



CCBE POSITION AS REGARDS THE “STARK” CASE C-293/10

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The Council of Bars and Law Societies of Europe (CCBE) represents around 1 million lawyers through its member bars and law societies from 31 full member countries and 11 further associate and observer member countries. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE had made representations to the parties involved in the “Eschig” case C-199/08 in order to stress the importance of the freedom of choice of a lawyer. The CCBE particularly welcomed the judgement in which the European Court of Justice held that Directive 87/344/EEC must be interpreted as prohibiting the legal expenses insurers from reserving the right, where several insured persons suffered loss as a result of the same event, to select the legal representative of all the insured concerned.

In the present “Stark” case the question referred to the ECJ for preliminary ruling by an Austrian court equally relates to the free choice of a lawyer according to Article 4 of the Directive. In summary, the question is whether “local lawyer clauses” in national legislation and legal expenses insurance policies are permitted, even though such clauses allow insurers to restrict the insured’s freedom of choice to lawyers that are based in the district of the court or administrative body that is competent for the proceedings in first instance. The question referred to the ECJ is the following:

“Is Article 4(1) of Directive 87/344/EEC to be interpreted as precluding a provision such as Paragraph 158k(2) of the Versicherungsvertragsgesetz (Law on insurance contracts) and a clause, based on that law, contained in the general conditions of insurance applied by a legal expenses insurer to the effect that it may be stipulated in the insurance contract that the insured person may select to represent him only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted?”

The CCBE is of the opinion that every Member State and all legal expenses insurers should comply with Article 4 of the Directive. The free choice of a lawyer according to Article 4 (1) a) of the Directive is a specific guarantee and principle based on the bond of trust between the client and his lawyer. Member States and insurers must comply with this principle in the implementing laws as well as in all legal expenses insurance contracts at all times and irrespective of which solution of avoiding conflicts of interests was chosen by the Member States under Article 3 (2) of the Directive.

Article 4 (1) a) of the Directive says: *“Any contract of legal expenses insurance shall expressly recognize 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.”*

On the other hand, Article 158 k (2) of the Austrian Law on insurance contracts states (English wording from the judgement in the “Eschig” case): *“It may be stipulated in the insurance contract that the insured person may select to represent him in judicial or administrative proceedings only persons professionally authorised to represent parties who have their chambers at the place of the court or administrative authority before which the proceedings at first instance are to be conducted. Where in such place at least four such persons do not have chambers the right to choose must extend to persons in the district of the court of first instance in which the authority concerned is situated.”*

It appears that Article 158 k (2) of the Austrian law on insurance contracts implementing the Directive restricts the freedom to choose a lawyer whereas Article 4 (1) a) of the Directive provides for an unrestricted right to freedom of choice which has to be expressly recognised in any contract of legal expenses insurance. In the “Eschig” case, the ECJ held in paragraph 47 that *“the use of the adjective ‘any’ as well as the tense of the verb ‘to recognise’ demonstrate the general application and obligatory nature of that rule”*.

Furthermore, the ECJ stated that the freedom to choose a representative for and in the procedures referred to in Article 4 (1) a) of the Directive is a specific guarantee in favour of insured persons that constitutes a “*minimum level of freedom which must be granted to the insured person whatever the option provided for in Article 3 (2) of that directive with which the insurance undertaking complies*” (paragraphs 40, 44, 45 and 48 of the judgement in the “Eschig” case).

Article 4 (1) a) of the Directive provides for the right of the insured person to freely choose a representative whenever an inquiry or proceedings are initiated (paragraph 50 of the judgement in the “Eschig” case). The provision contains no restriction whatsoever of the circle of representatives and in particular no restriction based on factual, territorial or commercial criterions.

By contrast, Article 158 k (2) of the Austrian law on insurance contracts causes two restrictions of the right to choose a lawyer: a territorial restriction and an implicit restriction. The territorial restriction of the eligible representatives follows from the wording of the provision. In extreme cases, the freedom of choice is restricted to only four possible representatives. This means that in such cases out of more than 5'600 lawyers registered in Austria and many more lawyers registered in the European Union only four lawyers may be chosen according to the provision in question.

The implicit restriction is caused by additional costs that undermine the free choice of a lawyer. Indeed, in practice the scope of reimbursement of the costs of the lawyer is limited if the lawyer chosen by the insured is based outside the district of the court or administrative body that is competent for the proceedings in first instance in the sense of Article 158 k (2). The consequence is that the insured is obliged to renounce his trusted lawyer if this lawyer is based out of town and to choose another but local lawyer in order to avoid the risk of not being reimbursed by the insurance the supplementary costs of his freely chosen but out of town lawyer.

The effectiveness of this restriction of the freedom of choice is complemented and secured in practice by the fact that Article 10 paragraph 6 of the Austrian general conditions for legal expenses insurances stipulates that only the insurer may mandate the chosen lawyer and not the insured person and that the latter may lose the insurance coverage if he mandated the lawyer himself.

Such direct or implicit restrictions are not covered by Article 4 (1) a) of the Directive. The restrictions also pose a problem in view of Article 56 Treaty on the Functioning of the European Union (TFEU) and Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services as they impede on the one hand insured persons to choose a European lawyer from another Member State to represent him at court or before an administrative authority and on the other hand lawyers registered in other Member States to provide cross-border services for insured persons in Austria.

In conclusion, the CCBE is of the opinion that Article 4 (1) a) of the Directive constitutes a minimum guarantee in favour of insured persons to freely choose their representative whenever an inquiry or proceedings are initiated. There is no legal basis in the Directive for a direct or implicit restriction of the right to freedom of choice to a geographically limited – often very small – circle of eligible representatives. The rights granted to insured persons under Directive 87/344/EEC as well as the rights granted to citizens and lawyers under Directive 77/249/EEC and Article 56 TFEU should be respected at all times by Member States and legal expenses insurers.