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## **RIAD's view on the judgment of the European Court of Justice in case 'Eschig vs Uniqua' (C-199/08)**

The European Court of Justice (ECJ) decided about the compatibility of a certain practice of a legal expenses insurance company with Article 4 (1) (a) of Directive 87/344/EEC, i.e. whether this provision precludes that the insurer can select a lawyer and thereby restricts the right of the individual insured person to choose his own lawyer in so-called "mass tort cases".

It ruled that "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 concerned".

### **1. The system of the Directive**

The ruling of the ECJ should be seen in the context of the system which the Directive introduces. In this respect it is important to underline that the Directive preliminarily aims at precluding as far as possible any conflict of interest arising out of the fact that the insurer is covering a person in respect of both legal expenses and other classes, in particular liability insurance, or is covering another person (see Article 1 of the Directive and number 39 of the judgment).

- a) The solutions given by the Directive for resolving the conflicts of interest in case the insurer is covering a person in respect of both legal expenses and other classes are of organisational and contractual nature: Article 3 (2) of the Directive provides that insurers can employ separate staff within their company to manage claims (Article 3 (2) (a)), they can subcontract the management of the claims to a legally separate undertaking (Article 3 (2) (b)), and, according to Article 3 (2) (c), they can decide to grant the insured person the contractual right to choose his representative as soon as an insured claim is made. Furthermore, Article 3 (3) explicitly states that all three solutions must be regarded as equally safeguarding the interests of the insured person in regard to resolving potential conflicts of interests (see also number 42 of the judgment).

Consequently, Article 3 (2) of the Directive lists organisational and contractual options which the insurer can choose. Each of the options resolves potential conflicts of interest arising from the fact that the legal

expenses insurer is covering a person in respect of legal expenses and other classes.

- b) In case the same insurer handles both sides of a claim there is a conflict of interest which is neither solved by Article 3 (2) (a) nor (b) and, therefore, according to Article 4 (1) (b), triggers the right of the insured person to freely choose a lawyer.

To be noted, if the insurance company has opted in the past to organise its business according to Article 3 (2) (c) there is no room for Article 4 (1) (b) because the insured person chooses his lawyer at the very moment when an insured claim is made and, subsequently, there cannot arise a conflict of interest (see also number 50 of the judgment).

## **2. The free choice of lawyer according to Article 4 (1) (a)**

In Case C-199/08 the ECJ rules that Article 4 (1) (a) grants the insured person the right to choose his lawyer or other person appropriately qualified according to national law. This right does not depend on the occurrence of a conflict of interest, has an obligatory nature and must generally be applied (see number 47 of the judgment).

Likewise, the Court establishes that Article 4 (1) (a) has a restricted application and only provides for the right to freely choose a lawyer where an inquiry or proceedings are initiated (see number 50 of the judgment).

To sum up, it follows from the Directive and the Court's ruling that there are three cases which have to be distinguished in regard of the free choice of lawyer:

- ✓ As a contractual measure according to Article 3 (2) (c).
- ✓ Whenever a conflict of interest arises between the insured person and his insurer according to Article 4 (1) (b).
- ✓ Where recourse is had to a lawyer or other person appropriately qualified according to national law once an inquiry or proceedings are initiated according to Article 4 (1) (a).

## **3. A difference of opinion between the insurer and the insured person**

It should be stressed that the Directive implements a system which broadly safeguards the insured person's interests: in case an insured person and his legal expenses insurer have a difference of opinion about the settlement of an insured dispute that cannot be solved after both sides have informed the other party of their attitudes and were not able to come to an agreement, Article 6 provides for an arbitration procedure which the insured person can initiate at any time against his insurer. The insurer is obliged to inform the insured of his right as soon as a difference of opinion becomes evident to the insurer.