

UDK: 340.142:343.121.4:341.62:368.891(493)

Nikola L. Filipović, LL.M.¹

FOREIGN COURT PRACTICE

JUDGMENT OF THE EUROPEAN COURT OF JUSTICE IN CASE ORDE VAN VLAAMSE BALIES ORDRE DES BARREAUX FRANCOPHONES ET GERMANOPHONE v MINISTERRAAD

1. Introduction

The legal issue addressed by the European Court of Justice in Case C-667/18 *Orde van Vlaamse Balies, Ordre des barreaux francophones et germanophone v Ministerraad* (judgment of 14 May 2020) pertains to the right to freely choose a lawyer in the context of legal expenses insurance, as well as the interpretation of terms contained in Article 198(1) (legal protection or legal proceedings) in connection with Article 201 (free choice of lawyer) of Directive 2009/138 (Solvency II) dated 25 November 2009.

2. EU Legal Framework

Point 11 of the Preamble of Solvency II Directive indicates that „The main objective of insurance and reinsurance regulation and supervision is the adequate protection of policy holders and beneficiaries.“

Legal expenses insurance is regulated by Articles 198 to 205 of the Solvency II Directive.

Article 198 of the Solvency II Directive defines the scope of application of the rules regarding legal expenses insurance, namely, that „an insurance undertaking promises, against the payment of a premium, to bear the costs of legal proceedings and to provide other services directly linked to insurance cover, in particular with

¹ Compliance Advisor

a view to the following: [...] defending or representing the insured person in civil, criminal, administrative or other proceedings“.

Article 201 of the Solvency II Directive stipulates the any contract of legal expenses insurance shall expressly provide that 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.

2.1. Belgian Law

According to Article 156 of the (then applicable) Belgian Insurance Law (dated 4 April 2014), the following is provided: „when it is necessary to proceed to judicial or administrative proceedings, the insured person can freely choose a lawyer or any other person who, under the law applicable to the proceedings, has the necessary qualifications.“ That article of the law was amended in April 2017 to read as follows: „the insured person shall be free to choose, when it is necessary to proceed to judicial, administrative or arbitration proceedings, a lawyer or any other person who, under the law applicable to the proceedings, has the necessary qualifications to defend, represent or serve his interests and, in the case of arbitration, mediation or any other recognized non-judicial method for settling disputes, a person who has the necessary qualifications and is appointed for that purpose.“

3. Subject of the Dispute and Legal Issues

The Belgian bar associations brought an action before the Constitutional Court of Belgium seeking to annul (declare unconstitutional) Article 156 of the Insurance Law. In support of their action, they raised, inter alia, a plea alleging infringement of certain provisions of the Belgian Constitution, read in conjunction with Article 201 of Solvency II Directive. According to the bar associations, that law is contrary to Solvency II Directive since it does not stipulate that an insured person has the right to choose his or her lawyer for mediation proceedings. Indeed, since those proceedings are covered by the term ‘proceedings’ within the meaning of Article 201 of Solvency II Directive, the insured person should have that right.

Before the entry into force of the amendments to the Law of 9 April 2017, all legal expenses insurance contracts had to prescribe that the insured person was free to choose a lawyer or other qualified person ‘in judicial or administrative proceedings’. That law, while extending that freedom to choose to arbitration proceedings, excluded it for mediation proceedings on the ground, first, that the presence of counsel is not likely to favor mediation and, second, that mediation is not necessarily based on legal reasoning.

The Belgian court has thus referred a question to the European Court, considering that in certain earlier judgments, the European Court interpreted the term “judicial proceeding” broadly, yet it has not taken a position in any case regarding whether a mediation proceeding falls within the scope of “judicial proceeding” within the meaning of Article 201 of the Solvency II Directive.

3.1. Position of the European Court of Justice

The court points out that the free choice of representative under the legal expenses insurance contract according to Article 201 of the Solvency II Directive, is general in application and obligatory in nature.

As the Directive itself does not provide definitions for “inquiry” or “proceeding,” when interpreting provisions of European Union law, one should take into account not only the text but also the objectives and context of the regulation of which the provisions are a part.

The court further recalls previous practices and cases in which it has been pointed out that an “inquiry” should be considered a distinct and different formulation from a “proceeding.” Additionally, in earlier judicial precedents interpreting the term “inquiry,” the stance was taken that it should be interpreted broadly – that is, the term includes even non-typical legal processes before bodies that are not judicial but decide on the rights or obligations of the insured persons.

Since the Court has previously accepted a broad interpretation of the term “inquiry,” by analogy, the Court considers that the term “proceeding” cannot be narrowly interpreted to refer only to a proceeding before a court. Rather, it must be interpreted to encompass both the process preceding the appearance before the court and, similarly, the subsequent (appellate) proceedings in a case.

From the case file, the European Court concludes that, according to national law, a court of a member state before which a dispute is initiated is required to propose mediation to the parties. If the parties agree to mediation, it becomes a phase of the ongoing judicial proceeding, as the court is generally bound by the agreement reached in the mediation process. Therefore, the Court considers that an insured party participating in a mediation process proposed by the court as part of a judicial proceeding has the right to freely choose a lawyer, as such mediation constitutes a part of the proceeding.

However, the Court also considers that mediation, even when not conducted before a court, falls within the scope of the term “proceeding” under the Directive. This is because the outcome of (extrajudicial) mediation is an agreement between the parties that the court can approve upon the initiative of any party. As the court is bound by the content of the agreement (except in cases where the agreement contradicts public interest or the interests of a minor child), the ultimate outcome of such a (court-approved agreement) is the same as a judgment. In such situations (proceedings),

where the ultimate outcome involves resolving the legal status (rights and obligations) of the insured person, with the same effect as a court judgment, the insured person requires legal protection or representation, even if they independently choose to engage in (extrajudicial) mediation. Therefore, an attorney, freely chosen by the insured party, can take care of their interests in such a process. The provisions of Article 201 of the Solvency II Directive are applicable to the choice of attorney in such proceedings.

This is also in line with Article 198 of the Solvency II Directive, which defines legal expenses insurance as insurance covering the costs of „defending or representing the insured person in civil, criminal, administrative or other proceedings“. Therefore, the right to freely choose a lawyer as stipulated in Article 201 extends to *other* types of proceedings as well.

Furthermore, as the EU itself encourages the use of alternative dispute resolution methods, the Court considered it inconsistent for the EU to promote alternative dispute resolution methods (by adopting the Directive) on one hand, while on the other hand, denying the right (to legal protection) for those who choose this form of dispute resolution.

In light of the foregoing, the Court concludes that legal expenses insurance, as well as the right to freely choose a lawyer as stipulated in Article 201 of the Solvency II Directive, should be interpreted in a manner that the term “proceeding” within that provision encompasses both judicial and extrajudicial mediation processes in which a court is or can be involved, either during the initiation of the process or after its conclusion.

4. Brief Overview of the Judgment

In line with the prior practice of autonomous interpretation of terms within European primary and secondary regulations, the Court applied both an extensive and functional interpretation of the term contained in the Directive. Considering that the fundamental goal of European insurance regulations is the protection of policyholders, the Court justifies the extensive interpretation of terms within EU directives. The Court holds that the term “proceeding” in which the insured has the freedom to choose a lawyer encompasses both judicial and extrajudicial mediation processes. Moreover, the Court argues that the term “judicial proceeding” cannot be confined by distinguishing between the preparatory phase and the decision-making phase. Thus, the insured, in all phases of the process, including preliminary stages that may lead to a court proceeding or have an outcome similar to a court judgment, has the right to freely choose a lawyer. According to the Solvency II Directive, such a process is also deemed to fall within the insured risk, as per legal expenses insurance.

Translated by: Zorica Simović