Note on Judgments C-22/12, Katarína Haasová v Ratislav Petrík and C-277/12 Blanka Holingová and Vitālijs Drozdovs v Baltikums AAS of the Court of Justice of the European Union

Eirini Sarri
Associate
Rokas & Partners Athens

In Cases C-22/12 and C-277/12, the Court of Justice of the European Union (CJEU), in its preliminary ruling under article 267 TFEU (former article 234 TEC)[1], held that the provisions of article 3.1 of the 1st Motor Insurance Directive (present article 3 of the codified Directive 2009/103[2]), article 1.1 and 1.2 of the 2nd Motor Insurance Directive (present article 3.4 and article 9.1 of the codified Motor Insurance Directive 2009/103) and article 1 sentence 1 of the 3rd Motor Insurance Directive (present article 12.1 of the codified Motor Insurance Directive 2009/103), should be interpreted "as meaning that compulsory insurance against civil liability in respect of the use of motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, in so far as such compensation is provided for as part of the civil liability of the insured party under the national law applicable in the dispute in the main proceedings". In such cases, the minimum coverage imposed by the EU secondary law for personal injuries will also apply to non-material damages[3].

According to the opinion of the Advocate General, which the CJEU followed, the CJEU adopted the approach of the EFTA Court of Justice[4] in Case E-8/07, *Celina Nguyen* v *The Norwegian State*, i.e. a broad interpretation of the notion of *personal injuries*, which includes, not only bodily injuries, but also, any damages of "personal"

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[1] *V. Christianos*, Analysis of article 267 TFEU in V. Christianos, (edit.), Treaty of the EU & Treaty on the Functioning of the European Union – analysis of each article, Athens, 2012.

[2] From the preambles of the Motor Insurance Directives it results that their aim is to ensure, on the one hand, the *free movement* of vehicles based in Community territory and of persons travelling in those vehicles and, on the other hand, that the victims of accidents caused by such vehicles receive *comparable treatment,* irrespective of the location of the accident within Community boarders. See 5th recital of the 2nd Motor Insurance Directive and 4th recital of the 3rd Motor Insurance Directive. Also see Decision of 28th of March 1996 in Case C-129/94, *Rafael Ruiz Bernáldez*, [1996], ECR I – 1829, paras 13-18.

[3] To be noted that the Advocate General developed a joint opinion because both Cases have common elements and both deal with the same central issue, although, due to the lack of a real connection between the two Cases, it was not examined whether the Cases should be heard jointly.

[4] Regarding the judicial dialogue between the EFTA Court of Justice and the CJEU, see *C. Baudenbacher*, Legal Framework and Case Law, Luxemburg, 2008, available on the website http://www.eftacourt.int. In many Cases either the CJEU Decisions or the opinions of the Advocate General refer to the approach adopted by the EFTA Court of Justice in its Decisions, see, regarding the interpretation of the 1st, 2nd and 3rd Motor Insurance Directives, the opinion of the Advocate General (para 42) in Case C-537/03, *Katja Candolin Jari-Antero Viljaniemi Veli-Matti Paananen v. Vahinkovakuutusosakeyhtiö Pohjola Jarno Ruokoranta*, [2005], ECR I-5745, where the following Case is mentioned: E-1/99, *Storebrand Skadeforsikring AS and Veronika Finanger*, Report of EFTA Court 1999, p. 119, para 25 for the interpretation of article 2.1 subparagraph b of the 2nd Motor Insurance Directive. See, however, opinions 1/91 and 1/92 of the CJEU, where according to the latter (dated 10.04.92, No. 1), the EFTA Court will assert its jurisdiction only within the framework of EFTA and will have neither personal nor operational links with the CJEU (para 13), while the EEA Agreement no longer contains provisions requiring CJEU to take case law of other Courts into account (para 16).

nature[5] "in the light of the different language versions of Article 1.1 of the Second Directive, Article 1.1 of the Third Directive and the protective aim of the three directives referred to above[6]".

Specifically, regarding the Haasová case, the District Court of Prešov referred the following question to the CJEU for a preliminary ruling: whether compulsory insurance against civil liability in respect of the use of motor vehicles must cover compensation for non-material damage suffered by the next of kin of the deceased victims of a road traffic accident, because the applicable law, in this case the Czech civil law, allows a person to seek compensation for non-material damages for losses suffered by such person due to unlawful conduct damaging his/her personal rights. The CJEU distinguished between compulsory insurance against civil liability in respect of the use of motor vehicles for damages caused to third parties[7] and the

[5] Contrary, *I. Rokas*, The limitations of benefits provided by the Auxiliary Fund of Legislative Decree no 489/76 enacted through Law 4092/12 and the commitments of the legislature as per Union law, Commercial Law Review 2013, p. 1 et seq, where he notes (p. 5) that the lack of reference in the wording of the abovementioned Motor Insurance Directives to the financial satisfaction for mental anguish or mental injury is consistent with the obvious **need to avoid**, as mush as that is possible, **recourse** to judicial settlement of disputes arising out of motor vehicle accidents, to which judicial settlement points the diagnostic process and its adjudication and especially as regards the determination of its amount. Additionally, he points out (p. 6) that the objective of the codified Motor Insurance Directive 2009/103 i.e. the **equivalent** and of **equally effective protection** between third party injured persons by an insured driver and third party injured persons by uninsured or unidentified driver, which are covered by the *body*, such as the Greek Auxiliary Fund, (see above Decision dated 4th of December 2003, C-63/01, *Samuel Sidney Evans v. Secretary of State for Environment Transport and the Regions, Motor Insurers' Bureau*, [2003], ECR I-14447), refers to the **level of minimum protection provided by said Directive**, the wording of which does not include financial compensation. Also, according to the opinion of the Advocate General (paras 72-74) in Case C-371/12, *Enrico Petillo and Carlo Petillo v Unipol Assicurazioni SpA* (not yet published), "it may be a **legitimate policy choice** for a Member State to determine and, as the case may be, to limit ex ante the monetary value to be attributed to non-material damage, so as to permit insurance undertakings to lower their premiums, to the benefit of car owners as a whole".

[6] It is very common for errors or misunderstandings to arise out of the many *equivalent* language versions in which the EU legislation is drafted. The Advocate General, as noted in his opinion, chose, so as to give a safe answer, the broad interpretation for the meaning of the term *personal injury,* which interpretation was based on the purposive interpretation of the relevant provisions. However, the protective aims of the Motor Insurance Directives according to the case law of the CJEU so far are, on the one hand **(1)** the free movement of vehicles based in EU territory and of persons travelling in those vehicles, on the other hand **(2)** the comparable treatment of the victims of accidents caused by such vehicles (see above footnote 2). As regards the interpretation of the notion of *personal injuries*, see the opinion of the Advocate General (para 43) in Case *Mendes Ferreira* (Decision of 14th September 2000, C-348/98, *Vitor Manuel Mendes Ferreira and Maria Clara Delgado Correia Ferreira v Companhia de Seguros Mundial Confiança SA*, [2000], ECR I-6711), according to which: " (…) the Community legislature has left the determination of the nature of the civil liability to the discretion of the Member States; (b) is concerned with laying down rules relating not to the determination of the nature of the liability but to the introduction of an obligation to insure and to the determination of the scope of that obligation. For example, it deals with the question whether that insurance is to cover only personal injury and damage to property, as Article 1.1 of the 2nd Motor Insurance Directive in fact provides, or (also) non-material damage. Similarly, it lays down the terms and conditions of the cover. The wording is extremely broad and takes account of the existing disparities between national laws with regard to the extent of the cover. In other words, as the Court has observed, Article 3.1 of the 1st Motor Insurance Directive '[in its] original version (...) left it to the Member Sates, however, to determine the damage covered and the terms and conditions of compulsory insurance". In this regard, see Decision of 23rd January 2014, C-371/12, *Enrico Petillo and Carlo Petillo v Unipol Assicurazioni SpA* (not yet published), paras 42-47.

[7] Article 3.1 of the 1st Motor Insurance Directive, as amplified and supplemented by the 2nd and 3rd Motor Insurance Directives, requires the MS to ensure that civil liability in respect of the use of vehicles normally based in their territory is covered by insurance, and specifies, inter alia, the types of

extent of compensation to third parties on the basis of civil liability of the insured. Compulsory insurance against civil liability in respect of the use of motor vehicles is defined and guaranteed by EU law, while the extent of compensation to third parties is governed by national law[8]. Consequently, in principle, Member States (hereinafter "the MS"), under their liability systems, shall retain the freedom to determine in which cases motor third party liability attaches, the extent of compensation[9], as well as the beneficiaries of such compensation; however, Union law must be taken into account when MS are required to determine which damages are covered by the compulsory motor insurance and how such insurance will take effect. According to the CJEU, protection to be afforded under the 1st Motor Insurance Directive extends to any person who, under national civil liability legislation, is entitled to claim compensation for damage caused by a vehicle[10]. In accordance with the points noted by the Slovak Court, provided that Mrs. K. Haasová and daughter were entitled under Czech law to receive compensation for non-material damages suffered due to the death of her husband and father, respectively, they were both entitled to the protections afforded by the 1st Motor Insurance Directive.

Similarly, the Latvian Supreme Court that heard the case of *Drozdovs* referred the same question as the Haasová Court to the CJEU. It further asked the CJEU to clarify whether the restriction imposed by the Latvian law on the maximum amount of financial compensation a person may seek for non-material damages resulting from a road traffic accident (100 LVL per claimant and per victim) is compatible with EU law. The CJEU noted that Mr. V. Drozdovs is entitled to the protections afforded by the 1st Motor Insurance Directive, since the Latvian law provides Mr. V. Drozdovs with the right to demand compensation for non-material damages suffered due to the death of his parents. The CJEU further noted that when a MS recognises the right to financial compensation in relation to non-material damages (that are within the meaning of personal injuries of the 2nd Motor Insurance Directive) it is not allowed to limit the maximum compensation amount to be guaranteed for such injuries at levels lower than those provided in article 1.2 of the 2nd Motor Insurance Directive.

In summary, in both abovementioned Cases, it is evident that there is a shift in the jurisprudence of the CJEU[11]. However, the determination of what is encompassed in the term *personal injuries* still requires **legislative action** by the Union legislature.

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loss or injury and the third party victims to be covered by that insurance (see Decision of 14th September 2000, C-348/98, *Mendes Ferreira* etc., as per above, paras 25-27, as well as Decision of 17th of March 2011, C-484/09, *Manuel Carvalho Ferreira Santos v Companhia Europeia de Seguros SA*, [2011], ECR I-0000, paras 25-27).

[8] See Decisions of the CJEU of 9th June 2011 in Case C-409/09, *José Maria Ambrósio Lavrador and Maria Cândida Olival Ferreira Bonifácio v Companhia de Seguros Fidelidade-Mundial SA*, [2011], ECR I-0000, para 23 and Case C-537/03, Carvalho Ferreira Santos etc, as per above, para 31.

[9] See opinion of the Advocate General (para 71) in Case Marques Almeida (Decision of 23rd October 2012, C-300/10, *Vítor Hugo Marques Almeida v Companhia de Seguros Fidelidade-Mundial SA and Others*, [2012], ECR I-0000), "the Directives (…) do not have any influence on the extent of the civil liability, since they are not aimed at harmonising the national provisions on civil liability (…) An approximation of those provisions indirectly by means of an extensive interpretation of the Directives does not appear to be feasible without encroaching on the competence of the European Union legislature, which to date has deliberately refrained from such harmonisation". Also, see *I. Rokas*, as per above, p. 6.

[10] According to the CJEU it cannot be concluded from any part of the 1st, 2nd and 3rd Motor Insurance Directives that the European legislature wished to restrict the protection granted by Motor Insurance Directives exclusively to persons directly involved in an event causing harm (see para 54 of Decision in Case *Haasová* και para 45 of Decision in Case *Drozdovs*).

[11] See above footnotes 5 and 6. See *V. Christianos*, The shifts in the jurisprudence of the Court of Justice of the European Union, Athens, 1998, p. 33.

Although the CJEU (as it stems from its role) is able to complete, via case law, intentional or unintentional gaps in EU legislation[12], the Treaty on the Functioning of the EU does not provide the CJEU with the authority to substitute the Union legislature for the purpose of defining the content of concepts that is in effect the creation of a rule that contradicts the letter of Union law provisions[13] under which "The insurance referred to in Article 3 (1) of Directive 72/166/EEC shall cover compulsorily both *damage to property* and *personal injuries*"[14].

Even if we assume that there is a real *gap* in the abovementioned provisions of the three Motor Insurance Directives, such gap may not be considered as one belonging to those gaps that warrant the Union Judge to complete it by way of broad delegation. The nature of this gap arises from the fact that after the subsequent to the 1st Motor Insurance Directives, i.e. the 2nd and 3rd Motor Insurance Directives that were intended to fill in some gaps in current regulations, some of which were perceived over time[15], because **the Motor Insurance Directives set the legal framework** that ensures the right to compensation of persons injured by a motor vehicle, wherever it may be registered within the Union[16].

[12] See *Em. Perakis*, The jurisdictional limits of CJEU under European governance, Athens, 2009, p. 277-282.

[13] According to the opinion of some authors, the CJEU may never exceed the limits of its authorisation because it is entitled to take into consideration financial, social and political factors in its judgments, see to that effect *Em. Perakis*, as per above, p. 319.

[14] Article 1.1 of the 2nd Motor Insurance Directive. Same applies to the subsequent Motor Insurance Directives.

[15] See for example the 3rd Motor Insurance Directive which filled the gap in the compulsory insurance of motor vehicle passengers other than the driver. This was necessary because, as referred to in the 5th recital of the Directive, there were some gaps in the compulsory insurance cover of motor vehicle passengers in certain MS and that such particularly vulnerable category of potential victims ought to be protected (Decision of 19th April 2007, C-356/05, *Elaine Farrell v Alan Whitty and Others,* [2007], ECR I-3067, para 24).

[16] See opinion of the Advocate General Carl Otto Lenz (paras 23-24) in Case *Ruiz Bernáldez*, as per above.