

Case C-213/20

Summary of a request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

12 May 2020

Referring court:

Sąd Rejonowy dla Warszawy-Woli w Warszawie (District Court for Warszawa-Wola, Warsaw, Poland)

Date of the decision to refer:

2 October 2019

Applicants:

G.W.

E.S.

Defendant:

A. Towarzystwo Ubezpieczeń Życie S.A.

Subject matter of the main proceedings

Claim for repayment of assurance premiums paid to the defendant pursuant to a unit-linked group endowment and life assurance contract.

Subject matter and legal basis of the questions referred

Interpretation of Article 36(1) of Directive 2002/83, in conjunction with points 11 and 12 of Annex III(A) thereto, in relation to the extent, category of addressees and required level of detail of the information which the assurer is obliged to communicate to the assured person, and the appropriate time for its communication.

Questions referred

1. Is Article 36(1) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance ..., in conjunction with point 12 of Annex III(A) thereto, to be interpreted as meaning that the obligation to provide the information indicated therein also covers the assured person if he is not at the same time the policyholder and he acts as a person acceding, as a consumer, to a unit-linked group endowment and life assurance contract, concluded between the assurance undertaking and the undertaking which is the policyholder, and as the actual investor in respect of the monies paid by way of the assurance premium?
2. If the first question is answered in the affirmative, is Article 36(1) of Directive 2002/83/EC ..., in conjunction with points 11 and 12 of Annex III(A) thereto, to be interpreted as meaning that, in the context of a legal relationship such as that set out in the first question, the obligation to provide information on the characteristics of the capital assets that are associated with the unit-linked fund also means that the consumer, the assured person, must be informed in a comprehensive and comprehensible manner of all the risks, and their kind and scale, associated with investment in a unit-linked asset (such as structured bonds or derivatives), or is it, for the purposes of the provision cited, sufficient to provide him with just basic information on the principal kinds of risk associated with investing monies by means of a unit-linked fund?
3. Is Article 36(1) of Directive 2002/83/EC, in conjunction with points 11 and 12 of Annex III(A) thereto, to be interpreted as meaning that, in the context of a legal relationship such as that described in the first and second questions, a consumer acceding to a life assurance contract as an assured person must be informed about all investment risks and associated terms and conditions about which the issuer of the assets (structured bonds or derivatives) making up the unit-linked fund informed the assurer?
4. If the preceding questions are answered in the affirmative, is Article 36(1) of Directive 2002/83/EC ... to be interpreted as meaning that a consumer acceding to a unit-linked group endowment and life assurance contract as an assured person must receive information on the characteristics of the capital assets and the risks associated with investing in those assets before conclusion of the contract, in a separate pre-contractual procedure, and does it therefore preclude a provision of national law [such as] Article 13(4) of the Ustawa o działalności ubezpieczeniowej z dn. 22 maja 2003 r. (Law on insurance business of 22 May 2003), ... under which it is sufficient for that information to be disclosed for the first time in the assurance contract and during the conclusion thereof, and the time at which the information is received is not unambiguously and clearly kept separate and distinct in the procedure for acceding to the contract?

5. If the first three questions are answered in the affirmative, is Article 36(1) of Directive 2002/83/EC ..., in conjunction with points 11 and 12 of Annex III(A) thereto, also to be interpreted as meaning that proper implementation of the obligation laid down therein to provide information must be regarded as an essential element of a unit-linked group endowment and life assurance contract and, consequently, may a finding that that obligation was not performed correctly have the effect of conferring on the assured consumer the right to claim repayment of all the assurance premiums paid on the ground of a possible declaration that the contract is invalid or is ineffective *ab initio* or that the individual declaration of accession to that contract is invalid or ineffective?

Provisions of Community law relied on

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): recital 52, Article 36, Annex III.

Provisions of national law relied on

Kodeks cywilny — ustawa z dnia 23 kwietnia 1964 r. (Civil Code — Law of 23 April 1964 (*Dziennik Ustaw* No 16, item 93, as subsequently amended): Articles 58, 353¹, 384(1) and (2), 805(1) and (2), 808(1) to (4), and 829.

Ustawa o działalności ubezpieczeniowej z dnia 22 maja 2003 r. (Law on insurance business of 22 May 2003) (*Dziennik Ustaw* No 124, item 11510; consolidated text of 16 December 2009, *Dziennik Ustaw* 2010 No 11, item 66): Articles 2(1)(13) and 13, and annex (Part I).

Succinct presentation of the facts and procedure

- 1 The applicants, G.W. and E.S., have brought an action against the defendant assurer for payment to them of specific amounts by way of repayment of the assurance premiums paid to it pursuant to a unit-linked group endowment and life assurance contract ('the contract at issue').
- 2 The contract at issue, to which individual consumers could accede, was concluded on 29 July 2001 between the defendant assurer and A.S.A., acting as policyholder. The applicants acceded to the contract at issue on the basis of separate declarations of accession submitted on 28 November 2011 and 30 November 2011.
- 3 The assurance product on offer was presented as a capital investment in the form of systematic saving. The offer of accession to the contract at issue was presented at a single meeting at the premises of the bank (the policyholder), a meeting at

which the declarations of accession to that contract were also submitted. The general assurance terms and conditions and unit-linked fund's instrument of incorporation were presented to the applicants at the same time.

- 4 When submitting the declarations of accession to the contract at issue, the applicants signed declarations stating that the aim of the fund is to attain at least 100% of the premium invested by the end of the assurance period. The declarations also contained information stating that during the assurance period the account value of shares in the unit-linked fund may undergo significant fluctuations on account of the valuation of the financial instruments of which it is comprised. According to the declarations, the product carries a risk arising from the possibility that the issuer of the financial instruments making up the product may fail to meet its payment obligation. It is also pointed out that the product is not a bank deposit and thus does not guarantee that the assured person will make a return, whilst adding that the simulation of the annual average return of the index amounts to 11.70%. In this respect, it is noted that this result is not a guarantee that similar results will be achieved in future.
- 5 Under the provisions of the contract at issue, which supplement the general assurance terms and conditions and the unit-linked fund's instrument of incorporation, the applicants were required to pay an initial premium and then a regular monthly assurance premium.
- 6 The author of both the general assurance terms and conditions and the unit-linked fund's instrument of incorporation was the assurer and the provisions contained therein were not negotiated with the assured persons. The assurance period was set at 15 years. At the same time, the assured person had the right to submit a declaration of withdrawal from the assurance cover at any time.
- 7 The assured persons' premiums were invested in the unit-linked fund 'UFK A.' That fund was defined in advance in the contract at issue and the assured persons had no choice in that respect.
- 8 The value of the fund's assets and the value of the individual share therein were subject to change over time on account of the nature of the price formation of the financial instruments in which the fund was invested. The instrument of incorporation noted that those changes could be substantial in nature.
- 9 The unit-linked fund's instrument of incorporation also set out a number of risks associated with investment in the unit-linked fund and the assurer made it clear that it is not liable for any investment risk associated with investing in the fund.
- 10 The assurance terms and conditions contained no reservation which might indicate that the stated form of investment is not targeted at the public at large or that the investment of the monies in bonds issued by A. requires knowledge and experience of the functioning of the capital market and financial instruments.

- 11 The assurer placed the monies invested in the unit-linked fund in 15-year structured bonds linked to index A. The issue of those bonds was not public, but was aimed at specific professional investors. The bonds were not dealt in on the capital market.
- 12 The documents relating to the terms and conditions governing acquisition of the bonds issued by A. stated and explained inter alia the risk factors. The issuer informed the purchaser of the bonds that potential investors in the securities covered by the issue should carefully consider the information set out in the 'Risk Factor' section before purchasing them. In addition, the issuer emphasised that the value of the investment and the return that can be obtained on it may decrease or increase and thus the investor may not obtain the amount that was invested, or even, in certain cases, may not get back any of the investment made.
- 13 The issuer also noted that investment in the structured products, as products subject to significant risk, is appropriate only for those who have knowledge and experience of the financial and business matters necessary to assess risks.
- 14 The content of these documents was not disclosed to the assured persons prior to acceding to the contract at issue and was not incorporated into that contract or into the general assurance terms and conditions or the unit-linked fund's instrument of incorporation. When consumers were offered the opportunity of acceding to the contract at issue, no experience of investing on the capital market was required of them, and their skills in this regard were not verified.
- 15 After eight years of paying assurance premiums, the applicant G.W. submitted a declaration of withdrawal from the contract at issue (of termination of the legal relationship), which became effective on 23 January 2019. The defendant assurer paid her, by way of the surrender value, an amount of PLN 14 285.30 and at the same time fixed the account value of the shares at an amount of PLN 15 403.57. In total, the applicant paid the assurer the amount of PLN 24 090 during the legal relationship. On that basis, the applicant modified her claim, requesting that the defendant be ordered to pay the amount of PLN 9 804.70. The applicant E.S. continues to pay assurance premiums and to date has not terminated the legal relationship arising from the contract at issue.

Essential arguments of the parties to the main proceedings

- 16 The applicants argue that the contract at issue is invalid as it is contrary to mandatory provisions of national law and that the applicants' individual declarations of accession to the contract are invalid or ineffective.
- 17 The applicants maintain that the defendant assurer seriously infringed its obligations to provide information arising from mandatory provisions of law since it failed to provide the assured persons with complete information on the characteristics of the structured bonds purchased for the unit-linked fund, including on all the associated risks. The applicants further contend that the

contract at issue is also contrary to the nature of a binding relationship since it provides that the value of the unit-linked fund's assets, on which the amount of the benefit due to the consumer directly depends, is to be determined arbitrarily and unilaterally by the defendant, in a manner unknown to the consumer, and also excluding any subsequent judicial review.

- 18 In the view of the applicants, the extent of the lack of information provided to consumers was so significant that it precluded a finding that they made the effective and valid declaration of will necessary for the correct establishment of a legal relationship. As a result of the assurer's actions, the applicants were unaware of what the monies paid by them were being invested in or what the actual scale and number of risks associated with that kind of investment were.
- 19 The defendant assurer argued that it was under no obligation to provide information on all the investment risks associated with accession to the contract at issue, and also on all the terms and conditions attached to the issue of structured bonds by A. The assured persons were not party to the legal relationship between the assurer and the issuer of the bonds. The assurer also pointed to the need to observe the obligation of secrecy in relation to the detailed provisions of the issuing contract, and also the method for pricing and designing the derivative embedded in the structured bond.
- 20 Furthermore, the assurer considers that the general assurance terms and conditions and the unit-linked fund's instrument of incorporation contain the necessary information in that respect, in particular as they note that investing monies by means of a unit-linked fund entails risks which also include the risk of not making a return on the investment.

Succinct presentation of the reasons for the reference for a preliminary ruling

- 21 First, the uncertainty of the referring court concerns whether the information required by Article 36(1) of Directive 2002/83, in conjunction with Annex III(A) thereto, must be provided also to assured persons where they accede to the contract at issue as consumers since they are at the same time the actual investors of the premiums paid to the assurer and then allocated to the unit-linked fund.
- 22 Formally, in the legal relationship underlying the reference, the consumer, the assured person, is not party to the assurance contract. That contract is concluded between the assurance undertaking and the policyholder, which in this case is a bank. The form taken by that contract is similar to the design of an assurance contract for the account of another party, where the assured person does not have to be named.
- 23 However, as the referring court points out, in the present case it is the consumer who assumes some of the policyholder's obligations, in particular the obligation to

pay the premiums. It is the consumer who bears the actual economic burden of investing the monies and the associated risk.

- 24 Consequently, in the view of the referring court it would appear — in the light of systemic and functional arguments, and also the wording of recital 52 of Directive 2002/83 — that the assured person must be provided with whatever information of this kind with which the policyholder is, or must, be provided. Otherwise, the assured person may not be able to assess properly the possible economic consequences of acceding to the contract.
- 25 Secondly, the referring court is uncertain as to the correct reading of the detailed substance and scope of the obligation to provide information laid down in Article 36(1) of Directive 2002/83, in conjunction with Annex III(A) thereto. The above provisions define a minimum standard of information in contracts such as that at issue, which means that national law may lay down more far-reaching requirements to provide information, but must not restrict them.
- 26 According to the English language version of the provisions of Community law under consideration, prior to concluding the contract the assurance undertaking must provide information about the characteristics of the assets (*'indication of the nature of the underlying assets'*) in which the monies paid by way of assurance premiums are being invested. Consequently, that information must include — according to various, similarly worded language versions — not only a definition of the kind of the assets, but also an indication of their characteristics (nature). In the view of the referring court, the transposition of the provisions of Directive 2002/83 into Polish law also followed this line since Article 13(4) of the Law on insurance business of 22 May 2003 uses the term *'charakterystyka aktywów'* (characteristics of the assets).
- 27 However, in this context uncertainty arises as to how the concept of the characteristics of the assets that is taken from Directive 2002/83 is to be interpreted, in particular whether it also encompasses the scale (intensity), extent and kind of investment risk associated with the specific assets of the unit-linked fund in which the assurance undertaking is investing the monies entrusted to it by the consumer by way of assurance premiums.
- 28 The uncertainty also concerns whether the concept of the characteristics of the assets making up the unit-linked fund should include all possible investment risks associated with them, or whether it should include only the principal investment risks, whose likelihood of materialising is, in relative terms, the highest, and which may characterise the instrument concerned from an economic point of view.
- 29 This lack of clarity also arises from the fact that provisions of Directive 2002/83, unlike those of the subsequent insurance directive, that is to say Directive 2009/138/EC (Article 185(4)), which replaced Directive 2002/83, did not lay

down a separate requirement to provide information on the kinds and level of risks associated with investing monies under the contract at issue.

- 30 In addition, the uncertainties as to the proper extent and detail of the information communicated to the assured person can also be founded on the need to maintain the proper proportion between the extent of the information provided and the degree of its complexity, and thus the objective intelligibility of the standard contract. This issue was referred to in the arguments of the defendant assurance undertaking which pointed out that the communication of more far-reaching or detailed information on the nature of the assets in which the monies of the unit-linked fund were invested would not have had any more far-reaching favourable effect, precisely on account of the degree of complexity of the information in that regard.
- 31 In the view of the referring court, that issue must be considered having regard to the requirements as to the formulation of the terms and conditions of contracts in transparent and intelligible language, also in respect of setting out the identifiable economic consequences of the investments. Community law on consumer transactions places particular emphasis on the obligation properly to inform consumers about the terms and conditions of contracts which they conclude or to which they accede, at the same time requiring that the information provided to consumers be expressed in a transparent and intelligible manner.
- 32 In the view of the referring court, there is also the issue of preserving the symmetry between the information provided to the consumer by the assurance undertaking and the content of the information which the assurance undertaking receives from the issuer of the structured bonds. The consumer, as the assured person, is not party to the contract on the issue of bonds between the assurer and the issuer of the bonds, and the content of that contract has no direct bearing on his rights and obligations arising from the assurance contract. Nevertheless, the monies paid by the consumers (assured persons) are subsequently invested in full by the assurer in the financial instrument thus acquired and therefore it is the consumer who is the actual investor bearing the associated risk. The question arises whether, in the light of Directive 2002/83, that relationship justifies the expectation that the consumer should be provided with all the information concerning the issued bond that the assurer was provided with.
- 33 In the view of the referring court, the investment risk element in that case is such an integral part of the characteristics of assets in the form of derivatives that, in the light of the minimum standard of information set out in Directive 2002/83 (and then developed in the subsequent insurance directive 2009/138/EC), an assured person who is a consumer must be informed thereof in a comprehensive and intelligible manner.
- 34 Thirdly, in the view of the referring court it is desirable to clarify the phrase ‘before the assurance contract is concluded’ and indicate whether or not, on that basis, it should be required that the stage at which information is provided to the

assured person be kept, as far as possible, precisely separate and distinct from the stage at which the contract is concluded (the assurance contract is acceded to).

- 35 In this regard, the very expression ‘before the contract is concluded’ can be understood differently, and in particular it could be argued that it denotes any short interval between the person acceding to the contract being provided with the essential information and the actual submission of the declaration of accession to the contract, provided that the provision of the information precedes the submission of the declaration.
- 36 The provisions of national law implementing Article 36(1) of Directive 2002/83 and Annex III(A) thereto merely increase the uncertainty which exists in this regard since it follows from them (Article 13(4) of the Law on insurance business of 22 May 2003) merely that specific information concerning the legal relationship — including the nature of the assets of the unit-linked fund — must be contained in the unit-linked fund’s instrument of incorporation. That instrument of incorporation is a variant of the standard contract, the wording of which defines in part the substance of the legal relationship. However, even the inclusion in the (standard) contract of specific provisions on information still cannot be regarded as fulfilment of the requirement to provide information prior to the conclusion of (accession to) the contract.
- 37 Where it is not possible to distinguish between the above two moments, also temporally, the practical significance of fulfilling the obligation to provide information becomes altogether uncertain. The lack of an appropriate time difference between the information stage and contract conclusion stage may rule out, or significantly reduce, the chances of the communicated information being understood.
- 38 The referring court considers that the appropriate time difference should, in this case, be established objectively, having regard to the nature of the legal relationship, the classification of the consumer and the extent and level of complexity of the essential information.
- 39 Fourthly and finally, in the view of the referring court uncertainties concerning interpretation are also raised by the legal effect of a finding that the assurer has failed to comply with the appropriately defined standard of information provision.
- 40 Resolution of this problem requires an interpretation of Article 36(1) of Directive 2002/83 to determine whether, on account of the importance of the obligation to provide information laid down therein, it can be regarded as an essential element of the contract (of the substance of the legal relationship to which the consumer has acceded). In the conventional view of the substance of a legal relationship, the elements thereof relating to information are not regarded as a component which is essential in nature (*essentialia negotii*). Provisions of this kind do not directly specify the rights and obligations of the parties or typify the contract concerned (the legal relationship). On the basis of Polish civil law, the above argument does

not appear to give rise to any uncertainty. However, as regards the interpretation of Community law, that matter appears to be problematic, having regard to recital 52 of Directive 2002/83 and the extent and importance of the information referred to in Annex III(A) thereto.

- 41 The referring court has been unable to find the answers to the above matters relating to the correct interpretation of the provisions of Directive 2002/83 in the previous case-law of the Court of Justice. The only judgments of the Court of Justice which the referring court has found, concerning a similar matter, namely life assurance contracts, do not answer the questions referred for a preliminary ruling (judgments of 1 March 2012 in Case C-166/11 *González Alonso*, ECLI:EU:C:2012:119, and of 29 April 2015 in Case C-51/13 *Nationale-Nederlanden Levensverzekering Mij*, ECLI:EU:C:2015:286). The judgment of the Court of Justice of 5 March 2002 in the case of *Axa Royale Belge*, C-386/00, EU:C:2002:136, concerned interpretation of a similar provision of the previous insurance directive, namely Article 31(3) of Directive 92/96/EEC of 10 November 1992, but in relation to a different subject matter and on the basis of a different kind of insurance contract.