Reports of Cases

OPINION OF ADVOCATE GENERAL
TRSTENJAK
delivered on 5 July 2012 [1]

Case C-300/10

Vítor Hugo Marques Almeida
v
Companhia de Seguros Fidelidade-Mundial SA

(Reference for a preliminary ruling from the Tribunal da Relação de Guimarães (Portugal))

(Directives 72/166/EEC, 84/5/EEC and 90/232/EEC — Insurance against civil liability in respect of motor vehicles — Collision between two vehicles, which is not attributable to the fault of either driver — Person travelling in one of the vehicles who contributed to the occurrence of his own injury — Liability for risk — Refusal or limitation of the right to compensation)

I – Introduction

1. The concept of reparation has its origins in the pursuit of justice, as it was already understood as an ideal in the philosophy of the ancient Greeks. Thus, in Plato [2] we find a discussion of reparation, extending beyond the criminal law, for all damage inflicted. In addition to different degrees of attribution of liability, the possibility of release from liability was also known to ancient Greek philosophy where it was apparent that loss or injury could not be solely attributable to the person causing the damage, for instance as a result of the contribution to it of the injured person himself. The concept, which Antiphon [3] was influential in shaping, became, in the course of Roman and modern European legal history, what is generally known today in the civil law systems of numerous Member States as 'contributory negligence'. [4] The question whether that concept, which is also known to Portuguese law on liability, is compatible with EU law on insurance against civil liability in respect of motor vehicles falls to be answered by the Court of Justice in the case at issue.

1 — Original language: Slovenian.
Language of the case: Portuguese.

2 — Plato (Ancient Greek: Πλάτων; circa 427/428 to 347/348 BC) recorded his thoughts on reparation in his work 'Νόμοι' (Laws).

3 — Antiphon of Rhamnus (Ancient Greek: Άντιφών; circa 480 to 411 BC) left behind numerous defence speeches which were intended for court proceedings. In addition, he passed on three so-called tetralogies, that is concisely drawn up sample preparations of fictional legal cases, in each case consisting of two speeches on the charges and on the defence. In those tetralogies, the issue of the personal negligence of the injured person was picked out as a central theme.

4 — See, in relation to this, Barta, H., 'Die Entstehung der Rechtskategorie "Zufall" — Zur Entwicklung des haftungsrechtlichen Zurechnungsinstrumentariums im antiken Griechenland und dessen Bedeutung für die europäische Rechtsentwicklung', *Lebend(ig)e Rechtsgeschichte* (eds: Heinz Barta, Theo Mayer-Maly and Fritz Raber), and Plato, *Werke — Übersetzung und Kommentar* (eds: Ernst Heitsch, Carl Werner Müller and Kurt Sier), Göttingen, 2011.

2. By its reference for a preliminary ruling pursuant to Article 267 TFEU, the Tribunal da Relação de Guimarães (Court of Second Instance of Guimares; 'the referring court') asks the Court of Justice a question on the interpretation of Directives 72/166/EEC,[5] 84/5/EEC[6] and 90/232/EEC,[7] which were adopted with a view to approximating the Member States' legal provisions in the field of insurance against civil liability in respect of motor vehicles. In its reference, the referring court essentially seeks clarification as to whether those directives preclude national civil liability rules which allow a court deciding on the entitlement to compensation arising from a road traffic accident to limit or even refuse that entitlement if the injured person's fault contributed to the occurrence or aggravation of the injury.

3. This question arises in the context of a legal dispute concerning the entitlement to compensation of a person injured as a consequence of a road traffic accident, who at the time of the road traffic accident was travelling as a passenger in one of the two vehicles involved. The injured person, who had not fastened his seat belt in breach of legislation,[8] suffered serious personal injury in the accident. The action seeking compensation which was subsequently brought against the drivers of both vehicles, the motor vehicle insurer of the driver of the vehicle in which he was travelling as a passenger and the guarantee fund was dismissed by the competent first instance court on the basis of the abovementioned civil liability rules on the ground that the injury was attributable to his own fault since the injured person had not complied with the statutory duty to fasten his seat belt.

4. The case at issue is one in a long series of references for a preliminary ruling from Portuguese courts which in essence concern the question whether national legislation on civil liability in the event of road traffic accidents is compatible with EU law and more specifically with the directives harmonising insurance against civil liability in respect of motor vehicles. Against the background of several recent decisions of the Court of Justice which answer that question in the affirmative, in particular the authoritative judgments of 17 March 2011 (*Carvalho Ferreira Santos*)[9] and 9 June 2011 (*Ambrósio Lavrador and Olival Ferreira Bonifácio*),[10] the case at issue provides the opportunity to confirm that case-law by means of a decision of the Grand Chamber — and accordingly to provide a more solid foundation for the case-law — or if necessary to clarify it.

5 — Council Directive of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (OJ, English Special Edition 1972 (II) p. 360; 'the First Directive').

6 — Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1984 L 8, p. 17; 'the Second Directive').

7 — Third Council Directive of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (OJ 1990 L 129, p. 33; 'the Third Directive').

8 — It is apparent from a study commissioned by the European Commission that after speeding and alcohol at the wheel, driving without a seat belt is the most frequent cause of death in traffic accidents. It concluded that measures to increase the obligation to wear a seat belt could save up to 7 300 lives in the European Union annually (Commission Staff Working Document — 'Respecting the rules, better road safety enforcement in the European Union', COM(2008) 151). In its White Paper of 12 September 2001 on European transport policy (COM(2001) 370 final), the Commission proposed that the European Union should set itself the objective of reducing the number of deaths on the roads by half by 2010. In the course of this action programme, several legislative projects were initiated. These include directives on equipping vehicles with seat belts and the expansion of the obligation to wear a seat belt to all categories of vehicle and to all seats incorporated in them. The compulsory use of safety belts was originally introduced by Council Directive 91/671/EEC of 16 December 1991 (OJ 1991 L 373, p. 26), amended by Directive 2003/20/EC of the European Parliament and of the Council of 8 April 2003 (OJ 2003 L 115, p. 63). First of all, it only applied to vehicles of less than 3.5 tonnes equipped with rear restraint systems and did not provide for an obligation to wear a seat belt in the rear seats for certain other vehicles (passenger vehicles, light goods vehicles). Since 2006 it has been compulsory to fasten a seat belt in all motor vehicles.

9 — Case C-484/09 [2011] ECR I-1821.

10 — Case C-409/09 [2011] ECR I-4955.

II – Legal context

A – *EU law*

5. In 1972 the EU legislature began the task of approximating the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles by means of directives. [11]

6. The First Directive provides for the abolition of checks on green cards at frontiers and the introduction of civil liability insurance which covers loss or injury caused in the territory of the Community in all Member States.

7. Proceeding on the principle that the victims of traffic accidents should be able to recover compensation from a solvent liable party if liability is established, Article 3(1) of the First Directive provides:

'Each Member State shall ... take all appropriate measures to ensure that civil liability in respect of the use of vehicles normally based in its territory is covered by insurance. The extent of the liability covered and the terms and conditions of the cover shall be determined on the basis of these measures.'

8. Article 3(2) of the First Directive further provides, inter alia, as follows:

'Each Member State shall take all appropriate measures to ensure that the contract of insurance also covers:

— according to the law in force in other Member States, any loss or injury which is caused in the territory of those States; ...'

9. With the Second Directive, the EU legislature intended to approximate the disparate approaches to the content of that compulsory insurance in order to provide victims of traffic accidents with a minimum level of protection and to reduce the disparities existing in the European Union as to the extent of this insurance.

10. Article 2(1) of the Second Directive states:

'Each Member State shall take the necessary measures to ensure that any statutory provision or any contractual clause contained in an insurance policy issued in accordance with Article 3(1) of Directive 72/166/EEC, which excludes from insurance the use or driving of vehicles by:

— persons who do not have express or implied authorisation thereto, or

— persons who do not hold a licence permitting them to drive the vehicle concerned, or

— persons who are in breach of the statutory technical requirements concerning the condition and safety of the vehicle concerned,

shall, for the purposes of Article 3(1) of Directive 72/166/EEC, be deemed to be void in respect of claims by third parties who have been victims of an accident.

11 — In relation to the history of harmonisation in the field of insurance against civil liability in respect of the use of motor vehicles, see point 45 et seq. of my Opinion of 7 December 2010 in the *Carvalho Ferreira Santos* case (judgment cited in footnote 9); Reichert-Facilidades, F., 'Europäisches Versicherungsvertragsrecht?', *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag* (eds: Jürgen Basedow, Klaus J. Hopt and Hein Kötz), Tübingen, 1998, p. 127; and Lemor, U., *Kommentar zur Kraftfahrtversicherung* (eds: Hans Feyock, Peter Jacobsen and Ulf Lemor), Third edition, Munich, 2009, Part 1, paragraph 5.

However the provision or clause referred to in the first indent may be invoked against persons who voluntarily entered the vehicle which caused the damage or injury, when the insurer can prove that they knew the vehicle was stolen. …'

11. The Third Directive was adopted in order to clarify some provisions relating to civil liability insurance, since significant disparities still existed regarding the extent of insurance cover provided. .

12. Article 1 of the Third Directive provides:

'Without prejudice to the second subparagraph of Article 2(1) of Directive 84/5/EEC, the insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

…'

13. Article 1a of that directive reads as follows:

'The insurance referred to in Article 3(1) of Directive 72/166/EEC shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law. This Article shall be without prejudice either to civil liability or to the amount of damages.'

14. Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability,[12] which came into force on 8 October 2009, now consolidates the abovementioned directives, which are consequently no longer in force. However, since the events which gave rise to the main proceedings took place long before Directive 2009/103 came into force, only the abovementioned directives are applicable to the main proceedings.

15. Article 12 of Directive 2009/103 provides as follows:

'1. Without prejudice to the second subparagraph of Article 13(1), the insurance referred to in Article 3 shall cover liability for personal injuries to all passengers, other than the driver, arising out of the use of a vehicle.

...

3. The insurance referred to in Article 3 shall cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law.

...'

12 — OJ 2009 L 263, p. 11.

B – *National law*

16. The provisions of the Portuguese Código Civil ('the Civil Code') which are relevant to the main proceedings state as follows:

17. Article 503(1): 'The person with effective control of any motor vehicle and who uses it in his own interests, even if acting through an agent, is liable for the damage resulting from the risks posed by the vehicle itself, even when the latter is not in use.'

18. Article 504(1): 'The liability for damage caused by vehicles shall benefit third parties in addition to those travelling in the vehicle.'

19. Under the heading, 'Exclusion of liability', Article 505 of the Civil Code provides: '[w]ithout prejudice to Article 570, liability provided for in Article 503(1) shall not be excluded unless the accident is due to the injured person himself or to a third party or is the result of *force majeure* external to the operation of the vehicle.'

20. Under the heading 'Fault of the injured person', Article 570 of the Civil Code provides:

'1. When the injured person's fault has contributed to the occurrence or aggravation of the injury or loss, it shall be for the court to determine, on the basis of the seriousness of the fault of both parties and of the consequences resulting therefrom, whether compensation is to be awarded in full, or in part, or is even not to be awarded.

2. When liability is based on a mere presumption of fault, the injured person's fault shall, save as otherwise expressly provided, exclude the obligation to compensate.'

III – Facts, main proceedings and question referred for a preliminary ruling

21. On 12 June 2004, there was a collision on a municipal road between two motor vehicles travelling in opposite directions. There was no valid and effective insurance for one of these vehicles. Mr Marques Almeida was a passenger in one of the two vehicles. In the accident, he struck the windscreen. The windscreen broke, which resulted in deep cuts to his head and face.

22. Before the competent first instance civil court, Mr Marques Almeida sought an order that the defendant insurer against civil liability in respect of motor vehicles of the keeper of one of the vehicles, the driver and the owner of the uninsured vehicle and the Fundo de Garantia Automóvel ('guarantee fund') should pay compensation. The action was dismissed on the grounds that neither of the drivers could be held to be at fault for causing the accident. The court decided in favour of the defendants because it was of the opinion that the injury sustained by Mr Marques Almeida was attributable to his own fault in travelling without wearing his seat belt, contrary to Article 82(1) of the Codigo da Estrada (Road Traffic Code). Consequently, an obligation to compensate was excluded under Article 505 of the Civil Code.

23. Mr Marques Almeida lodged an appeal against that judgment. The referring court, which must decide the appeal, expresses doubts concerning the compatibility of the Portuguese provisions on liability with EU law, since those provisions provide for a reduction in or even the loss of the injured person's entitlement to compensation if the latter contributed to the occurrence of the injury. In that

connection, it refers to the judgment of the Court of Justice in *Farrell*,[13] in which the Court stated that 'it is only in exceptional circumstances that, on the basis of an individual assessment and in compliance with Community law, the amount of the compensation may be limited'.[14]

24. The referring court considers an interpretation of the applicable provisions of the directives on insurance against civil liability in respect of motor vehicles to be necessary. Accordingly, it decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'(1) Must Articles 3(1) of the First Directive (72/166/EEC), 2(1) of the Second Directive (84/5/EEC) and 1 and 1a of the Third Directive (90/232/EEC) be interpreted to the effect that they preclude national civil law, in particular through the rules laid down in Articles 503(1), 504, 505 and 570 of the Civil Code, from providing that if, when two vehicles collide, the event is not attributable to the fault of either driver, and it gives rise to personal injury to the passenger in one of the vehicles (the injured person seeking compensation), the compensation to which the latter is entitled is to be refused or limited, on the ground that that passenger has contributed to the occurrence of the injury, for he was travelling in the vehicle, in the front passenger seat, without fastening his seat belt as required by national legislation?

(2) Having regard to the fact that it has been established that when the two vehicles involved collided, because of that collision and because he had not fastened his seat belt, that passenger struck his head with force against the windscreen, breaking it, which resulted in deep cuts to his head and face.

(3) And having regard to the fact that, one of the vehicles involved not being covered by valid and effective insurance with any insurer at the date of the accident, the defendants and respondents in the proceedings include, in addition to the insurer of the other vehicle involved, the owner of the uninsured vehicle, its driver and the Fundo de Garantia Automóvel, who and which may, in so far as strict liability is concerned, be jointly and severally liable to pay such compensation?'

IV – Proceedings before the Court of Justice

25. The order for reference dated 22 April 2010 was received by the Registry of the Court on 17 June 2010.

26. Written observations were submitted by Mr Marques Almeida, the Portuguese and German Governments and the European Commission within the period laid down in Article 23 of the Statute of the Court of Justice.

27. At the hearing on 22 May 2012, representatives of the Portuguese and German Governments and the European Commission presented oral argument.

13 — Case C-356/05 [2007] ECR I-3067.

14 — Ibid., paragraph 35.

V – Main arguments of the parties

28. *Mr Marques Almeida* is of the opinion that the directives at issue preclude a national provision which permits the refusal or limitation of the injured person's entitlement to compensation. In that connection, he refers to the case-law of the Court of Justice, which is aimed at giving passengers effective protection. In addition, he refers to the objective of the directives at issue, which in his view is to harmonise the law of the Member States and protect the entitlement to compensation of victims of traffic accidents. He submits that the national law at issue in the main proceedings is incompatible with EU law in so far as it curtails that entitlement to compensation.

29. In addition, Mr Marques Almeida points out that he did not contribute to the road traffic accident. Apart from that, he argues it has also not been proven that his injuries could have been avoided if he had fastened his seat belt. He points out that the driver of the other vehicle did not suffer any injuries although he had not fastened his seat belt. Against this background, the injuries suffered could not be attributed to him. Consequently, there was no reason to refuse him entitlement to compensation.

30. However, both the *Portuguese* and the *German Governments* and the *Commission* express the view that the directives at issue do not preclude a national provision such as that under discussion here. As grounds for this, they submit that according to their wording and their regulatory purpose the directives at issue are not aimed at harmonising the national provisions on civil law liability. On the contrary, they are intended, firstly, to encourage the free movement of vehicles normally based in European Union territory and that of passengers. Secondly, they are also to ensure the equal treatment of injured persons within the European Union. They submit that for this purpose the directives provide that civil liability in respect of the use of vehicles normally based in European Union territory must be covered by insurance. They indicate the nature of the loss or injury and the class of injured persons who are to be covered by that insurance.

31. That legislation on the extent of cover may be distinguished in turn from the obligation to compensate, which concerns the insured person's position in relation to the injured person under the national law on liability. That law falls within the regulatory authority of the Member States. Accordingly, it is argued that whether an injured person's entitlement to compensation may be refused or limited on the ground that that injured person has contributed to the occurrence of his own injury may only be deduced from the national law on liability. It is submitted that the Court of Justice has already confirmed this in the judgments delivered in *Carvalho Ferreira Santos* [15] and *Ambrosio Lavrador and Olival Ferreira Bonifácio*.[16] The facts on which the present case is based are also almost identical to the facts in those cases. On the other hand, the facts of the case in the main proceedings may be distinguished from those in *Farrell* [17] and *Candolin and Others* [18] in so far as the limitation of the obligation to compensate by the insurance is a consequence of the law on civil liability and not, as in those cases, of the law on insurance against civil liability. Having regard to these circumstances, the Portuguese and German Governments and the Commission do not consider that there are any grounds to depart from the case-law principles which the Court of Justice developed in its judgments in *Carvalho Ferreira Santos* and *Ambrosio Lavrador and Olival Ferreira Bonifácio*.

15 — Cited above in footnote 9.

16 — Cited above in footnote 10.

17 — Cited above in footnote 13.

18 — Case C-537/03 [2005] ECR I-5745.

VI – Legal appraisal

A – *Introductory remarks*

32. As stated at the outset, the case at issue provides the Court of Justice with the opportunity to give its opinion once again on the relationship between the two relevant areas of law for the purposes of enforcing traffic accident victims' entitlement to compensation — the law on insurance against civil liability in respect of motor vehicles and the law on civil liability in respect of road traffic accidents. An examination of the connecting factors which exist between the two areas of law appears necessary, especially since it cannot be excluded that in certain circumstances the requirements which EU law has laid down in the harmonised field of insurance against civil liability in respect of motor vehicles also have an effect on the law on civil liability in the Member States. This question is of relevance precisely in circumstances where, as the referring court suggests, it is probable that the objectives which the EU legislature pursued in adopting the directives on insurance against civil liability in respect of motor vehicles are being frustrated, which must be the subject of a separate investigation. The crucial question which arises in the case at issue is whether these EU law requirements preclude national law from providing that if, when two motor vehicles collide, the event is not attributable to the fault of either driver, the injured passenger's entitlement to compensation is to be refused or limited if it is established that that passenger has contributed to the occurrence of the injury.

33. For the purposes of assessing this legal question, the Court of Justice will have to examine whether its case-law to date in this area can be applied to the case in the main proceedings or whether clarification is required. In order to offer the Court a useful basis for its decision, I will organise my examination into three sections: first of all, a brief overview of the case-law is to be given, in the course of which the main issues will be outlined. Following that, I will deal with the question whether that case-law can be applied to the case in the main proceedings, for the purposes of which the special features of the situation at issue in the main proceedings may not be disregarded. Finally, I will apply myself to the question of whether in the light of the conclusions drawn it is advisable to clarify or even change that case-law.

34. I would like to state from the outset that I am not convinced that the case at issue justifies a different legal assessment from that in *Carvalho Ferreira Santos* [19] and *Ambrósio Lavrador and Olival Ferreira Bonifácio*.[20] In my opinion, the fundamental strict separation between the abovementioned areas of law should still be upheld.[21] Having regard to the fact that it is only the law on insurance against civil liability in respect of motor vehicles which has been subject to harmonisation by the EU legislature, the law on civil liability in respect of road traffic accidents must in principle remain unchanged. It would be difficult to reconcile any other assessment of the position with the intention of the EU legislature. It is only permissible to contemplate overriding the laws of Member States by means of a correspondingly broad interpretation of the scope of the directives on insurance against civil liability in respect of motor

19 — Cited above in footnote 9.

20 — Cited above in footnote 10.

21 — See Caradonna, G., 'Responsabilità civile da circolazione dei veicoli', *Giurisprudenza italiana — Recentissime dalle Corti europee*, 2011, p. 761, Michel, V., 'Assurance automobile obligatoire et responsabilité civile', *Europe*, May 2011, paragraph 5, p. 44. and by the same author, 'Indemnisation de la victime fautive', *Europe*, August 2011, paragraph 8, p. 43, which point out that the compulsory insurance cover for injuries to third parties as a consequence of road traffic accidents must be differentiated from the apportionment of civil law liability between the drivers of the vehicles who were involved, the latter coming solely within the regulatory competence of the Member States. In relation to the so-called principle of separation in the relationship between civil liability and civil liability insurance, see Baumann, H., 'Zur Überwindung des Trennungsprinzips im System von Haftpflicht und Haftpflichtversicherung', *Festgabe Zivilrechtslehrer 1934/1935* (ed.: Walther Hadding), Berlin, 1999, p. 13, and Von Bar, C., 'Das Trennungsprinzip und die Geschichte des Wandels der Haftpflichtversicherung', *Archiv für die civilistische Praxis*, 1981, No 181, p. 289, who speaks out against applying special features of insurance law to liability law, which suggests that a strict separation exists between the two areas of law in national law. Whilst Jansen, N., *Die Struktur des Haftungsrechts*, Tübingen, 2003, p. 115, refers to the ancillary character of the direct right of action to the liability claim, at the same time he draws attention to the differences which distinguish liability law and insurance law. He argues that whilst liability law serves the purpose of compensation for loss or injury, the purpose of insurance law is to apportion liability burdens amongst collective institutions providing compensation for loss or injury.

vehicles if it is apparent that the objectives which the legislature intended to achieve in adopting those directives are endangered by conflicting provisions and practices. The fact that there can be no question of that in the case at issue is shown by the parallels with *Ambrósio Lavrador and Olival Ferreira Bonifácio*, in which the Court of Justice regarded the Portuguese civil law provisions which are at issue as being compatible with EU law.

B – *Summary of the case-law*

1. *Carvalho Ferreira Santos*

a) Outline of the main issues in the case

35. The subject-matter of the *Carvalho Ferreira Santos* [22] case was a reference for a preliminary ruling from the Tribunal da Relação do Porto (Court of Second Instance of Oporto) which in essence concerned the question whether the directives on insurance against civil liability in respect of motor vehicles preclude a national provision of civil law which, in the event of contributory negligence on the part of the injured party, permits liability to be apportioned in accordance with the extent to which the risk posed by each vehicle contributed to the loss, with the consequence that it has the effect of reducing the amount of the accident victim's claim for compensation against the motor vehicle civil liability insurer.

36. That reference was made in the context of a legal dispute between Mr Carvalho and a civil liability insurance company, concerning the full recovery of the material and non-material damage which he suffered as a result of a road traffic accident. Mr Carvalho, who was driving a moped at the time of the accident, suffered cranioencephalic trauma as a result of a collision with a car. The civil court which had jurisdiction to decide on the claim for compensation found that neither of the two drivers had been at fault in relation to the accident. Since a doubt remained regarding the extent of the contribution of the vehicles involved in the accident to the damage which occurred, the civil court applied Article 506(2) of the Civil Code, with the result that the liability of each driver was fixed at 50%. The civil court decided that the liability of the driver of the vehicle which had caused the damage had to be reduced in accordance with the contribution of the victim's vehicle to the occurrence of that damage. That limitation of liability meant that there was a proportionate limitation of the compensation payable to the victim by the civil liability insurance company on the basis of insurance against liability in respect of the use of motor vehicles. [23]

b) The reasoning set out in the Opinion

37. In my Opinion of 7 December 2010 in *Carvalho Ferreira Santos* — the content of which I will refer to here — I found that that civil law provision was compatible with EU law, in essence on the ground that it did not fall within the scope of the directives at issue. [24] In order to reach this finding, I established the scope of the directives at issue by means of an interpretation on the basis of the wording and the spirit and purpose of the relevant provisions of the directives. In this way, I established that, whilst the directives regulate several aspects of the law on insurance against civil liability in respect of motor vehicles, they are not intended to harmonise the rules of the Member

22 — Judgment cited above in footnote 9.

23 — See *Carvalho Ferreira Santos* judgment, cited above in footnote 9, paragraphs 11 to 14.

24 — See point 73.

States governing civil liability.[25] As a result, I came to the conclusion that neither the substantive law criteria determining liability in respect of loss or injury which has occurred as a consequence of a road traffic accident nor the extent of that liability come within the scope of the directives.[26] Having regard to the fact that the Portuguese provision at issue in the main proceedings had to be classified as part of the system of national provisions of civil law on compensation, it could not be regarded as being covered by the scope of the directives.[27]

38. In addition, I commented in detail in my Opinion on the case-law of the Court of Justice in *Candolin and Others* [28] and *Farrell* [29] [30] referring to the obvious differences which existed between those cases and *Carvalho Ferreira Santos*. As I explained in detail, the factual and legal position in the last case differed significantly from that in *Candolin and Others* and *Farrell*, since that case concerned the compatibility of a provision of the law on civil liability and did not concern a provision of the law on insurance against civil liability in respect of motor vehicles, as in *Candolin and Others* and *Farrell*.[31] Against that background, in my view that case-law could not be applied to *Carvalho Ferreira Santos*.[32]

39. In view of the considerations briefly outlined here, I proposed to the Court of Justice that the questions referred be answered to the effect that the First, Second and Third Directives do not preclude a national provision of civil law, which in a situation such as that in the main proceedings, where a motor vehicle collision has occurred in which none of the drivers can be shown to be at fault for the accident, and which has caused personal injury and material loss to one of the drivers, results in the injured party's claim arising from liability for risk being reduced by a flat rate of 50%.

c) The decision of the Court of Justice

40. The Court of Justice was guided by that proposal in its judgment in *Carvalho Ferreira Santos*.[33] The legal reasoning in the judgment also reflects that in the Opinion to a great extent, as will be demonstrated below.

41. The starting point for that reasoning was the finding that the obligation to provide insurance cover against civil liability for damage caused to third parties by motor vehicles must be separated from the extent of the compensation to be afforded to them on the basis of the civil liability of the insured person. Whereas the former is defined and guaranteed by EU legislation, the latter is, essentially, governed by national law.[34] Referring to the judgments in *Candolin and Others* [35] and in *Farrell*,[36] the Court of Justice stated that the directives on insurance against civil liability in respect of motor vehicles

25 — See Case C-348/98 *Mendes Ferreira and Delgado Correia Ferreira* [2000] ECR I-6711, paragraphs 23 and 29. In relation to the interpretation of the First, Second and Third Directives as they affect the EFTA/EEA States, see also the case-law of the EFTA Court (which satisfies the requirement of uniformity in EEA law), including the judgment of 14 June 2001 in Case E-7/00 *Helgadóttir*, paragraph 30, and the judgment of 20 June 2008 in Case E-8/07 *Nguyen*, paragraph 24. Under points 8, 9 and 19 of Annex IX to the EEA Agreement, the directives are also applicable to the EFTA/EEA States. The case-law in the field of the law on insurance against civil liability in respect of motor vehicles in the European Economic Area has been substantially distinguished by years of exchanges between the Court of Justice of the European Union and the EFTA Court. See in relation to the features of this unique judicial dialogue, Baudenbacher, C., 'Some thoughts on the EFTA Court's phases of life', *Judicial Protection in the European Economic Area*, Stuttgart, 2012, p. 11 et seq., and 'The EFTA Court, the ECJ, and the Latter's Advocates General — a Tale of Judicial Dialogue', *Continuity and Change in EU Law — Essays in Honour of Sir Francis Jacobs* (eds: Anthony Arnull and Takis Tridimas), Oxford, 2008, p. 90 et seq.

26 — See point 59 of my Opinion.

27 — Ibid., point 60.

28 — Judgment cited above in footnote 18.

29 — Judgment cited above in footnote 13.

30 — Opinion in *Carvalho Ferreira Santos*, points 50 to 53, 61 and 70 et seq.

31 — Ibid., paragraphs 61 and 70. See Micha, M., *Der Direktanspruch im europäischen Internationalen Privatrecht*, Tübingen, 2010, p. 72 et seq., which examines the *Farrell* judgment exclusively from the perspective of the law on civil liability insurance.

32 — Ibid., point 74.

33 — Cited above in footnote 9.

34 — Ibid., point 31.

35 — Cited above in footnote 18.

36 — Cited above in footnote 13.

do not seek to harmonise the rules of the Member States governing civil liability and that, as EU law stands at present, the Member States are free to determine the rules of civil liability applicable to road traffic accidents. [37] That applies in particular as regards the specification of the type of civil liability, whether liability for fault or liability for risk, in respect of the use of the vehicles, which must be covered by compulsory insurance. [38] However, the Court of Justice made clear that regardless of this differentiation between these individual aspects of regulation, a connection nevertheless exists between them in that the Member States are obliged to ensure that the civil liability arising under their domestic law is covered by insurance which complies with the provisions of the three abovementioned directives. [39]

42. As regards the understanding of the abovementioned criteria from the *Candolin and Others* case-law and their possible applicability in turn to the case in the main proceedings, the Court of Justice expressed a similar point of view to mine, as set out in my Opinion. That is to say, it did not discern any interference with the effectiveness of the directives in the fact that a national provision on liability, such as that in Article 506 of the Civil Code, seeks to apportion the civil liability for damage caused by a collision between two motor vehicles, where neither driver is at fault, since that provision on liability does not affect the obligation under EU law to ensure that the provision on civil liability applicable under national law is covered by insurance which complies with the provisions of the three abovementioned directives. [40]

43. In order to back up its reasoning with a systematic interpretation, the Court of Justice also relied on the provisions of the newer directives on insurance against civil liability in respect of motor vehicles, from which, in essence, it follows that regardless of the general principle of coverage of personal injury and damage to property by insurance against civil liability in respect of the use of motor vehicles in the event of road traffic accidents, civil liability and the quantum of damages themselves are governed by the national provisions on civil liability. [41] Thus, it states, for instance, in Article 1a of the Third Directive, which was inserted by Directive 2005/14/EC, [42] that the insurance referred to in Article 3(1) of the First Directive is to cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law. In addition, that provision of the directive expressly provides that this is without prejudice either to civil liability or to the amount of damages. The Court of Justice also refers to Article 12 of Directive 2009/103, from which it is apparent that coverage by compulsory insurance of damage caused to special categories of victims, including non-motorised users of the roads and passengers, is without prejudice either to liability or to the quantum of damages.

44. In the light of the above considerations, the Court of Justice found that Article 3(1) of the First Directive, Article 2(1) of the Second Directive and Article 1 of the Third Directive did not preclude national law such as the provision in Article 506 of the Civil Code which, in the case of a collision between two motor vehicles which has caused damage, where neither driver is at fault, apportions the liability for that damage in accordance with the extent of the contribution of each of those vehicles to the occurrence of the damage and, in the event of doubt in that regard, fixes the contributions at parity. [43]

37 — Ibid., paragraph 32.

38 — Ibid., paragraph 33.

39 — Ibid., paragraph 34.

40 — Ibid., paragraph 44.

41 — Ibid., paragraph 45.

42 — Directive of the European Parliament and of the Council of 11 May 2005 amending Council Directives 72/166/EEC, 84/5/EEC, 88/357/EEC and 90/232/EEC and Directive 2000/26/EC of the European Parliament and of the Council (OJ 2005 L 149, p. 14).

43 — *Carvalho Ferreira Santos* judgment, cited above in footnote 9, paragraph 46.

2. *Ambrósio Lavrador and Olival Ferreira Bonifácio*

a) Outline of the main issues in the case

45. The *Ambrósio Lavrador and Olival Ferreira Bonifácio* case was a reference for a preliminary ruling from the Supremo Tribunal de Justiça (Supreme Court of Justice), by which, in essence, it requested clarification from the Court of Justice as to whether the First, Second and Third Directives are to be interpreted as precluding national provisions that limit or exclude the right to compensation of the victim of an accident involving a motor vehicle on the ground that the victim was partly, or even exclusively, responsible for the damage caused. [44]

46. The reference was made in proceedings brought by Mr Ambrósio Lavrador and Ms Olival Ferreira Bonifácio against a civil liability insurance company regarding compensation for the damage suffered by the applicants in the main proceedings, following a road traffic accident involving their minor child, who was riding a bicycle, and a vehicle which was insured against civil liability by the civil liability insurance company. [45] According to the order for reference, the parents' action seeking compensation was dismissed at first instance and on appeal on the ground that the child had been responsible for the accident in which he was killed since he was travelling on the wrong side of the road, and did not observe the rules on priority.

47. The Supremo Tribunal de Justiça had doubts concerning the compatibility of the civil liability rules applied in the main proceedings with the *Candolin and Others* case-law and decided to ask the Court of Justice for a ruling as to whether it was contrary to Article 1 of the Third Directive if Portuguese civil law — and in particular Articles 503(1), 504, 505 and 570 of the Civil Code — in the case of a road traffic accident, excluded or limited the right to compensation of a child, himself a victim of the accident, on the sole ground that that child was partly, or even exclusively, responsible for the loss caused.

b) The decision of the Court of Justice

48. Against the background that an Opinion had already been delivered in *Carvalho Ferreira Santos* and accordingly that *Ambrósio Lavrador and Olival Ferreira Bonifácio* did not give rise to any new legal issues, after hearing the Advocate General, pursuant to the fifth paragraph of Article 20of its Statute, the Court of Justice decided to proceed to judgment without an Opinion.

49. By its judgment in *Ambrósio Lavrador and Olival Ferreira Bonifácio*, [46] the Court of Justice decided that the directives on insurance against civil liability in respect of motor vehicles did not preclude national provisions falling within civil liability law that allow exclusion or limitation of the right of the victim of an accident to claim compensation under the civil liability insurance of the motor vehicle involved in the accident, on the basis of an individual assessment of the exclusive or partial contribution of that victim to his own loss or injury.

44 — *Ambrósio Lavrador and Olival Ferreira Bonifácio* judgment, cited above in footnote 10, paragraph 22.

45 — Ibid., paragraph 2.

46 — Cited above in footnote 10.

50. The Court of Justice used similar legal reasoning to that in the *Carvalho Ferreira Santos* case. First of all, it underlined the necessity to distinguish between the obligation to provide insurance cover against civil liability for damage caused to third parties by motor vehicles and the extent of the compensation to be afforded to them on the basis of the civil liability of the insured person. [47] At the same time, it recalled that in the absence of any harmonising legislation in EU law, the Member States are free to determine the rules of civil liability applicable to road accidents. [48]

51. As in *Carvalho Ferreira Santos*, the Court of Justice pointed out the difference between the case in the main proceedings and *Candolin and Others* and *Farrell*. In contrast to those latter two cases, the right to compensation for the victim of the accident was affected not by a limitation of the cover against civil liability under the insurance provisions, but rather by a limitation of the insured driver's civil liability under the applicable civil liability rules. [49]

52. That finding was based on an examination of the applicable national provisions. As the Court of Justice was able to infer from the order for reference, whilst Articles 503 and 504 of the Civil Code provided for strict liability in the case of road traffic accidents, under Article 505 of the Civil Code, the liability for risk set out in Article 503(1) of that code was excluded if the accident was caused by the victim. If the victim's fault had contributed to the occurrence or aggravation of the injury or loss, Article 570 of the Civil Code provided that according to the seriousness of that fault, that person was to be deprived of some or all of the compensation. [50] The Court of Justice understood those provisions to mean that they were intended to exclude the liability for risk of the driver of the vehicle involved in the accident only where the accident was caused exclusively by the victim. Where the fault of the victim had contributed to the causation or aggravation of his loss, the compensation for this was to be affected in proportion to the degree of seriousness of that fault. [51]

53. The Court of Justice expressed the view that unlike the respective legal backgrounds to the judgments in *Candolin and Others* and in *Farrell*, that legislation did not have the effect, where the victim contributed to his own loss or injury, of automatically excluding or limiting disproportionately this right, in the specific case of the parents of a deceased child who collided with a motor vehicle while riding a bicycle, to compensation by means of compulsory insurance against the liability of the driver of the vehicle involved in the accident. The Court of Justice concluded that the provisions at issue therefore did not affect the obligation under EU law to ensure that civil liability arising under national law is covered by insurance which complies with the provisions of the three abovementioned directives. [52]

54. In other words, the Court of Justice still regarded the fact that under the national civil liability rules the injured person is denied compensation because he contributed to the occurrence of the injury or loss as not interfering with the effectiveness of the directives, since the essential safeguarding of the civil law claim by the insurance against civil liability in respect of motor vehicles, which was intended by EU law, remained unaffected.

C – *Examination of the case at issue*

55. Following the above outline of the case-law to date, it is worth examining whether it has any implications for the handling of the case at issue.

47 — Ibid., paragraph 25.
48 — Ibid., paragraph 26.
49 — Ibid., paragraph 31.
50 — Ibid., paragraph 32.
51 — Ibid., paragraph 33.
52 — Ibid., paragraph 34.

1. Determining the subject-matter for interpretation

56. However, first of all, some observations are called for on the scope of the subject-matter for interpretation. It is recognised that it also falls within the powers of the Court of Justice where necessary to clarify questions referred or even reformulate them in order to be able to give the referring court the most complete and useful answer possible, which contributes to the decision in the legal dispute.[53] In my view, it is necessary to clarify the question referred in so far as it is in part also aimed at the interpretation of a provision — namely Article 1a of the Third Directive — which does not apply to the case in the main proceedings, either *ratione materiae* or *ratione temporis*.

57. It is not applicable *ratione materiae* because the injured person in the case in the main proceedings does not belong to the relevant group of protected persons. The provision provides that the insurance against civil liability in respect of motor vehicles is to cover personal injuries and damage to property suffered by pedestrians, cyclists and other non-motorised users of the roads who, as a consequence of an accident in which a motor vehicle is involved, are entitled to compensation in accordance with national civil law. However, the main proceedings concern the entitlement to compensation of a passenger injured in an accident.

58. It is not applicable *ratione temporis* because Directive 2005/14, which inserted it into the Third Directive, was not adopted until 11 May 2005. Pursuant to Article 6(1), Directive 2005/14 had to be transposed by 11 June 2007 at the latest. However, in principle, individuals are only able to rely on provisions of directives before national courts after the expiry of the period for transposition. As the Court of Justice has stated in its case-law, before the expiry of the period for transposition of a directive, the Member States cannot be blamed for not yet having taken measures to transpose it into national law.[54] Having regard to the fact that the road traffic accident which gave rise to the main proceedings had already happened on 12 June 2004, the possibility of relying on that provision of the directive is excluded.

59. In view of this finding, an interpretation of Article 1a of the Third Directive no longer appears relevant. Therefore the Court of Justice does not need to regard that provision as part of the subject-matter for interpretation either. The question referred must accordingly be clarified to the effect that the request for interpretation does not extend to the provision of the directive in question.

2. Applicability of the abovementioned case-law to the case in the main proceedings

60. A number of arguments, which will be considered below, may be cited in favour of the applicability to the case in the main proceedings of the case-law set out above on the relationship between national civil law and the law on motor vehicle insurance, which is shaped by EU law.

61. First of all, it must be noted that as the Portuguese Government[55] and the Commission[56] rightly point out, the Court of Justice has already answered an almost identical question in *Ambrósio Lavrador and Olival Ferreira Bonifácio*. It is notably for this reason that that judgment is of particular importance for the assessment of the legal issues which arise from the present case. As in that case, the case here ultimately also concerns the question whether the Portuguese rules on the exclusion of liability for risk on the part of the person having custody of the vehicle as a consequence of the fault of the injured person himself comply with the directives. As may be seen from both the question referred and also the applicable provisions of the Civil Code, these civil law rules grant a court which

53 — See, inter alia, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 32, and Case C-88/99 *Roquette Frères* [2000] ECR I-10465, paragraphs 18 and 19. See Lenaerts, K., Arts, D. and Maselis, I., *Procedural Law of the European Union*, Second edition, London 2006, p. 48 et seq., paragraph 2-021.

54 — See Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, paragraph 114.

55 — See paragraph 35 of the Portuguese Government's written observations.

56 — See paragraph 41 of the Commission's written observations.

must decide on the entitlement to compensation resulting from a road traffic accident the power to limit or even refuse such entitlement if the injured person's fault has contributed to the occurrence or aggravation of the injury or loss. This follows from a principle of Portuguese civil law, pursuant to which the injured person's fault may have an effect on the amount of the compensation. Depending on the seriousness of the fault this may even lead to the complete loss of the entitlement to compensation.

62. The case-law of the Court of Justice to date shows that in essence that principle of national civil law is compatible with EU law, since both of the abovementioned judgments recognised the power of the Member States to provide, in their legal systems, both for the reduction of the entitlement to compensation by half[57] and for the complete loss of that entitlement,[58] if this appears to be justified. This is primarily explained by the separation recognised by the Court of Justice between the law on insurance against civil liability in respect of motor vehicles, which is subject to EU law requirements, and the law on civil liability in respect of road traffic accidents, which is shaped by national law requirements. In view of the fact that the Member States are permitted to determine the nature of motor vehicle liability, in particular,[59] in shaping their national law, they are accordingly also free to determine whether the loss of the entitlement to compensation should be dependent upon any fault of the injured person.

63. As the German Government correctly observes,[60] the fact that the situation at issue in the main proceedings has certain special features is not of any legal importance for the purposes of answering the question referred. Nor can those special features be cited as an argument for making distinctions in how the case is considered. At most, those special features may have an effect on the legal assessment of the facts of the case according to national civil law. In specific terms, the special feature is the fact that in the case in the main proceedings the injured passenger infringed the statutory obligation to wear a seat belt, which, as can be seen from the order for reference, may constitute a legally relevant issue under Portuguese law which justifies the allegation of contributory negligence on the part of the injured person. That may be concluded from the way in which the question referred is formulated.

64. In that connection, it should be pointed out that the Court of Justice is ultimately bound by the interpretation given in relation to national civil law in the Portuguese courts' case-law, especially since it is not competent to interpret national law[61] or to assess questions of fact.[62] For the purposes of the proceedings provided for in Article 267 TFEU, it is exclusively a matter for the referring court to interpret and assess the effects of its national law.[63] From a EU law perspective, a legal evaluation of the facts of the case in the above sense is not capable of being challenged in any case, since the motor vehicle directives are not intended to harmonise the rules of the Member States governing civil liability. Accordingly, for the purposes of the present proceedings for a preliminary ruling, only the Portuguese courts' binding legal assessment of an action — in the form of an act or an omission — as contributory negligence is authoritative. Accordingly, it is not necessary for the Court of Justice to deal with Mr Marques Almeida's arguments concerning the claim that it is not possible to attribute liability for the injury because of the infringement of the obligation to wear a seat belt.[64]

57 — See point 44 of this Opinion.

58 — See point 49 of this Opinion.

59 — See point 41 of this Opinion.

60 — See paragraph 4 of the German Government's written observations.

61 — See, inter alia, Case 75/63 *Unger* [1964] ECR 177 and Case C-309/96 *Annibaldi* [1997] ECR I-7493, paragraph 13.

62 — See Case C-323/09 *Interflora and Interflora British Unit* [2011] ECR I-8625, paragraph 46, and Case C-523/10 *Wintersteiger* [2012] ECR, paragraphs 26 and 28.

63 — See Case 52/76 *Benedetti* [1977] ECR 163, paragraph 25; Case C-397/96 *Kordel and Others* [1999] ECR I-5959, paragraph 25; Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 21; and Case C-442/10 *Churchill Insurance Company and Evans* [2011] ECR I-12639, paragraph 22.

64 — See paragraph 23 of Mr Marques Almeida's written observations.

65. Neither can the fact that Mr Marques Almeida suffered serious injuries as a result be seen as a sound argument in favour of a different assessment of the legal position. At this point, it should be recalled that in the facts of the case on which the judgment in *Ambrósio Lavrador and Olival Ferreira Bonifácio* was based, the conduct which was deemed to be wrongful even led to the death of the injured person. Despite the seriousness of the injury suffered, the Court of Justice did not see any reason to deviate from its previous case-law. Against that background, the submissions of Mr Marques Almeida to this effect must be rejected for the purposes of the present proceedings on the basis that they are irrelevant.

66. The fact that one of the vehicles involved at the time of the accident was uninsured is cited as an additional special feature. However, the extent to which that fact could be of importance for the purposes of assessing the legal position is not apparent, especially since it remains open to Mr Marques Almeida, in addition to bringing an action against the insurer of the other vehicle involved, to also bring an action against the owner of the uninsured vehicle, its driver and the guarantee fund, who could be jointly and severally liable to pay such compensation, since it is a matter of strict liability. The referring court draws attention to that fact in its question.

67. It should also be made clear that the fact that — unlike *Carvalho Ferreira Santos* and *Ambrósio Lavrador and Olival Ferreira Bonifácio* — the case in the main proceedings does not concern compensation for a driver of a motor vehicle, but for a passenger, does not preclude the application of this case-law to the case at issue. First of all, it should be pointed out that in principle insurance against civil liability in respect of motor vehicles covers damage suffered by 'all passengers,' that is including the damage suffered by a passenger, as may be inferred from the wording of Article 1 of the Third Directive. Accordingly, the protection of a passenger under insurance law is comparable to that of any other user of the roads who drives a vehicle. That EU legislation, which is intended to guarantee comprehensive insurance protection for all users of the roads, does not ultimately affect the issue of a possible reduction of a passenger's entitlement to compensation or even the complete loss of such an entitlement under the law on civil liability. There is, in that regard, no particular effect on the determination of the extent of the compensation. As the Commission correctly observes,[65] the statements of the Court of Justice in relation to Article 1a of the Third Directive and Article 12 of Directive 2009/103 in the *Carvalho Ferreira Santos* judgment — although they concern the protection of other categories of road users — are to the same effect. Accordingly, it is established that the fact that the injured person is a passenger does not in itself have any effect on the assessment of the case at issue.

68. If, as is the case in the main proceedings, it is established that the loss of the injured person's entitlement to compensation is ultimately solely attributable to an exclusion of liability under civil law, then as a consequence the possibility of drawing parallels with *Candolin and Others* and *Farrell*, to which the referring court also makes reference in order to give grounds for its reference for a preliminary ruling, is excluded. In contrast to the facts in the proceedings which led to the judgments in *Candolin and Others* and *Farrell*, in the case in the main proceedings, Mr Marques Almeida's entitlement to compensation, as a victim of an accident, is not affected by a limitation of the cover against civil liability under insurance provisions.

69. In contrast to the regulatory frameworks in *Candolin and Others* and *Farrell* the Portuguese provisions at issue do not have as a consequence that in the event that the injured person contributed to his own injury, his entitlement to compensation by the mandatory insurance against civil liability of the driver of the vehicle involved in the accident would be excluded from the outset or disproportionately limited. Those provisions do not affect the obligation under EU law for the civil liability provided for under the applicable national law to be covered by insurance which is compatible with the motor vehicle directives.

65 — See paragraphs 47 to 51 of the Commission's written observations.

70. Since the legal issues in the present case have clear parallels with those in *Carvalho Ferreira Santos* and *Ambrósio Lavrador and Olival Ferreira Bonifácio*, it is clear that that case-law is applicable. In order to be consistent with that case-law, the Court of Justice should also hold that the motor vehicle directives do not preclude national law on civil liability from providing that if, when two vehicles collide, the event is not attributable to the fault of either driver, the compensation to which the injured passenger in one of the vehicles is entitled is to be refused or limited, on the ground that that passenger has contributed to the occurrence of his injury.

D – *No need for a change in the case-law*

71. The result of the above examination of the case-law is that the directives harmonising insurance against civil liability in respect of motor vehicles fulfil their legislative intention of ensuring that civil liability for vehicles is covered by insurance. However, they 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. Against that background, the answers, differing as to their detail, given by the systems of civil law in the Member States [66] with regard to the amount of the entitlement to compensation for victims of accidents, such as Mr Marques Almeida, must be accepted on the basis of the state of development of EU law to date. 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 EU legislature, which to date has deliberately refrained from such harmonisation. Proceeding to interpret the directives in that way, if harmonisation of the provisions on civil liability were to be regarded as necessary, would not be desirable either, especially since there is no carefully thought out approximation of civil law [67] by the EU legislature itself — as some of the current examples show [68] — to direct the way to this.

66 — Most of the Member States (for example Germany, Spain, Estonia, France, Italy, Latvia, Poland, Slovenia and Sweden) recognise entitlement to compensation for the victim of an accident, even if none of the drivers involved has been proven to be at fault. Generally, this is based on the concept of liability for risk as a result of driving a vehicle in traffic. These legal systems also provide for the person concerned to have a direct claim against the insurance company. However, in other Member States there is no such no-fault liability. On the contrary, the person concerned must plead an infringement of a duty of care on the part of the driver (for example Ireland and the Netherlands). As far as the extent of the entitlement to compensation itself is concerned, some Member States (for example Poland and Slovenia) do certainly provide for the reduction or even the loss of this entitlement if the person concerned did not have his seat belt fastened at the time of the accident. In turn, other Member States (for example France and Sweden) recognise a basic right of the person concerned to full compensation in their legal systems, with this principle only being deviated from in special cases. In contrast, other Member States (for example Germany, Spain, Greece, Italy and Latvia) provide in principle for a reduction or the loss of the claim if the person concerned has not complied with his duty to avoid the injury. However, the latter does not happen automatically, but rather is dependent on whether the party against whom the claim is asserted can prove that the person concerned would not have suffered his injuries if he had complied with the duty to wear his seat belt.

67 — The models for a step-by-step approximation of laws in the field of civil law include the Common Frame of Reference, which also offers rules on non-contractual liability. In VI — 1:101 ('Basic Rule'), it contains the basic rule, pursuant to which a person who suffers damage caused by the conduct of another person is entitled to compensation. VI — 3:205 ('Accountability for damage caused by motor vehicles') provides for liability for the keeper of the vehicle for damage caused to another person as a consequence of a road traffic accident. On the other hand, VI — 5:102 ('Contributory fault and accountability') provides in paragraph 1 for the reduction of the entitlement to compensation to the extent that the injured person has contributed to his own damage. However, pursuant to paragraph 2(c), such a reduction in the entitlement to compensation is excluded if the damage has occurred in the context of a road traffic accident unless in the light of the circumstances of the individual case the injured person's want of care was grossly negligent. This rule is aimed at giving the victims of traffic accidents special protection.

68 — In the field of civil law, a partial approximation of laws may be observed primarily in the area of consumer protection law. Consumer protection law in the European Union is currently undergoing a series of legislative adjustments, which bear witness to the Commission's efforts to consolidate and modernise the *acquis*. Not only has Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29) been subject to selective amendments by Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights (OJ 2011 L 304, p. 64), which adopts the approach of full harmonisation of national consumer protection rules, but, in addition, by its Proposal of 11 October 2011 for a Regulation of the European Parliament and of the Council on a Common European Sales Law (COM(2011) 635 final), the Commission has initiated a legislative proposal which will make it possible in future to apply that legislation on a voluntary basis to cross-border sales contracts, where expressly agreed between the parties to the contract.

VII – Conclusion

72. In view of the above considerations, I propose that the Court of Justice should answer the question referred by the Tribunal da Relação de Guimarães as follows:

Article 3(1) of Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability, Article 2(1) of Second Council Directive 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and Article 1 of Third Council Directive 90/232/EEC of 14 May 1990 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles must be interpreted to the effect that they do not preclude national law on civil liability from providing that if, when two vehicles collide, the event is not attributable to the fault of either driver, the compensation to which the injured passenger in one of the vehicles is entitled is to be refused or limited, on the ground that that passenger has contributed to the occurrence of the injury.