Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 19 October 2016[1]

Case C-558/15

Alberto José Vieira Azevedo,
Maria da Conceição Ferreira da Silva,
Carlos Manuel Ferreira Alves,
Rui Dinis Ferreira Alves,
Vítor José Ferreira Alves,
v
CED Portugal Unipessoal, Lda,
Instituto de Seguros de Portugal – Fundo de Garantia Automóvel

(Request for a preliminary rulingfrom the Tribunal da Relação do Porto (Court of Appeal, Porto, Portugal))

(Insurance against civil liability in respect of motor vehicles — Claims representative — Insurance undertaking — Powers of legal representation — Injured parties — Member State of residence)

I – Introduction

1. On 17 October 2007, there was a road traffic accident on a motorway in Spain which caused the death of one person and resulted in the injury of another. The driver, a Portuguese national employed by a company registered in Portugal, had lost control of a hire vehicle that was in the company's use. That vehicle was insured, by its owner, with Helvetia Seguros, a company established in Spain whose appointed representative in Portugal is C.E.D. Portugal Unipessoal, Lda ('C.E.D.') The applicants in the main proceedings are, respectively, the injured survivor of the accident and the heirs of the person that was killed in the accident.

2. The applicants in the main proceedings brought an action before a court of first instance in Portugal seeking compensation of the harm they had suffered as a result of the accident, citing C.E.D. as principal defendant and Fundo de Garantia Automóvel ('FGA') as a secondary defendant. However, on the basis, in particular, of the content of the representation agreement between C.E.D. and Helvetia Seguros, the court found that C.E.D. could not properly be made a defendant and it dismissed the action.

3. The applicants in the main proceedings brought an appeal against that decision before the referring court. That court takes the view that no provision of national law clearly confers on the Portuguese representative of an insurance undertaking that conducts its business in another Member State capacity to be sued, as defendant, in the Portuguese courts in an action for damages brought by the

1 — Original language: French.

victim of a road traffic accident involving a vehicle insured by the insurance undertaking which occurred in a country other than the Member State where the victim is resident.[2] The referring court also states that there are competing views on the issue, in both Portuguese case-law and in Portuguese legal theory.

4. The referring court also notes that the obligation on insurance undertakings that have a registered office in one of the EU Member States to appoint a representative for each of the other Member States has its origins in Directive 2000/26/EC of the European Parliament and of the Council of 16 May 2000 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 amending Council Directives 73/239/EEC and 88/357/EEC (Fourth motor insurance Directive) ('Directive 2000/26').[3]

5. Indeed, Article 4(4) of Directive 2000/26 states that 'the claims representative shall, in relation to such claims, collect all information necessary in connection with the settlement of the claims and shall take the measures necessary to negotiate a settlement of claims. The requirement of appointing a claims representative shall not preclude the right of the injured party or his insurance undertaking to institute proceedings directly against the person who caused the accident or his insurance undertaking.'

6. Article 4(5) of Directive 2000/26 provides that 'claims representatives shall possess sufficient powers to represent the insurance undertaking in relation to injured parties in the cases referred to in Article 1 and to meet their claims in full. They must be capable of examining cases in the official language(s) of the Member State of residence of the injured party.'

7. Article 4(8) of Directive 2000/26, as amended by Directive 2005/14/EC 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 relating to insurance against civil liability in respect of the use of motor vehicles ('Directive 2005/14')[4] goes on to clarify that 'the appointment of a claims representative shall not in itself constitute the opening of a branch within the meaning of Article 1(b) of Directive 92/49/EEC and the claims representative shall not be considered an establishment within the meaning of Article 2(c) of Directive 88/357/EEC or … an establishment within the meaning of Regulation (EC) No 44/2001 …'.

8. A simple reading of the provisions of Directive 2000/26 does not therefore enable the referring court to resolve the dispute before it without guidance from the Court of Justice, inasmuch as the concept of the 'sufficient powers' which the claims representative must possess is not sufficiently explicit for the referring court to be able to determine whether it includes the right of road traffic accident victims to sue claims representatives directly in the courts of their place of residence.

2 — Although the national legal framework is not entirely clear from the case-file, the referring court mentions, as a relevant provision applicable to the disputes in the main action, Article 43 of Decree-Law No 522/85 of 31 December 1985 on compulsory civil liability motor insurance, as amended by Decree-Law No 72-A/2003. That provision requires insurance companies established in Portugal and companies having their registered office in a non-member State and a branch office in Portugal to select a representative in each of the Member State of the European Union 'for the processing and settling, in the country in which the victim is resident, of claims arising in a State other than the victim's State of residence' (Article 43(1) of Decree-Law No 522/85, as amended). It also defines the obligations which the representative must satisfy, providing that it must have 'sufficient powers to represent the insurance company in relation to injured parties … and to meet their claims in full' (Article 43(3) of Decree-Law No 522/85, as amended) and that it must 'collect all necessary information in connection with the settlement of claims' and must take 'the necessary measures to negotiate their settlement (Article 43(4) of Decree-Law No 522/85, as amended).
While it is not for the Court of Justice to determine what national law applies to the facts of the dispute in the main proceedings, it must be observed that Article 43 of Decree-Law No 522/85, as amended, is intended to govern the status of representatives *in other Member States* of insurance undertakings that are registered in or have a branch office in Portugal, as is recommended in recital 15 of Directive 2000/26. The present request for a preliminary ruling concerns the representative of a Spanish-registered insurance undertaking that is responsible for settling claims in Portugal. The referring court makes no mention of any provisions which actually define the status of and the scope of the obligations of representatives located in Portugal.

3 — OJ 2000 L 181, p. 65.

4 — OJ 2005 L 149, p. 14.

9. Thus, confronted with this difficulty in the interpretation of EU law, the Tribunal da Relação do Porto (Court of Appeal, Porto) decided to stay the proceedings and, by decision received at the Registry of the Court of Justice on 2 November 2015, to refer the following questions for a preliminary ruling:

'(1) Do recital 16a [inserted into Directive 2000/26 by Directive 2005/14] and … paragraphs 4, 5 and 8 of Article 4 [of Directive 2000/26] permit a writ to be served on the representative of an insurance company which does not operate in the country in which an action for damages in respect of a road traffic accident is brought on the basis of compulsory civil liability motor insurance that has been taken out in another European Union Member State?

(2) If the first question is answered in the affirmative, does the question whether such a writ may be served depend on the specific terms of the representation agreement between the representative and the insurer?'

10. With the present request for a preliminary ruling, the Court has had the benefit of written observations from FGA, Portugal and the European Commission.

II – Legal assessment

11. What is the meaning of the provision according to which a claims representative, under Directive 2000/26, must possess 'sufficient powers to represent the insurance undertaking in relation to injured parties … and to meet their claims in full'?[5] Did the EU legislature intend to include, for the benefit of victims falling within the scope of the directive's application, a right to sue the representative directly in the courts of the Member State in which they reside? That is the main legal issue raised by the questions referred by the national court, which I shall address together.

12. The Court has consistently held that, in interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part.[6] I shall therefore begin by analysing the status of the claims representative as it is defined in the directives. I shall then follow up that textual analysis with an analysis of the context, the purpose and the scheme of the rules under consideration.

A – *The claims representative under Directives 2000/26 and 2005/14*

13. Like Europe itself, the rules governing insurance against civil liability in respect of the use of motor vehicles were not created in a day. So much is clear from the succession of directives that have appeared as the legislature's concerns have developed over time.[7] It was not until the adoption of Directive 2000/26, the fourth directive on the subject, that the figure of the claims representative appeared.

5 — Article 4(5) of Directive 2000/26.

6 — See the judgment of 26 March 2015 in *Litaksa* (C-556/13, EU:C:2015:202, paragraph 23 and the case-law cited).

7 — The first of these was Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of 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, Series I, 1972 (II) p. 345). Then came the second Council Directive 84/5/EEC of 30 December 1983 (OJ 1984 L 8, p. 17), then the third Council Directive of 14 May 1990 (OJ 1990 L 129, p. 33) and Directive 2000/26. Those directives were also amended, by Directive 2005/14, before being codified by 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 (OJ 2009 L 263, p. 11) ('Directive 2009/103').

14. The objective of this directive was to make good certain gaps [8] in the earlier directives by laying down 'special provisions applicable to injured parties entitled to compensation in respect of any loss or injury resulting from accidents occurring in a Member State other than the Member State of residence of the injured party which are caused by the use of vehicles insured and normally based in a Member State'. [9] In that context, all insurance undertakings must appoint, at their own discretion, [10] in every Member State other than that in which they have received their official authorisation, claims representatives, who must be resident or established in the Member State where they are appointed and whose job it is to handle and settle claims. [11] To that end, the claims representatives must collect all necessary information, take the appropriate measures to negotiate the settlement of claims [12] and possess sufficient powers to represent their insurance undertaking in relation to injured parties and to meet the latters' claims *in full*. [13]

15. At the same time, the EU legislature decided that 'the requirement of appointing a claims representative shall not *preclude* the right of the injured party or his insurance undertaking to institute proceedings directly against the person who caused the accident or his insurance undertaking'. [14] That clarification would not have been necessary if the legislature had not considered it possible to bring legal actions against claims representatives themselves.

16. Lastly, the legislature made it clear that the appointment of a claims representative does not in itself constitute the opening of a branch [15] and that the representative itself is not to be considered as an establishment. [16]

17. The tasks, functions and duties of claims representatives remained unchanged with the adoption of Directive 2009/103, [17] which is simply a codification directive. That means that no further clarification was given in the text as to the content of the 'sufficient powers' [18] and that, whilst it did not rule it out, the legislature did not express its position on whether or not claims representatives may be sued directly, in the courts of their place of residence, by persons injured in an accident in a foreign country. The conclusion which the Court of Justice drew, with regard to Article 21(5) of Directive 2009/103, that 'that provision, which thus lays down the purpose of that representation, does not define the exact scope of the powers granted for that purpose' [19] applies equally to Article 4(5) of Directive 2000/26. An analysis of the context, the purpose and the scheme of the rules therefore seems necessary.

8 — See recital 8 of Directive 2000/26.

9 — Article 1 of Directive 2000/26. See also recital 11 of Directive 2000/26.

10 — Freedom in the selection of a claims representative is provided for by Article 4(2) of Directive 2000/26.

11 — Article 4(1) of Directive 2000/26

12 — Article 4(4) of Directive 2000/26. See also recital 15 of Directive 2000/26.

13 — Article 4(5) of Directive 2000/26. Emphasis added.

14 — Article 4(4) of Directive 2000/26. Emphasis added.

15 — Within the meaning of Article 1(b) of Directive 92/49/EEC (see Article 4(8) of Directive 2000/26).

16 — See Article 4(8) of Directive 2000/26, as amended by Directive 2005/14.

17 — See recitals 34 to 40, 43, 47 and 50 and Articles 21 and 22 of Directive 2009/103. It is important to note that the content of Article 4 of Directive 2000/26 was merely reorganised and divided between two separate articles in Directive 2009/103.

18 — Within the meaning of Article 4(5) of Directive 2000/26 and Article 21(5) of Directive 2009/103.

19 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 18).

B – *Assessment of the context, purpose and scheme of the rules*

18. It is clear from analysing the literal wording of Directive 2000/26 that the 'sufficient powers' of claims representatives must be defined in such a way as to enable them to fulfil their two essential tasks, which are 'to represent the insurance undertaking in relation to injured parties' and 'to meet [victims'] claims *in full*'.[20] My presentation of the wording of Directive 2000/26 would not however be complete if I omitted to consider certain points of clarification in the recitals to the directive.

19. For example, the legislature made it clear that recourse to a claims representative 'affects neither the substantive law to be applied in each individual case nor the matter of jurisdiction'.[21] Again, that reference to substantive law and the determination of jurisdiction suggests that the representative may have a legal role to play. Similarly, the legislature also made it clear that the activities of claims representatives are 'not sufficient in order to confer jurisdiction on the courts in the injured party's Member State of residence if the rules of private international law on the conferral of jurisdiction do not so provide'.[22] Accordingly, therefore, the involvement of claims representatives in any legal actions that may arise is far from ruled out.

20. In parallel with the precautions taken by the legislature with regard to the potential effect of the involvement of a claims representative on the rules of jurisdiction and private international law, the direct right of action of victims against insurance companies located in another Member State is also recognised. That right of action is not, however, presented as the only path to the judicial resolution of an accident, but rather as 'a *logical supplement* to the appointment of [a representative, one which] *improves the legal position* of [victims]'.[23] The preamble to the directive was supplemented, moreover, after the adoption of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,[24] with a new recital 16a[25] according to which, under Article 11(2) read in conjunction with Article 9(1)(b) of Regulation No 44/2001, victims *may* bring legal proceedings *against the* civil liability *insurance provider* in the Member State in which they are domiciled. In principle, therefore, victims may also sue insurance undertakings in the courts of the Member State in which they are resident.

21. On reading the normative provisions of the directive and also the recitals in its preamble, it appears that it is possible for injured parties to bring a legal action either directly against the insurance undertaking or against its representative, the EU legislature seeming to have left open both means of recourse.

22. A reading of the recitals does therefore offer some clarification of the internal logic of Directive 2000/26. Nevertheless, I must also ensure that my interim conclusion, which is based on a literal and contextual analysis of the directive, is not contradicted by the correct teleological interpretation of the directive.

23. The purpose of Directive 2000/26 is to guarantee road traffic accident victims comparable treatment irrespective of where the accident occurs.[26] That means that account must be taken of the objective difference in the position of victims of accidents that have occurred outside their Member State of residence, so that that difference may be compensated by making it easier for them to take

20 — Article 4(5) of Directive 2000/26. Emphasis added.

21 — Recital 13 of Directive 2000/26.

22 — Recital 16 of Directive 2000/26.

23 — Recital 14 Directive 2000/26. Emphasis added.

24 — OJ 2001 L 12, p. 1.

25 — Inserted into Directive 2000/26 by Article 5 of Directive 2005/14.

26 — See, by analogy, the judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 19).

the necessary steps.[27] Facilitating the necessary steps is, in the eyes of the Court of Justice, the essential function of the claims representative.[28] As part of that, the system laid down in Directive 2000/26, for example, allows victims to lodge a claim in their own language[29] with the claims representative, with whom all the formalities preliminary to compensation may be carried out.

24. It goes without saying that to recognise the *légitimation passive* of the claims representative, that is to say, the representative's 'capacity to be a defendant',[30] would fully serve the purpose of the directive. It is with the claims representatives that victims carry out all the 'preliminary formalities'[31] and indeed the representative may be the only party with whom the victim deals. Therefore, the next logical step is to recognise that an action brought by a victim against the representative of an insurance company has been brought against the correct party, especially as the representative has an active part to play in the compensation process. To my mind, if claims representatives are to be able to meet claims for compensation fully, and that is one of the tasks assigned to them by Directive 2000/26, it must be possible to assign a role to them in legal proceedings, and not just any role but that of defendant.

25. That is also how I conceive of the improvement in the legal position of victims to which recital 14 of Directive 2000/26 refers. If we revert to the particular circumstances of the dispute in the main proceedings, it would be difficult for those victims to accept that their legal action should be dismissed on the rather formalistic ground (given the close bond between insurance undertaking and appointed claims representative) that they have sued the representative rather than the insurance undertaking itself.

26. Notwithstanding, most of the interested parties that have participated in the written part of the procedure have attached particular significance to the fact that, in its judgment in *Spedition Welter*,[32] the Court held that the mandate of the claims representative was limited and argued that limitation meant that the representative could not be sued in the Member State of residence of the injured parties. That view, however, is based, in my opinion, on an imperfect reading of the judgment, to which I must now therefore turn.

27. The issue in that case was whether the concept of 'sufficient powers' should extend to the authority of the claims representative validly to accept service of the necessary court documents for bringing a claim in damages, arising from an accident, before the court having jurisdiction.

28. The Court held that 'victims must be entitled to claim in their Member State of residence *against a claims representative* appointed there by the insurance undertaking of the responsible party'.[33] It went on to state that, according to recital 37 of Directive 2009/103 — the equivalent of recital 15 of Directive 2000/26 — it was an obligation for the Member States to see that claims representatives have sufficient powers to represent the insurance undertakings not only in relation to victims, but also in dealings with national authorities, 'including, where necessary, before the courts, in so far as this is compatible with the rules of private international law'.[34] It concluded that, 'without being able to call into question observance of the rules of private international law, representation of insurance undertakings under [Directive 2000/26] includes allowing injured parties validly to bring proceedings before national courts for compensation for damage'.[35] Those dicta are important for the present case and the question of capacity to be made a defendant.

27 — See the judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 24).
28 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 24).
29 — Idem.
30 — Opinion of Advocate General Darmon in *Parliament* v *Council* (302/87, not published, EU:C:1988:263, point 8).
31 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 24).
32 — Judgment of 10 October 2013 (C-306/12, EU:C:2013:650).
33 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 19). Emphasis added.
34 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 20).
35 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 21).

29. Nevertheless, after its apparently broad recognition of the powers of claims representatives, the Court, recalling the Opinion of its Advocate General, went on to state that it was apparent from the preparatory work for Directive 2000/26 that 'the powers enjoyed by the representative of an insurance undertaking in the victim's State of residence had, in the legislature's mind, the objective of including the authority to accept service of judicial documents, *albeit to a limited extent* since it was not to affect the rules of private international law relating to the conferral of jurisdiction'.[36] That last assertion therefore applies solely to the particular authority of claims representatives to accept service of documents addressed to an insurance undertaking when an action is brought against the insurance undertaking.

30. The case now before the Court presents a quite different situation. It concerns not an action brought against an insurance undertaking via its claims representative, which accepts service of the proceedings, but the question whether it is possible for victims to make a claims representative the defendant in a legal action. The distinction is an important one. In the first case, complex questions may justifiably arise regarding the status of the insurance undertakings as defendant,[37] and this indeed justifies the recognition of only a limited mandate for the claims representative, as the Court in fact found. In the second case, at least initially, there is a simpler legal relationship between two protagonists, the victim (the applicant) and the claims representative, and it remains to be established whether the latter has capacity to defend the insurance undertaking in legal proceedings.

31. At this stage of my analysis it becomes apparent that, contrary to what the referring court suggests by its second question, the issue of whether a claims representative may properly be made a defendant is an entirely separate matter unconnected with the actual content of the mandate between the representative and the insurance undertaking. If comparable treatment for victims is to be achieved and the steps which they must take facilitated, including those which they take before a judicial authority, the capacity of a claims representative to be sued as defendant cannot, in any way, be dependent on the contractual bond it has with an insurance undertaking. The same may be said of the foreseeability of the procedures for claiming compensation put in place for the benefit of victims by Directive 2000/26. In other words, the directive enshrined a sort of legal representation which it is hard to imagine might be defeated at the mere will of the parties.

32. If the Court were to answer the first question referred by the national court in the affirmative, would that, as the Commission argues, upset 'the delicate balance that characterises the rules on international jurisdiction and on the law applicable to actions for compensation for loss or damage caused by road traffic accidents with a cross-border dimension'?[38]

33. I do not think it would. The legislature's concerns with regard to the rules of private international law and the determination of jurisdiction are legitimate when the action is brought against the insurance undertaking. However, the question which the Court is asked today is different, inasmuch as it does not involve establishing jurisdiction or which law applies to the dispute. It simply involves establishing whether a claims representative has capacity to be made a defendant. Moreover, the Court's answer to the referring court will in no way affect whether or not the Portuguese courts have jurisdiction, as is evidenced by the fact that the jurisdiction of those courts is disputed by the parties to the main proceedings on account of uncertainty as to which Member State is actually the Member State of residence of one of the applicants. Capacity to be made a defendant is thus a different concept from that of jurisdiction. Even though the contrary view should be taken, the provision in

36 — Judgment of 10 October 2013 in *Spedition Welter* (C-306/12, EU:C:2013:650, paragraph 22). Emphasis added.

37 — In his Opinion in *Spedition Welter* (C-306/12, EU:C:2013:359), Advocate General Cruz Villalón emphasised that 'the powers of representation … do not include its defence in judicial proceedings, or the generic representation of the defendant before the … courts. … the powers of representation … are confined to the service of judicial documents, without in any way affecting [the insurance undertaking's] status as defendant or, still less, the conditions under which it must exercise its defence' (point 17 of the Opinion). Nevertheless, in *Spedition Welter*, the action which gave rise to the reference for a preliminary ruling had clearly been brought against the insurance undertaking alone.

38 — Opinion of Advocate General Cruz Villalón in *Spedition Welter* (C-306/12, EU:C:2013:359, point 29).

Article 4(5) of Directive 2000/26 pursuant to which the claims representative must have 'sufficient powers' to be able to meet victims' claims in full might seem like a special jurisdiction provision, even if only by implication, in relation to the rules governing international jurisdiction.[39] That being so, and taking into account the legislature's insistence on this point, it would seem prudent to bear the limitation in mind.

34. Therefore, for all the foregoing reasons, I take the view that Article 4(5) of Directive 2000/26 must be interpreted as meaning that one of the 'sufficient powers' which claims representatives must possess is the capacity to be sued, as defendant, in legal actions brought by victims of a road traffic accident, as referred to in Article 1(1) of Directive 2000/26, under the conditions laid down in that directive, the clauses of any contract between an insurance undertaking and a claims representative being incapable of altering the latter's capacity to be made a defendant.

III – Conclusion

35. In light of the foregoing considerations, I propose that the Court should answer the questions referred for a preliminary ruling by the Tribunal da Relação do Porto (Court of Appeal, Porto) as follows:

Article 4(5) of Directive 2000/26 must be interpreted as meaning that one of the 'sufficient powers' which claims representatives must possess is the capacity to be sued, as defendant, in legal actions brought by victims of road traffic accidents, as referred to in Article 1(1) of Directive 2000/26, under the conditions laid down in that directive, the clauses of any contract between an insurance undertaking and a claims representative being incapable of altering the latter's capacity to be made a defendant.

39 — In other words, the requirement to ensure that claims representative have sufficient powers to meet victims' claims in full is so significant that it would be rendered meaningless if it were interpreted as not making it possible for such victims to sue claims representatives in court.