CCBE POSITION WITH RESPECT TO THE FREE CHOICE OF A LAWYER IN RELATION TO LEGAL EXPENSES INSURANCE

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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. 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 suffer loss as a result of the same event, to select the legal representative of all the insured concerned. Accordingly, the CCBE is very interested in the ongoing work of the Commission tending to give guidance to the legal expenses insurers on the measures to be taken in order to comply with the decision as well as to develop a "doctrine" on the free choice of lawyers.

The CCBE does not intend to respond to the European Commission's questionnaire of 17th March 2010 as the questions refer to the situation and the relationship of lawyers and legal expenses insurers in the Member States. However, the CCBE conveys its three key concerns. First, the CCBE believes that the lawyers and their respective professional bodies, the CCBE included, should be associated to the elaboration of the "doctrine" to the same extent as the insurance industry as lawyers are obviously as concerned as insurers. Second, the CCBE invites the Commission to ensure that the Member States carry out the legislative modifications in order to transpose the Eschig decision if necessary and that the legal expenses insurers fully adhere to its terms. Finally and most importantly, the CCBE sets out why it believes that the freedom of choice shall be guaranteed at all stages and cannot be limited to the stage of proceedings.

I. Ensuring lawyers participation in the elaboration of a "doctrine"

The CCBE has been notified of an initiative being undertaken by DG Internal Market and services following the Eschig case and affecting the free choice of lawyer in relation to legal expenses insurance. According to the information received, DG Markt first planned to issue a communication. Then it intended to draft a "doctrine" that it wanted to submit to the national surveillance bodies of legal expenses insurers and to the Committee of European Insurance and Occupational Pensions Supervisors (EIOPS) prior to publishing it. More recently, the CCBE learned that the Commission is finally intending to entrust the insurance industry with drafting this "doctrine" while keeping an eye on its content.

To our knowledge, DG Markt had no intention to consult DG Justice and/or the Member States' ministries of justice in that respect. Moreover, it also seems that even if some bars and law societies had a few very useful meetings with DG Markt, the legal profession as a such has not been associated to its work to the same extent as the insurance sector. Having said this, the CCBE believes that the consequences of the Eschig decision and the free choice of lawyer cannot be seen strictly as an Internal Market issue as it directly touches upon the administration of justice and a fundamental right of every citizen in a democracy.

Given the importance of the issue, the CCBE is of the opinion that the legal profession must be allowed to fully participate in the elaboration of the "doctrine". The draft "doctrine" must be submitted to DG Justice and the Member States' ministries of justice in order to be checked on its compliance not only with the Directive but also with the European Union's Charter on Fundamental Rights and the requirements of the national judicial systems.

II. Ensuring insurers compliance with the terms of the Eschig case

On 10th September 2009 the ECJ stated in its decision on the Eschig case: "*Article 4 (1) (a) of Council Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative provisions relating to legal expenses insurance must be interpreted as not permitting the legal expenses insurer to reserve the right, where a large number of insured persons suffer loss as a result of the same event, itself to select the legal representative of all the insured persons.*"

Prior to taking this conclusion, the ECJ held that the rights of insured persons recognised by Articles 4, 6 and 7 of the Directive *"seek to broadly protect the interests of the insured person without being restricted to situations in which a conflict of interest arises."* It also stated that "*there are no indications [...] that Article 4 (1) (a) of Directive 87/344 was intended merely to create a further mechanism for the avoidance of a conflict of interests and not an independent right to choose one's legal representative".* In the contrary, the Court stressed that the drafting history of the Directive supports the conclusion "*that the original objective of guaranteeing the freedom to choose one's legal representative in all legal expenses insurance contracts, which is not dependent on the occurence of a conflict of interests, has been maintained, although restricted to legal and administrative proceedings."*

With this decision, the ECJ sends the clear message that the purpose of the Directive is not just to avoid or remove conflicts of interests between persons with legal expense insurance and insurers but to grant to every insured the right to freely choose a lawyer. The ECJ confirmed the view of the CCBE that freedom of choice is a key element of the Directive. The outcome of the Eschig case has a significant impact on the way the freedom of choice is applied in the Member States. The CCBE will explain its view on the application of the freedom of choice under the respective provisions of the Directive in the light of the Eschig judgement in chapter III.

Having said that, it is clear that insurers will have to stop to act as if the freedom of choice did not exist. This is particularly true for "mass tort clauses" such as the contentious one in the general conditions applicable to legal expenses insurance in Austria (ARB 1995), where the Commission is now called to supervise that these clauses are eliminated and that insurers conform their practice and case handling to the result of the Eschig case.

III. Ensuring insured's right to freedom of choice

1. Denial of freedom of choice by insurers

It is evident from the reports of the bars and law societies in the Member States that legal expenses insurers try to limit or to circumvent the free choice of a lawyer by various means. Few are the Member States in which the insurers do not place obstacles that discourage or prevent the insured from exercising their right to choose their lawyer. The example of France shows that the legislator even had to intervene and regulate the relationship between lawyes and insurers by law after he stated that the situation was not tenable.

In Austria, legal expenses insurers "punish" insured persons who choose their legal representative freely by billing franchises amounting up to 40% of the procedural costs meaning that the insured has to pay out of his pocket 40% of his lawyer's fees plus 40% of the fees of the legal representative of the adversary party plus 40% of the court fees and of the fees of technical experts. Moreover, insurers try to influence the conduct of cases and to limit or avoid the risk of litigation costs by pressuring lawyers chosen and mandated by themselves to avoid proceedings (often to the detriment of the insured).

In Germany, insurers try to circumvent the freedom of choice by recommending call centers ("damage hotlines for quick help in emergencies") established by themselves to their insured, thus systematically leading the insured to lawyers who have entered into agreements with the insurer. They also circumvent arbitration in case of disagreements as to the prospects of success of a case by mandating and pressuring lawyers to evaluate the prospects of success as negative as possible in order to spare the insurer the risk of loosing a case.

In France, insurers used to discriminate against insured that freely chose their lawyers. Those insured were forced to advance the lawyer's fees but only reimbursed the indemnity provided by the insurance contract. In contrast, insured persons whose lawyer was mandated by insurers themselves did not have to advance the fees: insurers paid their mandated lawyers directly. This practice led insured to

take the lawyer mandated by insurers as they had a clear interest in it. The fact that all legal expenses insurers are part of the main insurance companies in France aggravated the situation as in most of the cases the same insurance company handled the legal expenses insurance allowing the insured to put forward his claim, on the one hand, and the compensation of the insured, on the other hand. Only the law of 19th February 2007 cut the ties between legal expenses insurers and their network of lawyers and brought an end to abuses.

In England and Wales, the Directive – and specifically the term "proceedings" – is being incorrectly interpreted by insurers leading to de facto denial of freedom of choice to the consumer in the vast majority of cases and therefore frustrating the purpose of the Directive. It is plain that the pre-action protocols – and preparation therefore- are a compulsory part of proceedings. Insurers place obstacles that discourage the insured from exercising their right to choose even after proceedings have started, which can include denying liability for duplication of costs incurred as a result of the newly-appointed solicitors taking over the case and limiting remuneration rates. The combined practical effect of denying the insured a choice of solicitor from the outset and then placing obstacles at the point of issuing proceedings is to deny freedom of choice to consumers.

2. Conflict between interests of insurers and insured seeking justice

There is evidence from many Member States that insurers pressure and influence lawyers mandated by themselves (not chosen by insured) to represent the interests of clients if those interests are contrary to the interests of the legal expenses insurer. The best example for the behaviour of insurers is a draft cooperation agreement drawn up by a legal expenses insurer (ARAG) and presented to lawyers in Austria for signing, that contains the following clauses:

1. "*The cooperation partner* (the lawyer) *declares that he will always aim for an amicable settlement with ARAG in cases of dispute. If for any reasons this should not be possible, the cooperation partner already agrees not to conduct proceedings for coverage against ARAG."*

2. "*In cases where the success chances are questionable and purely dependent on the consideration of evidence through the court, the cooperation partner will recommend to the insured after consultation with the ARAG guiding team to aspire for a "Prozesskostenablöse"* (a deal where the insured is paid a lump sum in lieu of costs of litigation in turn for his renouncement to proceed with the action).

3. "*It is agreed that the content of the present contract and of the claims settlement is confidential*."

This contract proposal clearly shows that mandated lawyer shall be hindered to represent the interests of his client if those interests are contrary to the interests of the legal expenses insurer. The lawyer shall not undertake anything that could force the legal expenses insurer to perform the services stipulated in the insurance contract. He shall unsell the insured on proceedings if these proceedings are judged to be risky.

This cooperation agreement presented for signing to lawyers in Austria also shows that the interest of legal expenses insurers is to avoid proceedings. It becomes evident that whenever a lawyer is chosen by the insurer, the insured has to be aware of the attempt of the insurer to influence the lawyer (sometimes to the detriment of the insured).

The above mentioned modell of a cooperation agreement is not the only example of an attempt of an insurer to dissuade clients from launching a proceeding by influencing the lawyer. Accordingly, agreements between legal expenses insurers and lawyers may endanger all persons seeking for access to justice, if the commercial interests of the legal expenses insurers become prevalent.

It is evident that there is an indissoluble conflict between the interests of legal expenses insurers on the one hand and the interests of persons seeking justice on the other hand. The conflict of interest arises because legal expenses insurers want to avoid any cost risk but the achievment of the objectives of the client often is only possible if a certain risk is taken.

The mentioned examples show that legal expenses insurers try to influence the handling of the legal protection affairs with respect to the contents in order to avoid the risk of litigation. They also show that proceedings are not launched if the requirements of the insurers are followed with the consequence that the client is denied access to justice.

3. Freedom of choice under Article 3 (2) c)

The freedom of choice according to Article 3 (2) c) of the Directive has to be kept separate from the freedom of choice pursuant to Article 4. According to the ECJ (Eschig case) the Directive creates, "*first, organisational and contractual measures and, secondly, a certain number of specific guarantees in favour of insured persons. As regards the organisational and contractual measures, Article 3 (2) [...] gives insurers the possibility to employ separate staff within the same undertaking to manage claims or to subcontract the management of the claims to a legally separate undertaking. Furthermore, Article 3 (2) c) of that directive allows conflicts of interests to be avoided by granting the insured person the freedom to choose his representative as soon as an insured claim is made.*"

"*As regards the specific guarantees, that directive gives insured persons the right to freely chose a representative in the procedures referred to in Article 4 (1) a) or, in accordance with Article 4 (1) b), where a conflict of interest arises*." For the Court it is apparant from the entirety of Articles 4, 6 and 7 of the Directive that the rights of insured recognised by those articles seek to broadly protect the interests of the insured without being restricted to situations in which a conflict of interests arises. The Court notes that Article 4 (1) lays down the minimum level of freedom which must be granted to the insured whatever the option provided for in Article 3 (2) with which the insurance undertaking complies.

Accordingly, the freedom of choice pursuant to Article 3 (2) c) only applies if a Member State decided to allow for this specific solution. However, the Court held that if this is the case then this solution *"grants more extensive rights to insured persons than Article 4 (1) a) of that directive*", as "*the insured has the right to entrust the defence of his interests to a lawyer of his choice from the moment that he has the right to claim from his insurer under the insurance policy, therefore prior to any legal or administrative procedure*.

This means that Article 3 (2) c) provides for the free choice of a lawyer for legal advice not only in connection with an inquiry or proceedings but also irrespective of any legal or administrative procedure (Article 4 (1) a)) and irrespective of any conflict of interests (Article 4 (1) b)). The freedom of choice as laid down in Article 3 (2) c) covers "pure" legal advice or in other words legal advice in cases where no conflict has to be settled in an inquiry or proceeding and where no conflict of interests has arisen.

4. Freedom of choice under Article 4 (1) a)

The free choice of a lawyer according to Article 4 (1) a) is a specific guarantee insurers must comply with 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). Article 4 (1) a) 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*."

The main characteristic of the freedom of choice under Article 4 (1) a) is that this right is connected to inquiries and proceedings. This does not mean that insured are entitled to choose their lawyer only once the inquiries or proceedings have started. On the contrary, the legal provision provides for the free choice of a lawyer in order for insured to be defended, represented or their interests to be served in court or administrative proceedings. This again means that the right to choose a lawyer may not be linked to the beginning of proceeding as a condition.

The free choice of a lawyer in view of representation in court or administrative proceedings implies that the freedom of choice must be guaranteed prior to the proceedings in order to prepare them. Activities such as the preparation of a proceeding, the collection of information, the assessment of the legal situation, the drafting of a claim and the composing of an action are all carried out in order to represent insured in court or administrative proceedings.

The CCBE therefore believes that the freedom of choice under Article 4 (1) a) must apply from the moment when a lawyer is contacted by an insured person in the purpose to assess the chance of success of proceedings and to prepare and carry out court or administrative proceedings. The insured

person must be able to consult a freely chosen lawyer in order to decide whether proceedings shall be launched or not. This view is compelling for three reasons:

- First, it is the wording of Article 4 (1) a) itself that leads to that view as it includes the preparatory stage by saying *"[...] in order to defend, represent or serve the interests [...]*".
- Second, insured persons need to be protected from obvious conflicts of interests between insurers and themselves such as mentioned under point III.2. The interest of insurers is to avoid costly risks and therefore proceedings, the interest of insured is to get justice. To this end, insured must be advised by independent, freely chosen lawyers and proceedings may need to be prepared and launched.
- Third and finally, this view follows from the Eschig decision. Were insurers allowed to restrict the freedom of choice to the beginning of proceedings (for example the filing of claims), the freedom of choice under Article 4 (1) a) would be emptied of its substance as in practice no insured person changes its lawyer once the proceedings have started. However, in the Eschig case the Court clearly stated that it did not want to empty Article 4 (1) a) from its substance. The Court therefore did not follow the interpretation proposed by the insurer and the Commission because it would have led to the result of eradicating the scope of application of Article 4 (1) a).

The view of the CCBE is in line with the intention of, for example, the English, the Austrian, the Belgium or the German legislator. The English legal system of pre-litigation conduct under the civil procedure rules presents a situation where pre-litigation conduct must be within the scope of "proceedings". The Austrian, Belgium and the German procedure law do not provide for separate fees (to be determined in cases where the loser-pays-principle applies) for the preparatory steps. The fees for filing the complaint or action comprise preparatory services such as collecting information or preparation of the claim. This rule originates from the plausible consideration that a lawyer who has already given advice in the extrajudicial area is thus familiar with law and facts of the case necessary for further proceedings. This proves that the Austrian, Belgium and German legislators consider these steps as being intrinsically tied to the action and the proceeding themselves. The future development of a case is not just determined when considering filing a suit but already at the time of the first contact between lawyer and client: It is at that very moment that the lawyer assesses facts and circumstances and advises the client whether or not to pursue the case. Bearing that in mind it becomes clear that those who restrict free choice of lawyer in the extrajudicial area to those lawyers who are in one way or another depending on insurance companies are in fact virtually abolishing it completely.

Finally it is not understandable why free choice of lawyer is more important in court proceedings than outside the court. The fear is that an existing conflict of interest could materialize in court proceedings. In court proceedings this conflict may result in an overhasty settlement just for economic reasons at the expense of the client's best interests. This possible conflict may also result in a rash withdrawal of an action or declaration of final disposal. Those who are aware of these perils and thus believe in the necessity of a free choice of lawyer will have to ask themselves whether it is not at least as dangerous if the insured is detained from claiming his or her interests after seeking a lawyer's extrajudicial advice.