

Case C-18/24**Request for a preliminary ruling****Date lodged:**

11 January 2024

Referring court:

Nejvyšší správní soud (Czech Republic)

Date of decision to refer:

29 December 2023

Applicant:NOVIS Insurance Company, NOVIS Versicherungsgesellschaft,
NOVIS Compagnia di Assicurazioni, NOVIS Poist'ovňa a.s.**Defendant:**

Česká národní banka

...

[...] [national proceedings] **ORDER**

The Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) [...] has ruled in the case of the applicant: **NOVIS Insurance Company, NOVIS Versicherungsgesellschaft, NOVIS Compagnia di Assicurazioni, NOVIS Poist'ovňa a.s.**, having its registered office at [...] Bratislava, [...], against the defendant: **Česká národní banka** (Czech National Bank, Czech Republic), having its registered office at [...] Prague 1, with respect to the action challenging the decision of the Czech National Bank of 21 January 2021, ref. no. 2021/007794/ CNB/110/01, in proceedings concerning the applicant's appeal in cassation against a judgment of the Městský soud v Praze (Prague City Court) of 19 October 2022, ref. no. 6 Af 9/2021-105,

as follows:

- I.** The following questions are hereby submitted to the Court of Justice of the European Union for a preliminary ruling:
 - 1.** **Must Article 155 of Directive [...] 2009/138/EC (Solvency II) be interpreted such that it also applies to cases of supervision by the**

supervisory authority of a host State over compliance, by an insurance undertaking from another Member State, with the obligations laid down by Regulation No 1286/2014 (PRIIPs) or based on Directive [...] 2016/97 (IDD)?

- 2. If so, does Article 155 of the Solvency II Directive imply priority powers for the supervisory authority of the home State, and the obligation on the part of the supervisory authority of the host State to first exhaust the notification and remedial procedures under paragraphs 1, 2, and 3 of that article of the directive, even in the case of imposing administrative sanctions under paragraphs 5 and 6 of that article of the directive?**

II. [...] [national proceedings]

Grounds:

I. Subject matter of the proceedings

- 1 The applicant is a Slovak commercial company and an insurance undertaking operating in the field of life insurance. The applicant has a branch office in the Czech Republic, in Prague, under the right of establishment. The defendant is the supervisory authority of the Czech Republic as host Member State of the European Union. The defendant found the applicant guilty of three offences, for which it imposed a fine of CZK 1,000,000.
- 2 The first offence consisted of a breach of the obligations under Article 6(1) and Article 8(3)(c)(ii), (iii), (iv), and (f) of Regulation (EU) No 1286/2014 of the European Parliament and of the Council on key information documents for packaged retail and insurance-based investment products ('the PRIIPs Regulation') and was examined pursuant to Paragraph 179(1) of the zákon č. 256/2004 Sb., o podnikání na kapitálovém trhu (Law 256/2004 on engaging in business on the capital market) ('the CML'). Concretely, according to the defendant, the applicant failed to ensure that the information in its Key Information Documents ('KIDs') about its products was accurate, fair, clear, consistent with any binding contractual documents, and not misleading, and, furthermore, that the key information documents contain all the information, in the quality and scope required by directly applicable European Union legislation.
- 3 The second and third offences consisted in breaches of the obligations laid down by zákon č. 170/2018 Sb., o distribuci pojištění a zajištění (Law 170/2018 on the distribution of insurance and reinsurance) ('the IRDL'), which transposes Directive (EU) 2016/97 of the European Parliament and of the Council [...] on insurance distribution ('the IDD'). The second offence was examined on the basis of Paragraph 110(1)(c) of the IRDL and consisted in the applicant breaching the obligations of an insurance undertaking to lay down, maintain, and apply rules for the control of the activities of independent intermediaries acting for it, focusing on oversight of due compliance with the law, as set out in Paragraph 48(1)(a) of that

law. The third offence was examined on the basis of Paragraph 114(1)(l) IRDL and consisted in the applicant breaching the obligation to provide advice to the customer before arranging reserve-forming insurance laid down in Paragraph 78 of that law.

- 4 In the administrative proceedings, the defendant examined the applicant's objection that the defendant lacked jurisdiction to conduct infringement proceedings, referring to Paragraph 110 of zákon č. 277/2009 Sb., o pojišťovnictví (Law 277/2009 on the insurance sector) ('the IL'), transposing Article 155 of Directive 2009/138/EC of the European Parliament and of the Council [...] on the taking-up and pursuit of the business of Insurance and Reinsurance ('the Solvency II Directive'), which, in its view, regulates the uniform supervision of insurance undertakings from other Member States. According to the applicant, the defendant, as the supervisory authority of the host State, did not proceed in line with the provisions of the law and directive cited above, failed to inform the supervisory authority of the home state about the alleged breach of legal regulations in the host Member State, and did not wait for any appropriate measures by that authority, in order for the applicant to remedy the situation. In the applicant's view, the defendant was thus not authorised to automatically conduct sanction proceedings in respect of the applicant by itself. By contrast, the defendant considers that the regulation of supervision in the CML and the IRDL constitutes separate legislation (modelled on European regulations other than the Solvency II Directive), and is therefore independent of the regulation of supervision under the IL. According to the defendant, the special provisions of the CML and IRDL take precedence over the regulation set out in the IL. In the defendant's opinion, the applicant infringed obligations arising from the CML and the IRDL, for which it has been directly penalised, and not obligations under the IL.
- 5 In the contested judgment referred to above, the Prague City Court found no merit in the plea and dismissed the action. The City Court upheld the defendant's finding that the IL, which regulates general conditions in the insurance sector, which the applicant did not breach, should not be applied, and that it was necessary to apply exclusively the CML and IRDL, which regulate specialised segments of services provided by insurance undertakings, which were concerned by the offences committed by the applicant.
- 6 In its judicial review of the contested judgment of the Prague City Court, the Supreme Administrative Court is called upon to address the argument in cassation submitted by the applicant (now the complainant) that Paragraph 110 of the IL, which is based on Article [155] of the Solvency II Directive, must be applied in the exercise of any supervision pertaining to the insurance business. In the view of the complainant, both Paragraph 110 of the IL and Article 115 of the Solvency II Directive refer generally to a failure to comply with obligations/provisions, and thus are not limited to breaches of obligations under the IL or, as the case may be, of obligations imposed by legislation pursuant to the Solvency II Directive. Even though the complainant was penalised for a breach of the CML and IRDL, that

still concerned a breach of obligations in the course of insurance-related activities. In the complainant's view, neither the PRIIPs Regulation (and the CML, which follows from it on the national level) nor the IDD (and the IRDL, which implements it nationally) constitute regulations that are independent of the basic insurance industry regulations; rather, they are regulations that are complementary to and inseparably linked with the provisions of the IL (implementing the Solvency II Directive), which should have been applied in the case. According to the complainant, failure by the defendant to apply Paragraph 110 of the IL resulted in the administrative decision rendered by it being unlawful.

II. Applicable European Union and national legislation

- 7 Pursuant to Article 155 of the Solvency II Directive which, according to its heading, regulates the steps to be taken in cases when insurance undertakings do not comply with legal provisions, the following applies:

Where the supervisory authorities of a host Member State establish that an insurance undertaking with a branch or pursuing business under the freedom to provide services in its territory is not complying with the legal provisions applicable to it in that Member State, they shall require the insurance undertaking concerned to remedy such irregularity (paragraph 1).

Where the insurance undertaking concerned fails to take the necessary action, the supervisory authorities of the Member State concerned shall inform the supervisory authorities of the home Member State accordingly. The supervisory authorities of the home Member State shall, at the earliest opportunity, take all appropriate measures to ensure that the insurance undertaking concerned remedies that irregular situation. The supervisory authorities of the home Member State shall inform the supervisory authorities of the host Member State of the measures taken. (paragraph 2).

Where, despite the measures taken by the home Member State or because those measures prove to be inadequate or are lacking in that Member State, the insurance undertaking persists in violating the legal provisions in force in the host Member State, the supervisory authorities of the host Member State may, after informing the supervisory authorities of the home Member State, take appropriate measures to prevent or penalise further irregularities, including, in so far as is strictly necessary, preventing that undertaking from continuing to conclude new insurance contracts within the territory of the host Member State (paragraph 3).

(Note: emphasis added by the Supreme Administrative Court)

- 8 Pursuant to Article 155(5) of that directive, *Paragraphs 1, 2 and 3 shall not affect the power of the Member States to penalise infringements within their territories* while Article 155(6) thereof states, *Where an insurance undertaking which has committed an infringement has an establishment or possesses property in the Member State concerned, the supervisory authorities of that Member State may, in accordance with national law, apply the national administrative penalties*

prescribed for that infringement by way of enforcement against that establishment or property.

- 9 Article 155 of the Solvency II Directive was transposed to the Czech legal order by Paragraph 110 of the IL, which regulates supervision in relation to the activities of insurance undertakings from other Member States, as follows:

(1) Should the Czech National Bank find that an insurance undertaking from another Member State, which operates its insurance or reinsurance business on the territory of the Czech Republic on the basis of the right of establishment or on the basis of the freedom to provide services on a temporary basis, is not complying with any obligations that apply to such activities in the Czech Republic, it shall oblige that insurance undertaking to remedy the deficiencies within a period set by the Czech National Bank.

(2) In ascertaining or verifying the facts referred to in subparagraph 1, the Czech National Bank may require, from such an insurance undertaking, documents, information, and the necessary explanation pertaining to its activities on the territory of the Czech Republic, and the insurance company is obliged to comply.

(3) Should an insurance undertaking from another Member state fail to remedy the deficiencies referred to in subparagraph 1 within the time limit specified, the Czech National Bank shall inform the supervisory authority of the home Member State thereof.

(4) If remedial measures imposed by the supervisory authority of the home Member State do not result in remedying the deficiencies found in the activities of an insurance undertaking from another Member State, or if no remedial measures have been imposed, the Czech National Bank shall impose on such an insurance undertaking a fine or a ban on entering into new insurance or reinsurance agreements on the territory of the Czech Republic, and on expanding obligations from any such agreements already concluded. The Czech National Bank shall inform the supervisory authority of the home Member State of that decision. At the same time, the Czech National Bank may also refer the case to the European Supervisory Authority with a request for cooperation.

(5) In urgent cases, the Czech National Bank shall proceed in accordance with subparagraph 4, without applying the procedure set out in subparagraphs 1 to 3.

III. Analysis of the questions referred for a preliminary ruling

- 10 In view of the above, the Supreme Administrative Court must examine the legal question of whether Article 155 of the Solvency II Directive (and thus also the national transposing provision of Paragraph 110 of the IL) is also applicable to cases of supervision by the supervisory authority of the host State (the defendant) over whether an insurance undertaking from another Member State (the

complainant) adheres to the obligations established by the PRIIPs Regulation or on the basis of the IDD.

- 11 If the response to the question formulated above is affirmative, the Supreme Administrative Court must also consider whether Article 155 of the Solvency II Directive (and hence also the national transposing provision in Paragraph 110 IL) gives rise to a priority power for the supervisory authority of the home state and the obligation for the supervisory authority of the host State (the defendant) to first exhaust the notification and remedy procedure under paragraphs 1, 2, and 3 of Article 155 of the directive and subparagraphs 1, 3, and 4 of Paragraph 110 IL, even in the case of imposing administrative sanctions pursuant to paragraphs 5 and 6 of Article 155 of the directive, or whether the supervisory authority of the host State is authorised to penalise and impose administrative sanctions automatically.
- 12 According to Article 267(b) of the Treaty on the Functioning of the European Union, the Supreme Administrative Court is obliged to approach the Court of Justice of the European Union ('the CJEU' or 'the Court of Justice'), where a question concerning the validity and interpretation of acts of the institutions, bodies, offices, or agencies of the Union is raised. The Supreme Administrative Court has concluded that the conditions for submitting questions for a preliminary ruling have been met in the present case.
- 13 The Supreme Administrative Court is not aware of the question of the interpretation of Article 155 of the Solvency II Directive, in the regard in which it is decisive for the present case, having been addressed by the case-law of the CJEU (it is not an *acte éclairé*). Furthermore, as the national court deciding at last instance, it must be particularly vigilant in its assessment of whether or not there is any reasonable doubt as to the correct interpretation of the provision of EU law at issue and have regard, inter alia, to the objective pursued by the preliminary ruling procedure which is to secure uniform interpretation of EU law (judgment of the Grand Chamber of the CJEU of 6 October 2021, in *Consorzio Italian Management*, C-561/19, ECLI:EU:C:2021:799, paragraph 49). The Supreme Administrative Court believes that neither of the potential interpretations outlined below may be considered as clear and as manifestly more convincing, without reasonable doubt, than another interpretation (it is thus not an *acte clair*), and hence it refers the questions specified in the operative part of this order for a preliminary ruling.

III.1 First question: applicability of Article 155 of the Solvency II Directive

- 14 In addressing the first question, of whether Article 155 of the Solvency II Directive applies also to cases of supervision by a supervisory authority of a host State over whether an insurance undertaking from another Member State complies with the obligations laid down by the PRIIPs Regulation or on the basis of the IDD, the Supreme Administrative Court sees **a first possible interpretation whereby** the expression in Article 155(1) of the Solvency II Directive '*the*

insurance undertaking (...) is not complying with the legal provisions applicable to it' (French: *ne respecte pas les dispositions légales (...) qui lui sont applicables*) of the host State, is to be interpreted merely as meaning that it does not comply with the **legal provisions implementing the substantive requirements arising from that directive**. In that case, the procedure set out in Article 155 of the Solvency II Directive would thus not apply to supervision over compliance with the obligations laid down by the PRIIPs Regulation or on the basis of the IDD.

- 15 That possible interpretation is supported by the regulation of supervision and the supervisory authorities in Chapter III of the Solvency II Directive. The main objective of supervision, according to that directive, is generally the *protection of policy holders and beneficiaries* (Article 27); nevertheless, a secondary objective is the *stability of the financial systems concerned in the European Union* (Article 28), to which the short name of the directive corresponds. Furthermore, supervision is to be based on a *prospective and risk-based approach* (Article 29(1)). According to recital 14, the protection of policy holders presupposes that insurance and reinsurance undertakings are subject to effective solvency requirements that result in an efficient allocation of capital across the European Union. According to recital 24, the supervisory authorities of the home Member State should be responsible for monitoring the financial health of insurance and reinsurance undertakings.
- 16 Above all, however, Article 30 of the Solvency II Directive, which regulates the scope of the supervision introduced by the directive, refers to *the financial supervision of insurance and reinsurance undertakings, including that of the business they pursue either through branches or under the freedom to provide services, shall be the sole responsibility of the home Member State* (paragraph 1). *Financial supervision pursuant to paragraph 1 shall include verification, with respect to the entire business of the insurance and reinsurance undertaking, of its state of solvency, of the establishment of technical provisions, of its assets and of the eligible own funds, in accordance with the rules laid down or practices followed in the home Member State under provisions adopted at Community level (...)* (paragraph 2). According to Article 36(1) of the directive, which regulates the review process, *Member States shall ensure that the supervisory authorities review and evaluate the strategies, processes and reporting procedures which are established by the insurance and reinsurance undertakings to comply with the laws, regulations and administrative provisions adopted pursuant to this Directive*. It is evident from the list in paragraph 2 of that article that this means supervision over the financial health of insurance undertakings, to which the short name of the Solvency II Directive, and the vast majority of its other provisions, corresponds.
- 17 In this first possible interpretation, it therefore appears logical for Article 155 of the Solvency II Directive to be interpreted such that it follows on from the regulation of supervision in Chapter III of the directive (namely, financial

supervision) and that it should therefore be applied exclusively to breaches of legal provisions transposing the requirements of the Solvency II Directive.

- 18 According to the Supreme Administrative Court, however, a **second possible interpretation** cannot be ruled out, which emphasises the system of the Solvency II Directive, where Article 155 is placed in Chapter VIII, entitled *Right of establishment and freedom to provide services*, the intent and purpose of which is to harmonise all supervision over the spheres of insurance provision. According to this interpretation, the expression in Article 155(1) of the Solvency II Directive ‘*an insurance undertaking (...) is not complying with the legal provisions*’ would be interpreted such that it **is not complying with any legal provisions implementing EU requirements as to the position and activities of insurance undertakings** (meaning including other provisions than those arising under the Solvency II Directive). The procedure set out in that article should therefore apply to all supervisory activities by supervisory authorities over insurance undertakings.
- 19 Recital 11 speaks in favour of that interpretation, as it states that the directive constitutes an essential instrument for the achievement of the internal market. Hence, according to that recital, it is therefore *appropriate to bring about such harmonisation as is necessary and sufficient to achieve the mutual recognition of authorisations and supervisory systems, and thus a single authorisation which is valid throughout the Community and which allows the supervision of an undertaking to be carried out by the home Member State*, without that supervision being in any way specified or restricted. Recital 18 also emphasises that *The supervisory authorities of the Member States should therefore have at their disposal all means necessary to ensure the orderly pursuit of business by insurance and reinsurance undertakings throughout the Community whether pursued under the right of establishment or the freedom to provide services*.
- 20 According to this possible interpretation, Chapter III thus regulates only one segment of supervision, namely financial supervision, meaning supervision over the financial health of insurance undertakings. And since the objective of the directive constitutes an effort aimed at harmonising all segments of supervision, and all the activities of supervisory authorities in the sphere of insurance, and accordingly, to maximise attainment of the principle of supervision by the home Member State over insurance undertakings (in older terminology: the principle of control by the home Member State), Article 155 of the Solvency II Directive will also apply to supervision over other substantive requirements related to the position and activities of insurance undertakings.
- 21 To conclude this part, the Supreme Administrative Court observes that it is aware of the CJEU judgment of 28 April 2009 in *Commission v Italy*, C-518/06, ECLI:EU:C:2009:270, in which the CJEU spoke in restrictive terms about the principle of control by the home Member State (that it is say, in favour rather of the first possible interpretation), considering that the principle extends only to the financial supervision of insurance undertakings (paragraph 115 of the judgment)

and that the Community legislature did not intend that the home Member State should have exclusive supervisory competence extending to the commercial conduct of insurance undertakings (paragraph 116 of the judgment) and that controls by host-state authorities are not precluded (paragraph 117 of the judgment). The Supreme Administrative Court observes, however, that the judgment cited applies to legislation which, unlike in the present case, pertained to non-life insurance, and interpreted Council Directive 92/49/EEC [...] on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC ('the Third non-life insurance Directive'). Neither the legislation nor the statement of purpose of the EU legislator in the preamble to the Solvency II Directive are identical to those of the Third non-life insurance Directive. For that reason, therefore, the Supreme Administrative Court does not consider the question referred to be an *acte éclairé*. The Solvency II Directive allows for both of the interpretations outlined above, between which the CJEU should choose.

III.2 Second question: (un)conditional power of the supervisory authority of the host State to impose administrative penalties

- 22 Should the CJEU take the view that Article 155 of the Solvency II Directive applies to all supervisory activities by supervisory authorities (see paragraphs [19] to [21], above), and hence also to supervision of compliance with the obligations laid down by the PRIIPs Regulation or on the basis of the IDD, it is further necessary to examine the procedure described in Article 155 of the directive itself, and to distinguish when the supervisory authority of the host State is obliged to proceed in line with that article and when not. In particular, it is necessary to answer the question whether Article 155 of the Solvency II Directive gives rise to a priority power for the supervisory authority of the home state and the related obligation of the supervisory authority of the host State to exhaust the notification and remedy procedure, pursuant to paragraphs (1), (2), and (3) of that article of the directive, even in cases when administrative sanctions are being imposed pursuant to paragraphs (5) and (6) thereof. This issue is not clear, given the problematic wording of the text of the directive in several language versions.
- 23 According to the **first possible interpretation**, the supervisory authority of the host State must exhaust the notification and remedy procedure pursuant to paragraphs (1), (2), and (3) of Article 155, not only before the adoption of appropriate measures to prevent further infringements (that is, *prospective* measures, such as prohibiting new insurance agreements to be entered into on its territory), but also before adopting a measure to penalise infringements of the law (namely, *retrospective* administrative penalties). This possible interpretation accents the interpretation of the expression '*or penalise*' in Article 155(3) of the Solvency II Directive (French: *ou réprimer*), from which it can be inferred, at least in certain language versions, that the imposition of penalties on an insurance undertaking by the supervisory authority of the host State is also subject to the exhaustion of the notification and remedy process. In this possible interpretation, paragraphs (5) and (6) of Article 155 of the Directive only confirm the subsequent

power of the supervisory authority of the host State to impose penalties if the supervisory authority of the home state has failed to take appropriate measures or where the insurance undertaking has failed to remedy the situation on the basis thereof.

- 24 In terms of the **second possible interpretation**, emphasis is placed on the wording of Article 155(5) and (6) of the Solvency II Directive, which could also be interpreted as automatically (without any conditions) confirming the discovery and enforcement powers of the supervisory authorities of individual host Member States. Accordingly, that is effected without the need to first exhaust the procedure under paragraphs (1), (2), and (3) of Article 155 of the Solvency II Directive. The language does not prevent that interpretation because paragraph (5) states that paragraphs (1), (2), and (3) do not prejudice the power of the Member States to *penalise infringements within their territories* (French: *sanctionner les infractions sur leur territoire*), while pursuant to paragraph (6), supervisory authorities of the host State may *apply the national administrative penalties prescribed for that infringement by way of enforcement* (French: *mettre à exécution les sanctions administratives nationales prévues pour cette infraction*).
- 25 In this second possible interpretation, the notification and remedy process under paragraphs (1), (2), and (3) of Article 155 of the directive constitutes a condition only for the taking of appropriate measures to prevent further infringements (that is, prospective measures, such as prohibiting the conclusion of new insurance agreements on its territory) but does not constitute a condition for the ability of the supervisory authorities of the host State to directly, independently, and efficiently penalise administrative offences committed on its territory.
- 26 This interpretation is supported, for example, by the French version of the directive, which in Article 155(3) uses the terms *prévenir ou réprimer de nouvelles irrégularités*, that is, to prevent or suppress new irregularities (errors). The French text of the directive in paragraph 3 therefore focuses only on prospective measures and not on retrospective penalties.
- 27 This interpretation is also supported by the position (albeit stated without detailed grounds) taken in the CJEU judgment cited above in *Commission v Italy*, C-518/06 (paragraph 120), which, with respect to Article 40(7) of the Third non-life insurance Directive, confirmed the power of the host Member State to penalise infringements committed on its territory, without the CJEU considering the obligation to first exhaust the notification and remedy procedure pursuant to the text of Article 40(3), (4), and (5) of the Third non-life insurance Directive as then applicable.
- 28 Lastly, the Supreme Administrative Court observes that it is also aware of the CJEU judgment of 27 April 2017 in *Onix Asigurări SA*, C-559/15, ECLI:EU:C:2017:316. According to the Supreme Administrative Court, that judgment does not, however, provide any answers to the questions referred, since it pertains to Article 40(6) of the Third non-life insurance Directive (similar to the

current Article 155(4) of the Solvency II Directive), namely the possibility to take necessary measures in emergency (urgent) cases that are of a prospective nature and constitute temporary protective measures (paragraph 52 of the judgment). It therefore does not pertain to the powers of authorities to impose administrative sanctions, which constitute the subject matter of the case under consideration.

IV. Conclusion

29 For the reasons referred to above, the Supreme Administrative Court has referred the questions set out in operative part I of this order for a preliminary ruling.

[...]

[...] [national proceedings, date, signatures]

WORKING DOCUMENT