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Insurance-based investment products, between the market and policyholder protection. What responses from European Union Law?

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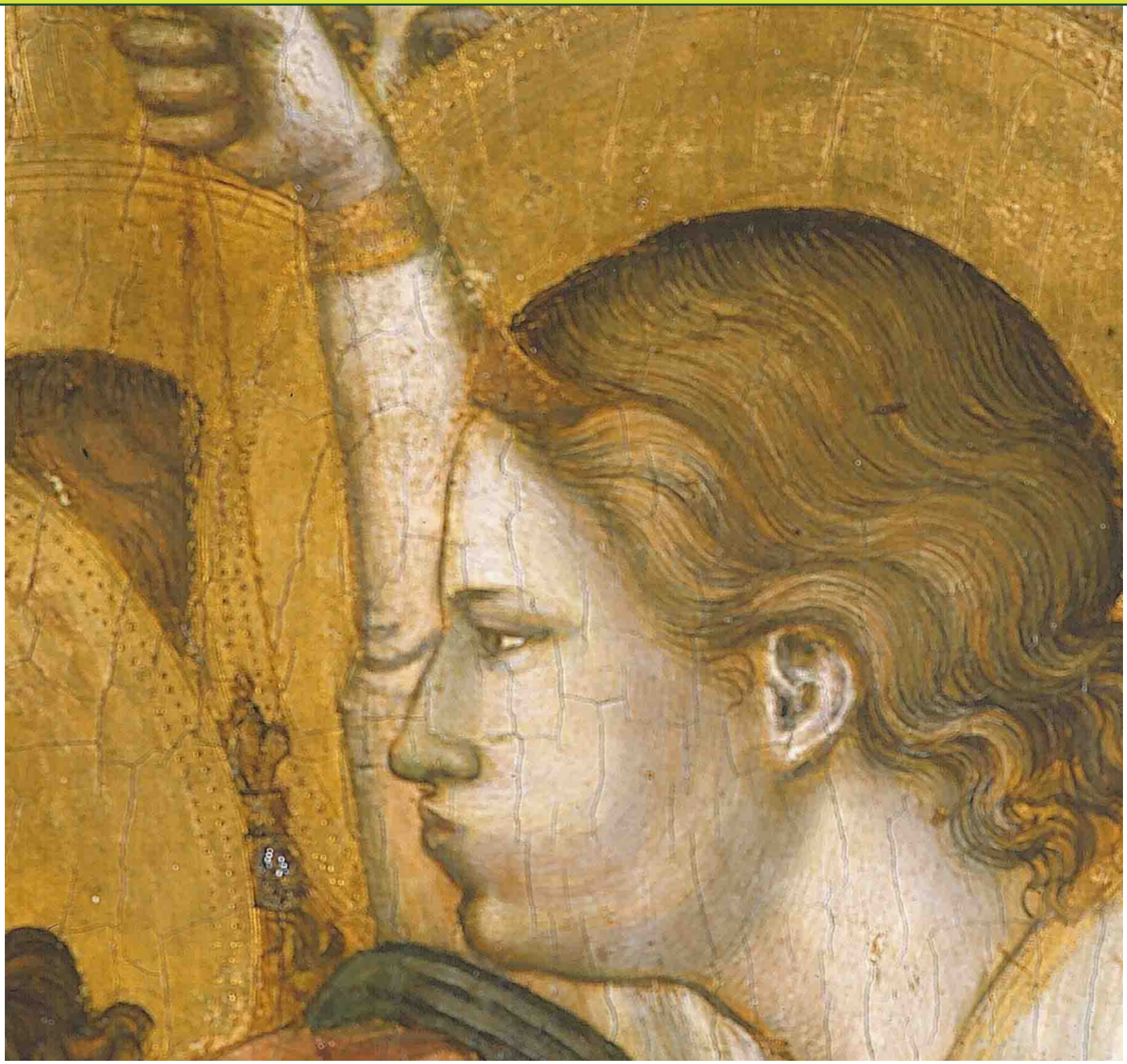

How information duties in plain and intelligible language finally caught up with Dutch ULIP-backed mortgage loans

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I. Introduction

Between roughly 1990 and 2006, the Dutch insurance industry introduced and vigorously marketed and distributed a new form of home financing: the combination of a mortgage loan offered by one subsidiary of the insurance company with a special capital life insurance contract offered by another subsidiary, typically the unit-linked insurance plan (ULIP).[1] These ULIP-backed mortgage loan schemes became known as investment mortgage loans.

For insurance companies, the development of this new product was a godsend, opening up a new market. While in the past it was mostly banks that offered mortgage loans with simple annuity or linear interest terms, the introduction of ULIP-backed mortgage loans meant that insurance companies could enter the consumer mortgage product market. What better way to sell more life insurance in a country where the life insurance market was already saturated?

Typically, the consumer would be granted a loan and repayment of the loan would be postponed for the running period of the ULIP, usually a 30-year period. During that period, the monthly repayments made by the consumer would go towards:

- Risk premium for a life insurance module in case of early death of the consumer
- A deposit into one or several investment plans, mostly in varying proportions, in fixed-rate investments, variable-rate investments and financial investment products of the insurance company conglomerate offering the contract
- Administrative fees and investment management costs
- Sometimes, the monthly payments would also cover interest payments on the mortgage loan but in most cases the interest would simply accrue and be added to the debt

The basis idea was that on maturation of the loan after 20 or 30 years, the investment plan would have yielded enough returns to repay the outstanding debt on the loan. The loan would thus be repaid *at once* in *one sum* with the proceeds of the investment.

Obviously, at the end of the running period, the investment would have to have shown a positive yield, the *equity*. Typically, the product would contain contractual levers for the consumer to bank some of the returns, to transform the portfolio along the way into investments with less risk exposure such as government bonds and to maximize the chances of producing sufficient equity to cover the loan sum.

In theory, ULIPs have the potential of wealth creation over the long term by the mechanism of consumer policyholders entrusting investment experts with their money for at least a certain lock-in period, while maintaining certain levels of autonomy to switch between different investment funds to attain the policholder's long terms goals.

The typical downside of ULIP schemes is their lack of transparency in terms of the exact allocation of the periodic contributions made by the policyholder. Various charges are associated with ULIPs, including life insurance premium allocation charges, mortality charges, fund management fees, policy administration charges, and surrender charges. Ideally, ULIP contract clauses should be able to transparently communicate to policyholders 'where their money goes' so they can both develop some understanding of the allocation of contributions and model the equity growth trajectory. Also, ULIPs typically experience an overstretched demand due to tax benefits – where government policy encourages consumers to become policyholders of ULIPs rather than save their money in ordinary savings accounts, the effect may be skewed demand for ULIPs. And where government policy is unstable, withdrawal of tax benefits may be a major threat to the sustainable viability of ULIP schemes. In the

[1] ULIPs are part of the family of insurance-based investment products (IBIPs).

Netherlands, this was in fact was one of the causes of the prior collapse of another ill-fated investment scheme, the consumer securities lease agreements scheme.

The Dutch schemes for ULIP-backed mortgage loans were, in hindsight, rather risk-prone and shockingly opaque for consumers. In reality, they ensured rather one-sided profits for the insurance companies. Whereas in a traditional home financing scheme, the deal is pretty straightforward – the consumer knows in advance the loan sum, the interest rate, the annuity vs linear repayment calculation, the running period for both the loan and the interest rate, and therefore the monthly repayment obligations with a view to clearing his overall debt during the running period, this was certainly not the case with ULIP-based mortgage loans.

In the traditional mortgage loan, the outcome is defined: full repayment with interest. It assumes a risk-averse consumer. In investment, only the periodic input is defined: deposits to investment vehicles. Whether upon maturity, the homeowner can in fact repay the mortgage, remains to be seen. This in itself is problematic: if we agree that home mortgages should aim at maximum home security, investment is perhaps not the most fitting answer for risk averse consumers. Admittedly, an investment structured mortgage loan may fit consumers with risk appetite and the ability to absorb those risks. The problem here was that in the 1990s, consumers were not tested properly for their risk attitudes before these investment products were let loose on them.

So, there is the issue of potential *inherent unfitness for purpose*. As early as 2003 the Dutch Financial Markets Authority (AFM) calculated that an average household with a ULIP-backed mortgage ran a 55% chance of incurring residual debts. Here we can ask how well the average consumer understands the risks associated with the ULIP-backed mortgage.

The ULIP-backed mortgage loan also combines investment with life insurance. So the monthly installments are not fully invested. Does the product provide a breakdown of the installments so that the consumer knows which part is invested and which part is a risk premium? Here we can ask whether the product information and the general contract terms clearly distinguish and define the allocation of the installments.

It is important to consider the reasons why consumers have massively opted for ULIP-backed mortgage schemes. Why would someone choose this product over a traditional mortgage? The answer is multifaceted:

- Some consumers may have been persuaded by intermediaries to consider this product, despite not actively choosing it.
- It appears that consumers may have had an inaccurate understanding of the ULIP's lever effect.
- Others, who attempted to compare products, encountered difficulties due to the limited availability of traditional options.
- There are a number of reasons why a ULIP-backed mortgage might be selected over a traditional mortgage. Initially, it provided a tax advantage that was not available with previous products. Additionally, it is worth noting that commission-driven intermediaries often chose to exclude traditional annuity or linear loan products from their range of offerings.
- The product and its tax benefits may have led to an increase in the buying capacity of home buyers.
- In retrospect, there were concerns about the transparency regarding the commission fees earned by the intermediary. It appears that there could have been more clarity from both the insurers and the intermediary about these fees. This lack of transparency may have contributed to the economic incentives for insurers and the intermediary to promote this particular product line.

By far the most important problem with ULIP products launched between 1990 and 2006 was the complete lack of transparency in cost allocation. Most of the policies did not make it clear what part of the monthly premium went to the life risk premium, what part was the net investment, and what part was allocated to expenses and investment portfolio management. Obviously, if the running costs are high, the net investment will be low and the chances of accumulating sufficient funds at the end of the term will also be

reduced. This raised two issues: were the contract terms sufficiently clear and comprehensible, and did they provide a solid legal basis for the cost allocation decisions taken by insurers?

What happened between 2006 and 2022 is too much to discuss in this context, but the short version is this: growing consumer dissatisfaction associated with more than 2,5 million policies, media onslaught (the term "woekerpolis" or "usury insurance policies" was coined, and this framework was impossible to shake off), political intervention, advisory committees, guidelines on cost allocation and transparency, attempts at mass claims settlements, and so on. A significant portion of the insurers involved slowly agreed and implemented positive changes for the future as well as some form of token compensation for the past. By 2010, some insurers were willing to settle mass claims. Others, however, rebuffed all attempts by consumer advocates to settle, preferring to litigate each case individually, hoping for some miracle or redemption that would exonerate them. The result was a wave of individual litigation that was unproductive and inefficient.

In a way, the industry's stance was understandable. The stakes were unprecedented and extremely high: the life insurance industry had become totally dependent on ULIPs, and if the products were deemed defective or mis-sold, the insurance industry would likely collapse if they were forced to unwind and settle the outstanding policy obligations. On the other hand, if the products were allowed to run their course, thousands of homeowners would most likely be left with residual debt. The slow and painful process that took place between 2006 and 2022 was perhaps the lesser of several evils.[2]

As we will see, a landmark decision by the Dutch Supreme Court in 2022 finally caught up with ULIP-backed consumer mortgage loans. The 2022 Supreme Court decision was the final push to remove the remaining pockets of resistance to the mass claims settlements that were completed in 2023-2024, amounting to millions of euros. To understand the 2022 decision, we first need to step back and take a broader view of the contractual background against which ULIPs were positioned. In particular, we need to clarify the relevant parts of the framework of Directive 93/13/EEC on unfair terms in consumer contracts. Therefore, in the next section we will first review the development in the ECJ case law on the concept of "plain, intelligible language" in Art. 4(2) and Art. 5 of Directive 93/13/EEC, before turning to the ECJ jurisprudence that led to the 2022 Supreme Court ruling.

II. Directive 93/13/EEC

The capital life assurance contract is in part insurance, in part investment contract. In the Dutch contract law context, such contracts are considered insurance contracts subject to the Civil Code rules of life insurance.[3] Note that the ECJ also appears to classify these contracts as insurance contracts rather than investment contracts. For example, in *Länsförsäkringar* (ECJ May 31, 2018, C-542/16, ECLI:EU:C:2018:369), the issue was whether intermediary activities in relation to capital life insurance contracts - essentially: the provision of financial advice on such insurance contracts - fall within the scope of MiFiD I (2004/39) or the Insurance Mediation Directive 2002/92 (now the IDD). The ECJ ruled that such activities were covered by the Insurance Mediation Directive.[4]

In any case, capital life insurance and therefore ULIPs are considered as contracts with mutual obligations for the insurer and the policyholder. Thus, the general framework of the Civil Code for contracts and for consumer contracts applies.

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[2] In more detail, VAN BOOM, Willem H., book review of "B. van Hattum, De afwikkeling van zorgplichtclaims – Een onderzoek naar het adequater oplossen van affaires rondom retail producten en dienstverlening op de financiële markten" in: *Tijdschrift voor Consumentenrecht en Handelspraktijken* 6 (2018) 322-325.

[3] See art. 7:975, 7:964 and 7:925 of the Dutch Civil Code.

[4] See also ECJ March 1, 2012, C-166/11, ECLI:EU:C:2012:119 (*Alonso v Nationale Nederlanden*), where it was held that the Doorstep Selling Directive 85/577, which excluded the sale of insurance contracts from its scope, was therefore not applicable to ULIPs.

As mentioned, the general complaint that emerged was that the opacity of the general contract terms associated with ULIP-backed mortgage loans made it difficult to assess the decomposition of the monthly installments: it was unclear how life insurance premium allocation charges and mortality charges were calculated, fund management fees were typically unclear, and policy administration charges and surrender charges were hidden. This raised the question of whether the terms of the contract were actually drafted in a clear and unambiguous manner and whether the balance of obligations under the contract was sufficiently balanced. For ULIPs entered into after December 31, 1994,[5] the framework of Directive 93/13/EEC on unfair terms in consumer contracts (as implemented in the Dutch Civil Code) was applicable to deal with these matters. The general test under the Directive is one of fairness: contract terms are regarded as unfair if, contrary to the requirement of good faith, they cause a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. Furthermore, the terms need to be drafted in plain and intelligible language. Art. 4 (2) Directive 93/13 provides:

> Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in *plain intelligible language*. [emphasis added]

Moreover, art. 5 Directive 93/13 adds:

> In the case of contracts where all or certain terms offered to the consumer are in writing, these terms must always be drafted in *plain, intelligible language*. [emphasis added] Where there is doubt about the meaning of a term, the interpretation most favourable to the consumer shall prevail. This rule on interpretation shall not apply in the context of the procedures laid down in Article 7 (2).

This concept of 'plain, intelligible language' in Art. 4(2) and Art. 5 has developed from a linguistic into an overarching *transparency requirement* against the backdrop of average consumer financial literacy. Two pivotal cases stand out: *Kásler* (2014) and *Van Hove* (2015).[6]

The case of Kásler concerned a credit agreement between two Hungarian borrowers and a bank. The capital provided to the borrowers was denominated in Hungarian currency and was made available in Swiss francs (at the purchase rate) under a single clause. However, the monthly repayment obligations were expressed in terms of the selling rate under a separate clause. The borrowers subsequently lodged a complaint regarding this discrepancy. The ECJ had to rule on the interpretation of the concept of "clear and intelligible" in Art. 4(2) Directive. Was this just a linguistic test of the terms, or was there more to it? The Court ruled:

> Having regard to all the foregoing, the answer to the second question is that Article 4(2) of Directive 93/13 must be interpreted as meaning that, as regards a contractual term such as that at issue in the main proceedings, the requirement that a contractual term must be drafted in plain intelligible language is to be understood as requiring not only that the relevant term should be grammatically intelligible to the consumer, but also that the contract should set out transparently the specific functioning of the mechanism of conversion for the foreign currency to which the relevant term refers and the relationship between that mechanism and that provided for by other contractual terms relating to the advance of the loan, so that that consumer is in a position to evaluate, on the basis of clear, intelligible criteria, the economic consequences for him which derive from it.[7]

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[5] See Art. 10 (1) of Directive 93/13/EEC.

[6] ECJ 30 April 2014, C-26/13, ECLI:EU:C:2014:282 (*Kásler and Rábai v OTP Jelzálogbank Zrt*) ; ECJ 23 April 2015, C-96/14, ECLI:EU:C:2015:262 (*Van Hove v CNP Assurances SA*). See also ECJ 12 January 2023, C-395/21, ECLI:EU:C:2023:14 (*Lithuanian solicitor*), para. 37. In ECJ 20 April 2023, C-263/22, ECLI:EU:C:2023:311 (*Occidental*), the ECJ has effectively transposed the transparency requirement into a duty to provide the opportunity to become acquainted with the entire set of general contract terms before conclusion of the contract.

[7] *Kásler* para. 75.

In brief, the ECJ ruled that:[8]

- core terms must also be drafted in plain, intelligible language
- the requirement of plain and intelligible language in Art. 4(2) Directive has the same scope as in Art. 5 Directive
- terms must not only be linguistically and grammatically comprehensible but given the consumer's weak position and lack of information, the requirement of transparency must be interpreted broadly
- the terms harbour the possibility of an unlimited increase in the cost for the consumer of the financial service
- the reasons for the particulars of the exchange rate mechanism should be transparently specified so that the consumer can foresee the economic consequences on the basis of clear and comprehensible criteria
- the court will have to determine whether a normally informed and reasonably prudent and observant average consumer, on the basis of all the relevant factual data, including the advertising and information provided by the lender in the negotiation of a loan agreement, could not only know that in the securities market there is usually a difference between the selling and buying rate of foreign currency, but could also estimate the potentially significant economic consequences for him of the application of the selling rate to the calculation of the repayments ultimately due by him and thus of the total cost of his loan
- the requirement for a clause to be drafted in plain, intelligible language requires that the concrete operation of the exchange rate mechanism to which the clause in question refers, as well as the relationship between this mechanism and the mechanism prescribed by other clauses concerning the loan amount made available, be transparently specified so that the consumer can foresee, on the basis of clear and comprehensible criteria, the economic consequences arising from it for him.

Van Hove (2015) involved a dispute over the interpretation of the term "total disability" in an insurance contract. *Van Hove* was declared totally unfit to perform his former occupation, but he was considered able to perform modified activities part-time. The insurer held that this did not fall under "total disability" but under "permanent partial disability. Van Hove argued, among other things, that consumers cannot understand the scope of these definitions without knowledge of the facts. The ECJ ruled that:[9]

- Art. 4(2) must be interpreted strictly
- terms which are ancillary to core clauses do not fall within the concept of "main subject matter of the contract"
- in the case of insurance, the characteristic feature is that the insurer undertakes, in return for the prior payment of a premium, to provide a service agreed upon when the insured risk materializes
- that in insurance contracts there is no test as to whether or not terms which clearly define or delimit the insured risk and the insurer's commitment are fair, when those restrictions are taken into account in calculating the premium paid by the consumer
- the nature, overall design and all the terms of the contract and the legal and factual context must be taken into account when determining whether a term falls within the concept of the "main subject matter of the contract"
- the court must assess the extent to which the term, having regard to these factors, establishes a core performance of the contractual framework of which it forms part, which as such is characteristic of that framework
- if the clause is a constituent part of the actual subject matter, the court must also consider whether it was clearly and intelligibly worded by the insurer

Regarding the plain and intelligible language requirement, the ECJ considered that linguistic and grammatical comprehensibility are not sufficient and that the requirement of transparency must be interpreted broadly given the consumer's weak position and having less information than the insurer. In

[8] *Kásler* paras. 67-75.

[9] *Van Hove*, paras. 31-39.

addition, the Court held that it is essential that the consumer, before concluding the contract, be informed not only of the conditions of coverage, but also of the mechanisms for payment and their relationship with other mechanisms, so that he can assess the economic consequences for him on the basis of clear and comprehensible criteria. It is on the basis of this assessment that he will decide whether he wishes to be bound by the terms and conditions set by the insurer. The Court thus places the requirement of plain and intelligible language at the heart of informed consent to the terms and conditions.

In conclusion, according to Art. 4(2) and Art. 5 Directive 93/13/EEC a term is written in plain language which is intelligible to the normally informed and reasonably prudent and observant average consumer if all the following conditions are met:

- the clause is linguistically and grammatically comprehensible
- the concrete operation of the mechanism to which the term refers is set out in a transparent manner
- the relationship of the mechanism to other mechanisms arising from other terms is set out in a transparent manner,
- the consumer can assess, on the basis of clear and comprehensible criteria, the potentially significant economic consequences arising for him.

In reviewing terms, consideration should be given to all relevant factual data, including advertising and information provided by the insurer in the negotiation of the insurance contract and, more generally, within the contractual framework.[10]

The upshot of all this for ULIP-backed mortgage loans is that general contractual terms which do not comply with the requirement of plain and intelligible form may be examined for fairness, even if these terms define the main subject matter or relate to the adequacy of price and remuneration. If the terms are found to be unfair, they are not binding on the consumer (Art. 6(1) Directive 93/13/EEC). However, under Dutch law, the mere fact that contract terms are not written in plain and intelligible language does not make them unfair. A holistic assessment is required, as the lack of plain and intelligible language may be outweighed by other terms that benefit the consumer.[11] In any event, a lack of clarity in the language chosen can cause another problem. It can create a gap in the contract as agreed, as was the disastrous outcome of a case in 2012. There, the standard terms and conditions of a ULIP sold to a consumer did not specify what percentage of the total monthly payments related to the death risk premium payable. As a result, the policyholder knew what the total periodic payment was, but could not determine what portion of the payment was for the purchase of investments and what portion (percentage) was for the premium. The court therefore held that the contract provided a basis for the premium due, but not for the amount of the premium. Therefore, the insurer could not simply unilaterally determine what that premium would be; what followed was the court's own determination of a reasonable premium, and it was lower than the amount the insurer had unilaterally determined.[12]

1. 2015 ECJ Ruling *Nationale Nederlanden / Van Leeuwen*

A new chapter in the ULIP saga concerned whether information requirements based on open-ended concepts of national private law were preempted by the European regulatory framework for life insurance information requirements. This question came before the ECJ in the 2015 case *Nationale Nederlanden / Van Leeuwen*.[13]

In *Van Leeuwen*, the question was whether the framework for precontractual information duties laid down in the Third Life Assurance Directive 92/96/EEC (succeeded by Directive 2002/83/EC and then in 2012,

[10] *Van Hove*, para. 48.
[11] Hoge Raad 22 November 2019, ECLI:NL:HR:2019:1830 (*Euribor mortgage loan*).
[12] Hoge Raad 14 June 2013, ECLI:NL:HR:2013:BZ3749 (*Aegon v Stichting Koersplandewegkwijt*).
[13] ECJ EU 29 April 2015, C-51/13, ECLI:EU:C:2015:286 (*Nationale Nederlanden/Van Leeuwen*).

by Directive 2009/138/EC (Solvency II) pre-empted any room for national legislation and courts to apply stricter rules.

Article 31(1) of the Third Life Assurance Directive 92/96/EEC provided that at least the information listed in point A of Annex II must be communicated to the policyholder before the conclusion of the assurance contract. Article 31(2) provided that the policyholder must be kept informed throughout the term of the contract of any change concerning the information listed in point B of that annex. The Netherlands had transposed these regulatory information duties into Dutch law by means of the 1998 Regulation regarding the provision of information to policyholders (Regeling informatieverstrekking aan verzekeringsnemers 1998; 'RIAV 1998').

However, if there is no full harmonisation at the European level, may national courts, by way of interpreting national private law standards of conduct, place a more far-reaching burden on the shoulders of the regulated insurer?[14] The private law practitioner would probably exhort: of course it can, since private law is separate from regulatory requirements, and it is autonomous in nature, since it defines the horizontal legal relationship between private persons. More specifically, in the Netherlands, private law practitioners would point to the landmark 1957 Supreme Court decision in Baris vs. Riezenkamp. Ever since this case was decided, Dutch case law has consistently held that contract negotiations are governed by the principles of reasonableness and fairness. In *Baris*, the Supreme Court speaks of a "special legal relationship" that gives rise to "care" and "duties" and considers that the negotiating parties must allow their conduct to be partly determined by the legitimate interests of the other party.[15] In subsequent case law, the pre-contractual duty of care has become a cornerstone for assessing the pre-contractual conduct of negotiating parties. Indeed, it follows from subsequent case law that the duty may lead to a pre-contractual duty of disclosure on the part of the party that has better information than its counterpart.

From the perspective of European law, however, the role of 'reasonableness and fairness' as an autonomous source of information duties is far from self-evident. Consequently, in Nationale Nederlanden (2015), the ECJ was asked to consider the relationship between Article 31(1) of the Third Life Assurance Directive 92/96/EEC and the Dutch practice of using open-textured and context-dependent information duties in private law arising from precontractual reasonableness and fairness. The CJEU had to balance the wording and purpose of the Third Life Assurance Directive against the open-textured private law framework at the national level.

It did so by ruling as follows:

> 34 Consequently, the answer to the first question is that Article 31(3) of the third life assurance directive must be interpreted as not precluding an insurance company, on the basis of general principles of domestic law such as the 'open and/or unwritten rules' at issue in the main proceedings, from being required to send to policyholders certain information additional to that listed in Annex II to that directive, provided that the information required is clear, accurate and necessary for the policyholder to understand the essential characteristics of the commitment and that it ensures a sufficient level of legal certainty, which it is for the referring court to ascertain.

This, I would argue, is a well-balanced outcome. In essence, the ECJ allows national courts to apply autonomous private law standards and to derive from these rules certain information obligations (in addition to those set out in the Directive), even if they go beyond the obligations arising from written, specific public law rules of market regulation. However, national courts may only do so under the condition that the concrete obligation arising from the unwritten rule is clear, precise and necessary for a proper understanding by the policyholder of the essential elements of the commitment and ensures sufficient legal certainty. So, the requirement that the additional information required by national law or court practice must be "clear, accurate and necessary" serves to protect the interest of *the insurance company*:

[14] The MiFID II Directive (Directive 2014/65/EU) may be a case in point.

[15] Hoge Raad 15 november 1957, ECLI:NL:HR:1957:AG2023 (*Baris/Riezenkamp*).

it cannot be required to provide additional information if the requirement does not provide information that is clear, accurate and necessary to improve consumers' transactional decisions.

However, the flipside of this argument is that it can also be said that the average consumer in turn needs this "clear, accurate and necessary" information and should be allowed to seek a fitting remedy in cases where the insurance company is not in compliance with this duty. This is exactly what had been happening in the Netherlands. By using the open standards of the 1957 *Baris vs. Riezenkamp* ruling in conjunction with the requirement set forth by article 2 (2) of the 1992 Civil Code ("Creditor and debtor are obliged to behave towards each other in accordance with the requirements of reasonableness and fairness."), Dutch lower courts increasingly considered the regulatory information duties stemming from the 1998 Regulation regarding the provision of information to policyholders (RIAV 1998) to be insufficient. They considered that reasonableness and fairness put additional duties on the shoulders of insurance companies, in order to enable consumers to make well informed choices. In the 2022 *Woekerpolis / Nationale Nederlanden* ruling, the Supreme Court effectively gave its 'seal of approval' to this trend.[16]

2. The 2022 Supreme Court decision

In 2022, the Dutch Supreme Court ruled in the test case between Vereniging Woekerpolis (Consumer Association against Usury Policies) and the insurance company Nationale Nederland. The case concerned the application of the ECJ ruling in the *Van Leeuwen* case. The question before the Court was essentially whether Dutch law was in conformity with the Van Leeuwen judgment: could the private law requirements of reasonableness and fairness (Article 2 of Book 6 of the Civil Code) be used to supplement the statutory requirements on pre-contractual information duties set out in the RIAV 1998?

The Supreme Court basically held the following: it is for the Dutch courts to determine whether the obligations to inform the other party, which the insurer has under civil law standards when entering into, concluding or performing an investment insurance contract, satisfy the requirements of *Van Leeuwen*. This evaluation consists of three distinct steps.

First, it must be determined whether the insurer has any civil law obligations to provide additional information beyond the information already required by the RIAV 1998, and if so, which ones.
Second, it must be assessed whether those obligations (i) relate to information that is clear and precise, (ii) are necessary for a proper understanding of the essential elements of the investment insurance offered or provided, and (iii) provide sufficient legal certainty.

The third requirement is met if those obligations enable the insurer to determine with a reasonable degree of predictability what additional information it must provide and what the policyholder can expect to receive. In this regard, it should be noted that it is for the insurer to determine the nature and characteristics of the insurance products it offers, and therefore it should in principle be able to determine which characteristics of those products justify the provision of additional information to the policyholder. If the obligation does not meet the three requirements, the court may not impose the obligation.

If it does meet the requirements, the policyholder may seek redress in court.

This follows from Dutch civil (procedural) law, the RIAV 1998 and the interpretation of the Life Assurance Directive by the ECJ. It is also in line with the intention of the Dutch legislator, who, in enacting rules relating to the implementation of Art. 31 Third Life Assurance Directive in the RIAV 1994 and the RIAV 1998, stated that the application of these provisions "is governed by civil law, whereby, for example, the requirements of reasonableness and fairness (Article 2 of Book 6 of the Civil Code) also apply".[17]

The policyholder is therefore entitled to this legal protection, with reference to the requirements of reasonableness and fairness, even if the insurer has faithfully complied with the information obligations set out in Art. 31 (3).

[16] Hoge Raad 11 February 2022, ECLI:NL:HR:2022:166 (*Woekerpolis.nl/NN*).
[17] See *Staatscourant* (Official Gazette) 1994, no. 97, p. 19 and *Staatscourant* 1998, no. 134, p. 8.

III. How information duties in plain and intelligible language finally caught up

It seems that there are two ways in which the ULIP-backed mortgage loans that became dominant in the Netherlands in the 1990s and 2000s have been addressed by private law: On the one hand, courts emphasized the existence of pre-contractual information duties based on common principles of reasonableness and fairness between insurance companies and consumers. On the other hand, the fairness test of opaque standard contract terms according to the requirement of plain and intelligible language in consumer contracts was applied with increasing rigour.

As regards the first approach, the ECJ and the Dutch Supreme Court essentially resisted calls by the insurance industry to grant them the so-called regulatory compliance defense. Conversely, courts upheld the principle that private law standards may exceed the requirements stipulated by public law.[18]

As for the second path, since the beginning of the 2010s, the ECJ has begun to extend the scope of the requirement of plain and intelligible language in consumer contracts to the area of transparency of the economic mechanisms at work in financial products. This slowly led to a whole new paradigm of testing the overall comprehensibility of financial product terms.

With the benefit of hindsight, when insurers embarked on the ULIP adventure in the 1990s, they could have reviewed their small print more thoroughly. This would have made their general contract terms less opaque and given consumers a clearer insight into the breakdown of the allocation of the monthly instalments of their ULIP-backed mortgage loan.

Whether such an alternative scenario would have prevented the 'usury policy scandal' from unfolding remains an open question. If anything, decades of legislative efforts to achieve product transparency in the financial products sector should make us very humble about our ambitions to make the average consumer a better version of themselves. Admittedly, hordes of consumers would still not have bothered to understand the workings of their loans as long as they were able to pay their monthly installments. Consumers with a higher need for cognition, however, would have taken the opportunity to compare offers. So would financial experts, intermediaries, and specialized journalists. This would have at least created a chance for a better past for consumer welfare.

[18] On the regulatory compliance defense in private law, see, e.g, VAN BOOM, Willem H.: "On the Intersection Between Tort Law and Regulatory Law – A Comparative Analysis" in: VAN BOOM, Willem H./LUKAS, Meinhard/KISSLING, Christa (eds.): *Tort and Regulatory Law*, Wenen-New York 2007, 436.