintain its request for a preliminary ruling.

38 By email of 6 May 2022, that court informed the Court that it was maintaining that request. Consequently, the decision to resume the proceedings in the present case was taken.

Admissibility of the request for a preliminary ruling

39 TUŻ expresses doubts as to the admissibility of the request for a preliminary ruling, arguing that an answer to the questions referred is not necessary in order to resolve the dispute in the main proceedings. First, on 25 November 2020, TUŻ acknowledged and paid into the account of K.D. the amount claimed by it, with the result that the dispute in the main proceedings has become devoid of purpose. Secondly, the case-law of the Court and of the national courts already provides an answer to those questions.

40 As regards, first, the fact that the Court's case-law has already provided an answer to the questions raised by the referring court, it suffices to point out that, even where there is case-law resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so; the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling or lead to the inadmissibility of the questions referred (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraphs 21 and 22).

41 As regards, secondly, the existence of a dispute in the main proceedings, it is true that, as is apparent from the very wording of Article 267 TFEU, the preliminary ruling sought must be necessary in order to enable the referring court to give judgment in the case before it. Thus, the preliminary ruling procedure presupposes, among other things, that a case is pending before the

national courts, in which they are called upon to give a decision that may take the preliminary ruling into account (see, to that effect, judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraph 25 and the case-law cited).

42 However, in the context of the cooperation between the Court and the national courts provided for in Article 267 TFEU, it is solely for the national court before which a dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case in the main proceedings, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20,, EU:C:2022:120, paragraph 23 and the case-law cited).

43 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court for a preliminary ruling only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 24 February 2022, *TGSS (Domestic worker unemployment)*, C-389/20, EU:C:2022:120, paragraph 24 and the case-law cited).

44 In the present case, when questioned in that regard by the Court, the referring court stated that the case in the main proceedings was still pending, that the applicant's application had not been withdrawn and that it considered that there was no need to close that case, since recognition of the debt by TUŻ was intended to bring about the closure of the proceedings before it and to prevent the Court from ruling.

45 The Court has already ruled that an indication by the referring court that the main proceedings are still pending is binding on the Court and cannot, in principle, be called into question by the parties to the main proceedings (see, to that effect, judgments of 27 February 2014, *Pohotovosť*, C-470/12, EU:C:2014:101, paragraph 30, and of 18 November 2020, *DelayFix*, C-519/19, EU:C:2020:933, paragraph 33).

46 Furthermore, since it is not apparent either from the file before the Court or from the reply of the referring court on the maintenance of its reference for a preliminary ruling that the applicant in the main proceedings has withdrawn its action or that its claims have been fully satisfied, so that the dispute has become devoid of purpose, it is not obvious that the problem described in the request for a preliminary ruling has become hypothetical, with the result that an answer to the questions referred appears still necessary in order to resolve that dispute (see, to that effect, judgment of 8 December 2022, *Caisse régionale de Crédit mutuel de Loire-Atlantique et du Centre Ouest*, C-600/21, EU:C:2022:970, paragraph 25).

47 In those circumstances, it must be considered that the request for a preliminary ruling is admissible.

Consideration of the questions referred

The first and second questions

48 According to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 15 July 2021, *Ministrstvo za obrambo*, C-742/19, EU:C:2021:597, paragraph 31).

49 It should also be recalled that the Court has repeatedly held that the justification for a reference for a preliminary ruling is not that it enables advisory opinions on general or hypothetical questions to be delivered but rather that it is necessary for the effective resolution of a dispute (judgment of 15 June 2021, *Facebook Ireland and Others*, C-645/19, EU:C:2021:483, paragraph 116 and the case-law cited).

50 In the present case, it is apparent from the account of the facts set out in paragraph 23 of the present judgment that the dispute in the main proceedings concerns, inter alia, the existence of an alleged unfair commercial practice consisting of an assurance undertaking drawing up a standard unit-linked group contract in an unclear and imprecise manner, so that a consumer who acceded to that group contract, on the proposal of a second undertaking, the policyholder of that group contract, is not in a position to understand the nature and structure of the assurance product offered and the risks associated with it.

51 In those circumstances, by its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 3(1) of Directive 2005/29 must be interpreted as meaning that it is an 'unfair commercial practice', within the meaning of that provision, for an assurance undertaking to draw up a standard unit-linked group contract which does not enable a consumer who accedes to that group contract on the basis of a proposal from a second undertaking, the policyholder, to understand the nature and structure of the assurance product proposed and the risks associated with it. If so, the referring court also asks whether the assurance undertaking, the policyholder undertaking or both traders together must be held liable for that unfair commercial practice.

52 Under Article 3(1) of Directive 2005/29, that directive is to 'apply to unfair business-to-consumer commercial practices, as laid down in Article 5, before, during and after a commercial transaction in relation to a product'. Under Article 5(4) of that directive, commercial practices which are misleading, within the meaning of Articles 6 and 7, or aggressive, within the meaning of Articles 8 and 9 thereof, are unfair.

53 As regards, in the first place, the classification of the drafting of a standard unit-linked group contract by an assurance undertaking as a 'commercial practice', within the meaning of Directive 2005/29, it should, first, be borne in mind that the concept of 'commercial practices' is defined, in Article 2(d) of that directive, in particularly broad terms, the practices thus covered having to be, first, of a commercial nature, that is to say, from traders, and, secondly, directly connected with the promotion, sale or supply of products to consumers. In that regard, the Court clarified, first, that the words 'directly connected with the sale of a product' cover, inter alia, any measure taken in relation to the conclusion of a contract, the concept of 'product' within the meaning of

Article 2(c) of that directive, covering, moreover, any goods or service. Secondly, it is apparent from Article 2(b) of that directive that the concept of 'trader' refers to 'any natural or legal person' who pursues a remunerated activity, provided that the commercial practice is part of the professional activities in which he or she engages, including where that practice is carried out by another undertaking acting in the name and/or on behalf of that person (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 129 and the case-law cited).

54 As regards, secondly, the applicability of such a concept to the actions of an assurance undertaking in relation to the accession of consumers to a unit-linked group contract, the Court has already held, first of all, that the declaration by which a consumer accedes to such a group contract concluded between an assurance undertaking and an undertaking which is the policyholder gives rise to an individual assurance contract between that assurance undertaking and that consumer. By proposing to that consumer to accede to the group contract, the undertaking which is the policyholder carries out, for remuneration, an insurance mediation activity within the meaning of Directive 2002/92/EC of the European Parliament and of the Council of 9 December 2002 on insurance mediation (OJ 2003 L 9, p. 3) (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraphs 81, 87 and 88).

55 That means, then, that a consumer who intends to accede to such a unit-linked group contract receives the information which Article 36(1) of Directive 2002/83 requires to be communicated to the policyholder before the conclusion of the assurance contract ('the contractual information') (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 82).

56 In that regard, the Court has held that, since, in the case of a unit-linked group contract, the assurance product contains an element of investment, which is inseparable from that product, that contractual information must include, inter alia, information on the essential characteristics of the underlying assets of the unit-linked group contract. Those particulars must include a clear, accurate and intelligible description of the economic and legal nature of those underlying assets, including the general principles governing their yield, as well as clear, accurate and intelligible information on the structural risks associated with those underlying assets, namely the risks inherent in their nature and that may directly affect the rights and obligations arising from the insurance relationship, such as the risks linked to the depreciation of units in the investment fund to which that contract is linked or the credit risk of the issuer of the financial instruments which make up those underlying assets. On the other hand, that information does not necessarily have to include a detailed and comprehensive description of the nature and scope of all the investment risks associated with the underlying assets of the unit-linked group contract, such as those arising from the specific features of the various financial instruments of which they are composed, or from the technical methods for calculating the value of the index on which the payment of those financial instruments is based, or the same information as that which the issuer of those financial instruments is required, as a provider of investment services, to communicate to its clients (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraphs 97 and 102 to 105).

57 Finally, it is for the assurance undertaking to communicate the contractual information to the policyholder undertaking, formulating it in a clear, accurate and intelligible manner for consumers, with a view to its subsequent transmission to consumers during the procedure for accession to a unit-linked group contract. That policyholder undertaking, acting as an insurance

intermediary, must, for its part, communicate that contractual information to any consumer before the consumer accedes to that contract, together with any other details which may prove necessary in the light of the consumer's requirements and needs. These details must be modulated according to the complexity of the contract and formulated clearly and accurately and in a manner intelligible to the consumer (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraphs 89 to 91).

58 The Court has also stated that the communication of contractual information to a consumer who intends to accede to a unit-linked group contract may be made by means of a standard contract drafted by the assurance undertaking, provided that it is given to that consumer by the policyholder undertaking prior to his or her accession, in sufficient time to enable him or her, in full knowledge of the facts, to make an informed choice as to the assurance product best suited to his or her needs (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 118).

59 On the basis of the considerations summarised in paragraphs 53 to 58 of the present judgment the Court held, in the judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)* (C-143/20 and C-213/20, EU:C:2022:118, paragraph130), that the communication of contractual information before the consumer's accession to a unit-linked group contract, on the one hand, was made by the assurance undertaking and by the policyholder undertaking acting as an insurance intermediary and is part of the activities in which those undertakings engage on a professional basis and, secondly, that it is directly related to the conclusion by that consumer of an assurance contract within the meaning of Directive 2002/83, so that that communication constitutes a 'commercial practice' within the meaning of Directive 2005/29

60 Since, as in the present case, that communication takes the form of a standard contract, which forms the basis for the offer of accession to the unit-linked group contract proposed by the policyholder undertaking, the drawing up by the assurance undertaking of that standard contract also falls within the concept of 'commercial practice' within the meaning of Directive 2005/29.

61 As regards, in the second place, the unfairness of a commercial practice whereby an assurance undertaking drafts a standard unit-linked group contract in a manner that is unclear and imprecise, which does not allow a consumer who is acceding to it, on a proposal from a policyholder of that group contract, to understand the nature and structuring of the assurance product offered and the associated risks, it must be borne in mind that it follows from Article 7(1) of Directive 2005/29 that a commercial practice is to be regarded as misleading and thus constitutes an unfair commercial practice within the meaning of Article 5(4) thereof if, considered in its factual context and taking into account all its characteristics and circumstances and the specific limitations of the means of communication used, two conditions are met. First, the practice must omit material information which the average consumer needs, given the context, to make an informed commercial decision. Secondly, the commercial practice must lead or be likely to lead the average consumer to take a commercial decision that he or she would not otherwise have taken (judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 131).

62 Furthermore, in accordance with Article 7(2) of that directive, in so far as the second condition set out in the preceding paragraph is fulfilled, a commercial practice is also to be regarded as a misleading omission where a trader hides such material information or provides it in an unclear, unintelligible, ambiguous or untimely manner (judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 132).

63 In that regard, the Court found, first, that the contractual information referred to in paragraph 56 of the present judgment constitutes material information within the meaning of Article 7 of Directive 2005/29 (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 133).

64 Second, having regard to the cardinal importance of the communication of the contractual information referred to in paragraph 56 to enable a consumer who intends to accede to a unit-linked group contract to make, in full knowledge of the facts, an informed choice as to the assurance product best suited to his or her needs, the Court held that the failure to communicate that information, its concealment or the communication of that information in an unclear, unintelligible, ambiguous or untimely manner appeared to be likely to cause him or her to take a transactional decision that he or she would not have taken otherwise (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 134).

65 The Court concluded that the failure to communicate that contractual information to a consumer who wishes to accede to a unit-linked group contract may constitute an unfair commercial practice within the meaning of Article 5(4) of Directive 2005/29 and, more particularly, may be considered as a misleading omission within the meaning of Article 7 of that directive (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraph 135).

66 Thus, where, on the one hand, the contractual information is communicated to a consumer who intends to accede to that contract by means of a standard contract drafted by the assurance undertaking and, on the other hand, that standard contract omits, conceals or communicates in an unclear, unintelligible or ambiguous manner the contractual information referred to in paragraph 56 of the present judgment, so that it does not enable that consumer to understand the nature and structure of the assurance product offered and the associated risks, and thus make an informed choice as to which assurance product best suits his or her needs, such a commercial practice may be regarded as a misleading omission within the meaning of Article 7 of Directive 2005/29 and therefore constitutes, by virtue of Article 5(4) of that directive, an unfair commercial practice.

67 It therefore follows from the foregoing that, subject to the verifications which are incumbent on the national courts as to whether the conditions set out in the preceding paragraph are satisfied, the drafting by an assurance undertaking of a unit-linked group contract which does not enable the consumer to understand the nature and structure of the assurance product proposed and the risks associated with it may constitute an 'unfair commercial practice' within the meaning of Article 3(1) of Directive 2005/29.

68 As regards, in the third and last place, the attribution of liability for such an unfair commercial practice to the assurance undertaking, the policyholder undertaking or both of those traders, the Court has already held that, in the light of the definition of the concept of 'trader', set out in Article 2(b) of Directive 2005/29, referred to in paragraph 53 of the present judgment, that

directive may apply in a situation where the commercial practices of an operator are used by another undertaking, acting in the name or on behalf of that operator, with the result that the provisions of that directive could, in certain situations, be relied on as against both that operator and the undertaking, if they satisfy the definition of 'trader' (judgment of 17 October 2013, *RLvS*, C-391/12, EU:C:2013:669, paragraph 38)

69 In this case, it follows in particular from the considerations set out in points 54, 57 and 59 of the present judgment that, first, in the context of the process of consumers acceding to a unit-linked group contract, both the assurance undertaking and the policyholder undertaking meet the definition of a trader within the meaning of Directive 2005/29. Furthermore, those traders are both individually responsible for the proper performance of the pre-contractual information obligation referred to in Article 36(1) of Directive 2002/83 for the benefit of the consumer who accedes to that unit-linked group contract, for the part of that obligation which they are required to fulfil.

70 Thus, where the unfair commercial practice consists of the fact that the assurance undertaking drafted the standard unit-linked group contract in a misleading manner, and which was transmitted to the consumer in in a timely manner before he or she acceded to that group contract, that undertaking must, in principle, be held liable for such a practice.

71 That is so without prejudice to any liability of the policyholder undertaking in respect of other unfair commercial practices directly related to the process whereby the consumer acceded to the unit-linked group contract, such as those which may consist of the failure to provide specific additional information within the meaning of paragraph 57 of the present judgment, concerning, inter alia, the financial aspects of the investment in the assurance product and the associated risks, which that undertaking, in its capacity as an insurance intermediary, within the meaning of Directive 2002/92, is required to transmit to the consumer, or the fact that it has failed to comply with the time limit for transmitting the standard unit-linked group contract to the consumer within the meaning of paragraph 58 of the present judgment.

72 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 3(1) of Directive 2005/29 must be interpreted as meaning that the drafting by an assurance undertaking of a unit-linked group contract which does not enable a consumer who is acceding to that group contract on the basis of a proposal from a second undertaking, the policyholder, to understand the nature and structure of the assurance product offered and the risks associated with it may constitute an 'unfair commercial practice' within the meaning of that provision and that that assurance undertaking must be held liable for that unfair commercial practice.

The third question

73 It is apparent from the order for reference, as summarised in paragraphs 30 to 32 of the present judgment, that, by its third question, the referring court seeks, in essence, to ascertain whether, in the light of Article 3(2) of Directive 2005/29, from which it is apparent that a finding that a commercial practice is unfair does not directly affect the validity of the contract, an interpretation of Polish law which confers on the consumer the right to seek the annulment of a contract concluded as a result of an unfair commercial practice may be regarded as a proportionate measure for the purposes of Article 13 of the directive.

74 In accordance with the case-law referred to in paragraph 48 above, it must be held that, by that question, that court asks, in essence, whether Article 3(2) of Directive 2005/29, read in conjunction with Article 13 thereof, must be interpreted as precluding an interpretation of national law which confers on a consumer, who has concluded a contract as a result of an unfair commercial practice on the part of a trader, the right to seek the annulment of that contract.

75 In order to answer that question, it is necessary to determine, first, whether Article 3(2) of that directive precludes the Member States from conferring such a right on consumers as a penalty for the existence of an unfair commercial practice, and then, if not, to determine whether annulment of the contract may be regarded as an effective, proportionate and dissuasive penalty within the meaning of Article 13 of that directive.

76 As regards, in the first place, the interpretation of Article 3(2) of that directive, it should be recalled that, according to settled case-law of the Court, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part (judgment of 26 April 2022, *Landespolizeidirektion Steiermark (Maximum duration of internal border control)*, C-368/20 and C-369/20, EU:C:2022:298, paragraph 56).

77 As regards, first, the wording of that provision, it is apparent from the very wording of that provision that, in the absence of harmonisation at EU level of the general aspects of contract law, the validity of contracts is governed by national law (see, to that effect, judgment of 3 February 2021, *Stichting Waternet*, C-922/19, EU:C:2021:91, paragraphs 42 and 45).

78 As regards, secondly, the context of that provision, on the one hand, recital 9 of Directive 2005/29 clearly states that it applies without prejudice not only to national rules on contract law but also to individual actions brought by persons harmed by an unfair commercial practice.

79 On the other hand, the Court has ruled that the directive merely provides, in Article 5(1) thereof, that unfair commercial practices 'shall be prohibited' and that, accordingly, it leaves the Member States a margin of discretion as to the choice of national measures intended, in accordance with Articles 11 and 13 of that directive, to combat those practices, on condition that they are adequate and effective and that the penalties thus laid down are effective, proportionate and dissuasive (judgment of 19 September 2018, *Bankia*, C-109/17, EU:C:2018:735, paragraph 31 and the case-law cited).

80 The Court has stated that, although Article 11 of the directive merely requires Member States to ensure that adequate and effective means exist to combat those practices, such means may nonetheless consist of legal proceedings against such practices, the purpose of which is to bring them to an end (see, to that effect, judgment of 19 September 2018, *Bankia*, C-109/17, EU:C:2018:735, paragraph 42).

81 Thirdly, as regards the purpose of Directive 2005/29, its objective is to ensure a high level of consumer protection and, to that end, to ensure that unfair practices are effectively combated in the interests of consumers (see, to that effect, judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraphs 32 and 51).

82 It is therefore apparent from a literal, systematic and teleological interpretation of Article 3(2) of Directive 2005/29 that that provision does not preclude Member States from conferring on a consumer, who has concluded a contract as a result of an unfair commercial practice, the right to seek the annulment of that contract, provided that such a penalty is effective, proportionate and dissuasive within the meaning of Article 13 of that directive.

83 That interpretation is not invalidated by the fact that Directive 2019/2161 inserted a new Article 11a into Directive 2005/29, paragraph 1 of which provides that 'consumers harmed by unfair commercial practices, shall have access to proportionate and effective remedies, including compensation for damage suffered by the consumer and, where relevant, … the termination of the contract', while stating, in paragraph 2, that it is 'without prejudice to the application of other remedies available to consumers under … national law'.

84 Apart from the fact that the period for transposing Directive 2019/2161 expired on 28 November 2021, so that Article 11a is irrelevant to the interpretation of Article 3(2) and Article 13 of Directive 2005/29 in the present case, its inclusion in Directive 2005/29 in any event merely confirms that it was and remains open to Member States to provide for other remedies in favour of consumers harmed by unfair commercial practices, including those providing for the consumer's right to seek the annulment of a contract concluded as a result of such a practice.

85 As regards, in the second place, the effective, proportionate and dissuasive character, within the meaning of Article 13 of that directive, of a penalty consisting of the annulment of the contract, the Court has stated, on the one hand, that it is for the national courts alone to assess, taking into consideration all the circumstances of the cases before them, whether the system of penalties applicable to traders using unfair commercial practices, laid down by the Member States in accordance with the case-law referred to in paragraph 79 of the present judgment, complies with the requirements of that directive and, in particular, the principle of proportionality (see, to that effect, judgment of 16 April 2015, *UPC Magyarország*, C-388/13, EU:C:2015:225, paragraphs 58 and 59, as well as, by analogy, judgment of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraph 27.

86 On the other hand, the Court considered, for the purpose of providing clarification to guide the national courts in such an assessment, that the penalty of nullity of the contract satisfies, in principle, the requirements of effectiveness, proportionality and dissuasiveness laid down by a provision similar to Article 13 of Directive 2005/29 (see, to that effect, judgment of 5 March 2020, *OPR-Finance*, C-679/18, EU:C:2020:167, paragraphs 25, 26, 29 and 30 and the case-law cited).

87 In that context, it should also be recalled that the Court has held, as regards the commercial practices surrounding accession of consumers to unit-linked group contracts, such as those at issue in the main proceedings, that, although Directive 2002/83 does not require the view to be taken that the incorrect performance of the obligation to provide pre-contractual information laid down in Article 36(1) of that directive leads to the nullity or invalidity of a unit-linked group contract or of the declaration of accession thereto, the national courts are nonetheless required to assess whether, in view of the cardinal importance of the contractual information referred to in paragraph 56 of the present judgment in shaping the consumer's willingness to enter into the contract, incorrect performance of that duty to provide information is liable to vitiate the consumer's consent to be bound by the contract (see, to that effect, judgment of 24 February 2022, *A and Others ('Unit-linked' assurance contracts)*, C-143/20 and C-213/20, EU:C:2022:118, paragraphs 125 and 126).

88 In those circumstances, the consumer's right to seek the annulment of a contract concluded as a result of an unfair commercial practice, consisting of the drafting of a unit-linked group contract which does not enable that consumer to understand the nature and structure of the assurance product and the risks associated with it, appears to be an effective, proportionate and dissuasive penalty within the meaning of Article 13 of Directive 2005/29, which is, in any event, a matter for the referring court to determine, having regard to all the relevant circumstances of the case.

89 In the light of all the foregoing considerations, the answer to the third question is that Article 3(2) of Directive 2005/29, read in conjunction with Article 13 thereof, must be interpreted as not precluding an interpretation of national law which confers on a consumer who has concluded a contract as a result of an unfair commercial practice on the part of a trader the right to seek the annulment of that contract.

The fourth question

90 The fourth question is asked only in the event that the third question is answered in the affirmative. In view of the answer given to the third question, there is therefore no need to answer it.

Costs

91 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the cost of those parties, are not recoverable.

On those grounds, the Court (Ninth Chamber) hereby rules:

1. **Article 3(1) of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive'),**

   must be interpreted as meaning that the drafting by an assurance undertaking of a standard group life assurance contract linked to an investment fund which does not enable a consumer who is acceding to that group contract on the basis of a proposal from a second undertaking, the policyholder, to understand the nature and structure of the assurance product offered and the risks associated with it may constitute an 'unfair commercial practice' within the meaning of that provision and that that assurance undertaking must be held liable for that unfair commercial practice.

2. **Article 3(2) of Directive 2005/29, read in conjunction with Article 13 thereof,**

   must be interpreted as meaning that it does not preclude an interpretation of national law which confers on a consumer who has concluded a contract as a result of an unfair commercial practice on the part of a trader the right to seek the annulment of that contract.

[Signatures]