Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 15 December 2022[1]

Case C-618/21

AR,
BF,
ZN,
NK Sp. z o.o. s.k.,
KP,
RD Sp. z o.o.,
v
PK S.A.,
CR,
SI S.A.,
MB S.A.,
PK S.A.,
SI S.A.,
EZ S.A.

(Request for a preliminary ruling from the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw, Poland))

(Reference for a preliminary ruling – Insurance against civil liability in respect of motor vehicles – Directive 2009/103/EC – Article 3 – Civil liability in respect of the use of vehicles – Compulsory insurance of vehicles – Article 18 – Direct right of action – Scope – Determination of the amount of compensation – Hypothetical costs – Possibility of making the payment of compensation subject to certain conditions – Sale of the vehicle)

I. Introduction

1. The request for a preliminary ruling concerns the interpretation of Article 18 of 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,[2] in conjunction with Article 3 of that directive.

[1] Original language: French.

[2] OJ 2009 L 263, p. 11.

2. The request has been made in cases involving six vehicle owners and insurers covering, as regards civil liability, the persons responsible for the damage caused *to* their vehicles.

3. This case gives the Court of Justice an opportunity to clarify, for the first time, the scope of the direct right of action available to an injured party seeking compensation, against an insurance undertaking, for all damage caused *by* a motor vehicle.

4. In this Opinion, I will set out the reasons why I believe EU law does not preclude the benefit due from an insurance undertaking from being only pecuniary and why the effectiveness of Directive 2009/103 would be impaired if the direct right of action of the injured party had to be limited or excluded because the damaged vehicle had not actually been repaired.

II. Legal framework

A. Directive 2009/103

5. Recital 30 of Directive 2009/103 states:

'(30) The right to invoke the insurance contract and to claim against the insurance undertaking directly is of great importance for the protection of victims of motor vehicle accidents. In order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings, a right of direct action against the insurance undertaking covering the person responsible against civil liability should be provided for victims of any motor vehicle accident.'

6. Article 3 of that directive, entitled 'Compulsory insurance of vehicles', provides:

'Each Member State shall, subject to Article 5, 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 the measures referred to in the first paragraph.

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

(a) according to the law in force in other Member States, any loss or injury which is caused in the territory of those States;

(b) any loss or injury suffered by nationals of Member States during a direct journey between two territories in which the Treaty is in force, if there is no national insurers' bureau responsible for the territory which is being crossed; in such a case, the loss or injury shall be covered in accordance with the national laws on compulsory insurance in force in the Member State in whose territory the vehicle is normally based.

The insurance referred to in the first paragraph shall cover compulsorily both damage to property and personal injuries.'

7. Under Article 18 of that directive, entitled 'Direct right of action':

'Member States shall ensure that any party injured as a result of an accident caused by a vehicle covered by insurance as referred to in Article 3 enjoys a direct right of action against the insurance undertaking covering the person responsible against civil liability.'

B. Polish law

8. Article 363(1) of the kodeks cywilny (Civil Code) provides:

'Compensation for the damage should be effected, as the injured party chooses, either by restoration to the previous state or by payment of a corresponding sum of money. However, if restoration to the previous state is impossible or would involve excessive difficulty or costs for the party liable, the injured party's right of action shall be limited to a monetary payment.'

9. Article 822(1) and (4) of the Civil Code provides:

'1. By a civil liability insurance contract, the insurer undertakes to pay compensation, as specified in the policy, for damage caused to third parties in respect of whom the policyholder or insured person bears liability.

…

4. A person entitled to compensation for a contingency covered by a civil liability insurance policy may bring an action directly against the insurer.'

III. The facts of the main proceedings and the questions referred for a preliminary ruling

10. Six cases are pending before the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw, Poland). Five of them relate to the refusal by the insurance undertakings (the defendants in the main proceedings), covering, as regards civil liability, the person responsible for a road traffic accident that damaged vehicles, to compensate the injured parties (the applicants in the main proceedings), who exercised their direct right of action provided for in Article 18 of Directive 2009/103, for the costs of repairing those vehicles, which they did not incur. Such costs are described by the referring court as 'hypothetical repair costs'.

11. The sixth case differs from the previous ones only in that the damage results from a garage door which fell down and destroyed the vehicle of the applicant in the main proceedings.

12. These cases stem from the fact that the injured parties are seeking monetary compensation for the damage to their vehicles on the basis of a high estimate of the repair costs (parts and labour) and not on the basis of documentary evidence of the repair costs they incurred – that is to say, the actual costs incurred. The insurance undertakings submit that such compensation may not exceed the actual amount of the damage, calculated according to the 'differential' method. The latter must correspond to the difference between what would have been the value of the damaged vehicle had the accident not occurred and the vehicle's current value, in its damaged or even (partially) repaired state.

13. The referring court explains that, under national law, compensation is designed to restore the injured party's property to the value that it would have had if the damage had not occurred, whilst not allowing the injured party to enrich himself or herself.

14. However, according to Polish case-law, the courts award compensation for damage caused to vehicles on the basis of the hypothetical repair costs, the amount of which far exceeds the amount of damage to the injured party's property determined by the differential method. The same applies if the damaged vehicle is sold and the injured parties can no longer have it repaired.

15. According to the referring court, that case-law – which is open to criticism in so far as it allows the injured party to enrich himself or herself in certain cases – could be justified by the special protection afforded to victims of road traffic accidents under EU law. The referring court thus considers it necessary for clarification to be provided as to the scope of the injured party's rights arising from the direct right of action which he or she may exercise against the insurance undertaking.

16. The referring court states, in that regard, that there is a conflict between, on the one hand, that direct right of action, in conjunction with the fact that, under Polish law, the injured party has two different rights of action against the person responsible for the accident which he or she may exercise, that is to say, both a right of action for payment of compensation and a right of action for restoration in kind to the state before the accident and, on the other hand, the principle under Polish contract law that the benefit provided by the civil liability insurer is a 'payment' and thus a pecuniary benefit.

17. The referring court is therefore seeking to ascertain whether EU law precludes provisions of national law which have the effect of depriving an injured party wishing to exercise a direct right of action against an insurance undertaking of one of the means of redress under national law, which would generally be dissuasive.

18. The referring court also raises the question of whether, in order to ensure the effectiveness of the injured party's claim under Article 18 of Directive 2009/103, the injured party must have a right of action against the insurer as regards the civil liability of the person responsible for the accident to obtain compensation for an amount equivalent to the costs necessary to have the damaged vehicle repaired himself or herself, where he or she lacks the funds to do so. Thus, the compensation could be based on an actual repair.

19. The referring court's final question concerns the situation in which the damaged vehicle can no longer be repaired, for example because it has been sold. It is inclined to consider that the injured party's compensation should only correspond to the difference between the price he or she received for the damaged vehicle and the price he or she would have obtained if he or she had sold the vehicle in a non-damaged state.

20. In those circumstances, the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Article 18 of Directive [2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an injured party who exercises a direct right of action for repair of the damage to his or her vehicle in connection with the use of motor vehicles against an insurance undertaking covering the person responsible for the accident,

as regards civil liability, can obtain from the insurance undertaking only compensation for the real and actual loss to his or her property, [that] is to say, the difference between the value of the vehicle in its state before the accident and the value of the damaged vehicle, plus the reasonable costs actually incurred in repairing the vehicle and any other reasonable costs actually incurred as a result of the accident, whereas if he or she sought a remedy directly from the person responsible, he or she could opt to require the latter to restore the vehicle to its state before the damage occurred (repair of the damage by the person responsible or by a garage paid by that person), instead of claiming compensation?

(2) If the answer to the previous question is in the affirmative, must Article 18 of Directive [2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an injured party who exercises a direct right of action for repair of the damage to his or her vehicle in connection with the use of motor vehicles against an insurance undertaking covering the person responsible for the accident, as regards civil liability, can obtain from the insurance undertaking, instead of compensation for the real and actual loss to his or her property, that is to say, the difference between the value of the vehicle in its state before the accident and the value of the damaged vehicle, plus the reasonable costs actually incurred of repairing the vehicle and any other reasonable costs actually incurred as a result of the accident, only an amount corresponding to the costs of restoring the vehicle to its state before the damage, whereas if he or she sought a remedy directly from the person responsible, he or she could opt to require the latter to restore the vehicle to its state before the damage occurred (and not merely provide funds for that purpose), instead of claiming compensation?

(3) If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, must Article 18 of Directive [2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which an insurance undertaking, to which the owner of a car damaged in connection with the use of motor vehicles applied for payment of hypothetical costs which he or she has not incurred but would have had to incur if he or she had decided to restore the vehicle to its state before the accident, can:

(a) make that payment conditional on the injured party proving that he or she genuinely intends to have the vehicle repaired in a specific way, by a specific mechanic, at a specific price for parts and services, and to transfer the funds for that repair directly to that mechanic (or to the seller of the parts necessary for the repair), subject to reimbursement, if the purpose for which the funds were paid should not be fulfilled, and if not:

(b) make that payment conditional on the consumer undertaking to show, within an agreed period, that he or she has used the funds paid to repair the vehicle or to reimburse them to the insurance undertaking, and if not:

(c) after the payment of those funds and indication of the purpose of the payment (the manner in which they are used) and expiry of the necessary period during which the injured party was able to have the car repaired), require him or her to show that those funds have been spent on the repair or refunded

so as to rule out the possibility of the injured party enriching himself or herself as a result of the damage?

(4) If the answer to Question 1 is in the affirmative and the answer to Question 2 is in the negative, must Article 18 of Directive [2009/103], in conjunction with Article 3 thereof, be interpreted as precluding national legislation under which the injured party, who is no longer the owner of the damaged car because he or she has sold it and received money in return, and thus can no longer have it repaired, cannot therefore claim from the insurance undertaking covering the person responsible for the accident, as regards civil liability, payment of the costs of the repair which would have been necessary to restore the damaged vehicle to the state before the damage, and [the injured party's] right of action is limited to claiming from the insurance undertaking compensation for the real and actual loss to his or her property, [that] is to say, the difference between the value of the vehicle in its state before the accident and the amount obtained from the sale of the vehicle, plus the reasonable costs of repairing the vehicle actually incurred and any other reasonable costs actually incurred as a result of the accident?'

21. KP and RD Sp. z o.o., two of the applicants in the main proceedings, SI SA, one of the defendants in the main proceedings, the Polish, Czech and German Governments and the European Commission have submitted written observations.

IV. Analysis

A. Admissibility

22. The request for a preliminary ruling is based on the referring court's finding that 'national compensation law … requires insurance undertakings to pay the injured parties the "hypothetical costs" of repairing the damaged vehicle, irrespective of whether they are subsequently incurred, thus allowing injured parties, whose vehicles have been damaged and who do not wish to have their vehicles repaired, to increase the value of their property by the difference between the cost of repairing the damaged vehicle and the loss of value of the vehicle as a result of the damage – at the expense of the insurance undertakings and, moreover, of all owners of vehicles who pay compulsory insurance premiums'.

23. The referring court is therefore seeking a solution in which the amount of compensation is as close as possible to the actual costs that the injured parties would have to incur. The referring court notes that the injured parties cannot claim compensation in kind from the insurer, as they might do from the person responsible for the damage.

24. This recognition of the difference in regime under Polish law between those two actions available to persons entitled to compensation for damage caused to a vehicle has led the referring court to question the extent and scope of the injured party's direct right of action provided for in Article 18 of Directive 2009/103, in order to ensure its effectiveness. In those circumstances, the reference for a preliminary ruling is admissible.

25. According to the settled case-law of the Court of Justice cited by the referring court, the request for a preliminary ruling cannot concern the extent of compensation for damage, which is essentially governed by national law. [3]

[3] See judgment of 10 June 2021, *Van Ameyde España* (C-923/19, EU:C:2021:475, paragraphs 36 and 38 and the case-law cited).

26. It should also be recalled that, as follows from the actual wording of Article 267 TFEU, the question referred for a preliminary ruling must be 'necessary' to enable the referring court to 'give judgment' in the case before it. [4]

27. In the present case, one of the six cases brought before the referring court concerns compensation for damage caused to a vehicle by a garage door.

28. Directive 2009/103 is clearly not intended to cover civil liability where the damage is not caused by a vehicle. [5] The purpose of the directive is to provide special protection for victims on account of the severity of the damage to property or personal injury they are likely to suffer by reason of the danger inherent in a motor vehicle's design and function.

29. Furthermore, the first paragraph of Article 3 of Directive 2009/103 provides that each Member State is, subject to Article 5 of that directive, to 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.

30. Admittedly, the concept of 'use of vehicles', which is an autonomous concept of EU law, has been interpreted by the Court in the light of the first paragraph of Article 3 of Directive 2009/103, [6] bearing in mind that the objective of protecting the victims of accidents caused by motor vehicles has continuously been pursued and reinforced by the EU legislature. [7]

31. Thus, the Court has ruled that the first paragraph of Article 3 of Directive 2009/103 must be interpreted as meaning that the concept of 'use of vehicles' in that provision is not limited to road use, that is to say, to travel on public roads, but that that concept covers any use of a vehicle that is consistent with its normal function as a means of transport. [8]

32. In that respect, the Court has clarified that a vehicle is used in accordance with its function as a means of transport when it moves but, in principle, also while it is parked between two journeys. [9]

33. The Court inferred from this that the concept of 'use of vehicles', referred to in the first paragraph of Article 3 of Directive 2009/103, covers a situation in which a *vehicle parked in a private garage* of a building, used in accordance with its function as a means of transport, has caught fire, *giving rise to a fire which originated in the electrical circuit of that vehicle*. [10] The same applies when the accident results from an *oil leak caused by the mechanical condition of the parked vehicle* in question. [11]

4 There must therefore be a connecting factor between the dispute and the provisions of EU law whose interpretation is sought, by virtue of which that interpretation is objectively required for the decision to be taken by the referring court. See order of 10 December 2020, *OO (Suspension of judicial activity)* (C-220/20, not published, EU:C:2020:1022, paragraph 26).

5 See, to that effect, judgment of 20 June 2019, *Línea Directa Aseguradora* (C-100/18, EU:C:2019:517, paragraph 45; 'the judgment in *Línea Directa Aseguradora*').

6 See judgment in *Línea Directa Aseguradora* (paragraph 32).

7 See judgment of 20 May 2021, *K.S. (Costs of towing a damaged vehicle)* (C-707/19, EU:C:2021:405, paragraph 27 and the case-law cited).

8 See judgment in *Línea Directa Aseguradora* (paragraphs 35 and 36). See also the wording of Article 1(1a) of Directive 2009/103 as amended by Directive (EU) 2021/2118 of the European Parliament and of the Council of 24 November 2021 (OJ 2021 L 430, p. 1). Article 2 of the directive requires it to be transposed by 23 December 2023.

9 See judgment in *Línea Directa Aseguradora* (paragraph 42).

10 See judgment in *Línea Directa Aseguradora* (paragraph 48).

11 See order of 11 December 2019, *Bueno Ruiz and Zurich Insurance* (C-431/18, not published, EU:C:2019:1082, paragraphs 42 to 45).

34. Consequently, situations in which the accident is not caused by the vehicle's behaviour or a technical fault are clearly excluded from the concept of 'use of vehicles' within the meaning of the first paragraph of Article 3 of Directive 2009/103.

35. In addition, the Court has held that, in order for a vehicle to be exempt from the insurance obligation provided for in that article, it must have been officially withdrawn from use, in accordance with the applicable national rules. [12]

36. Thus, there is no doubt that the scope of Directive 2009/103, as interpreted by the Court, is limited to the obligation to insure against civil liability for damage caused by a vehicle.

37. That interpretation cannot be called into question by the referring court's argument that, in essence, it has to ensure equal treatment in matters of civil liability insurance, hence bringing the matter before the Court of Justice in the case involving compensation for damage caused to a vehicle by a garage door.

38. I therefore propose that, on this point, the Court should find the request for a preliminary ruling to be inadmissible.

39. As to the admissibility of the questions raised, there seems to be no justification, as the Polish Government claims, for treating the first two questions referred – on which the other two questions depend – as hypothetical. The Polish Government argues that, in the main proceedings, the applicants seek only the payment of a pecuniary benefit. It is precisely this limitation of the forms of compensation of damage caused by road traffic accidents that concerns the referring court. The latter considers that it has grounds to reject the applications made on the basis of an assessment of the costs, even though EU law does not require this.

40. In those circumstances, I propose that the Court deal with the questions referred for a preliminary ruling together by recognising that the referring court is asking it, in essence, whether Article 18 of Directive 2009/103 is to be interpreted as precluding national legislation that provides only for the payment of financial compensation to injured parties exercising their direct right of action against the insurance undertaking covering, as regards civil liability, the person responsible for an accident caused by a vehicle, and that it is not necessary to substantiate the actual costs of repair in the event of damage caused to another vehicle.

B. Substance

41. The request for a preliminary ruling requires the Court to define the purpose of the direct action provided for in Article 18 of Directive 2009/103.

42. Specifically, the referring court is uncertain as to whether the purpose of the direct action is to oblige the insurer (rather than the person responsible for the damage) to provide the injured party with the benefit due from the person responsible for the damage, as compensation for that damage, or to oblige the insurer to pay the benefit provided for in the insurance policy directly to the injured party.

[12] See judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny* (C-383/19, EU:C:2021:337, paragraph 58).

43. First, it is worth pointing out that the direct right of action of the injured party was introduced by Directive 2000/26/EC, [13] which is one of the four directives codified by Directive 2009/103. [14]

44. As the Court has held on numerous occasions, the background to that right is as follows:

– Member States are required to establish, in their domestic legal systems, a general obligation to insure vehicles; and

– each Member State must ensure, subject to certain derogations provided for in Directive 2009/103, that every vehicle normally based in its territory is covered by a contract concluded with an insurance undertaking in order to cover, up to the limits established by EU law, civil liability arising as a result of the use of that vehicle. [15]

45. With a view to ensuring ever greater protection for persons injured by road traffic accidents, Directive 2000/26 provided for a direct right of action for such persons against the insurance undertaking of the person responsible or against its representative in the State of residence of the injured party. [16] The intention was to give the victims of road traffic accidents more rights outside their State of residence [17] and to harmonise those rights in the Member States, some of which were unfamiliar with the right to take direct action directly against the insurer of the person responsible. [18]

46. Directive 2005/14/EC [19] extended that direct right of action to all victims of motor vehicle accidents, in order to facilitate an efficient and speedy settlement of claims and to avoid as far as possible costly legal proceedings. [20]

47. That objective was restated in Directive 2009/103, which emphasises the importance of guaranteeing motor vehicle accident victims comparable treatment, irrespective of where in the European Union accidents occur. [21] Recital 30 of that directive borrows the definition of the

[13] Directive 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) (OJ 2000 L 181, p. 65).

[14] See recital 1 of that directive. The case-law relating to those earlier directives can therefore be applied to the interpretation of the equivalent provisions of that directive. See, inter alia, judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny* (C-383/19, EU:C:2021:337, paragraph 35).

[15] See judgment of 10 June 2021, *Van Ameyde España* (C-923/19, EU:C:2021:475, paragraphs 25 and 26 and the case-law cited).

[16] See, for the legislative history of that directive, the European Parliament Report on the joint text approved by the Conciliation Committee for a European Parliament and Council directive 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 Directives 73/239/EEC and 88/357/EEC (Fourth Motor Insurance Directive) (C5-0155/2000 –1997/0264(COD)) (Final A5-0130/2000), available at https://www.europarl.europa.eu/doceo/document/A-5-2000-0130_EN.pdf, p. 6. See also Pailler, P., *Manuel de droit européen des assurances*, 2nd edition, Bruylant, Brussels, 2022, in particular paragraph 263, p. 273.

[17] See recitals 8 to 14 of Directive 2000/26.

[18] See, in that regard, Article 9 of the Convention on the Law Applicable to Traffic Accidents, concluded in The Hague on 4 May 1971. See also the explanatory report by Eric W. Essén, available at https://assets.hcch.net/docs/826ac363-4725-484a-9435-0f10802ba2b3.pdf, in particular p. 214.

[19] 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 (OJ 2005 L 149, p. 14). This directive added to Directive 2000/26 a recital 16a in which, as regards the right of injured parties to bring proceedings against the insurer in the courts for the place where they are domiciled, the EU legislature referred to Article 9(1)(b) and Article 11(2) 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 (OJ 2001 L 12, p. 1). In that regard, see judgment of 13 December 2007, *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraph 29).

[20] See recital 21 of that directive.

[21] See recital 20 of that directive, as well as the judgment of 20 May 2021, *K.S. (Costs of towing a damaged vehicle)* (C-707/19, EU:C:2021:405, paragraph 27 and the case-law cited).

direct right of action against the insurance undertaking covering, as regards civil liability, the person responsible for a motor vehicle accident, which was contained in recital 21 of Directive 2005/14.

48. Second, it should be stressed that recital 21 defines that right as 'the right to invoke the insurance contract and to claim against the insurance undertaking directly'.

49. Accordingly, where the compulsory insurance cover is arranged directly by the injured party exercising his or her right under Article 18 of Directive 2009/103, the insurance undertaking covers the civil liability of the person responsible within the limits of the contract entered into with that person. [22] As such, the financial consequences of the civil liability are covered, as is personal injury, even if the insured party takes care of the repairs himself or herself. [23]

50. Since the rights of the injured party are determined solely by the insurance contract – [24] in other words, they are based on the contract of the insured party – they can only have the effect of awarding the injured party compensation that the insured party would have been entitled to claim from the insurance undertaking had he or she compensated the victim himself or herself, within the limits of the contract between them. As the German Government points out, this is standard practice for insurance companies.

51. Several other aspects support that interpretation. First, the direct right of action of the injured party is in line with the objective of settling claims swiftly and is an integral part of motor insurance. The legislature has emphasised the special importance of this for the free movement of European citizens within the European Union and for insurance undertakings. [25] This aspect of the question in cross-border situations is, in my view, rightly emphasised by the Commission and the German Government and supports the argument that a form of compensation in kind should not be compulsory.

52. Second, the principle of monetary compensation stems from Article 22 of Directive 2009/103, entitled 'Compensation procedure', which defines the obligations of the insurance undertaking to which the injured party has addressed a claim for compensation. This principle can also be inferred from the fact that the EU legislature has established minimum amounts of insurance cover, [26] which constitute an essential guarantee for the protection of victims. [27]

53. Third, insurance undertakings are obliged to compensate the injured party to guarantee the effectiveness of the right to compensation and thus protect the injured party against the risk of insolvency of the person responsible for the damage. [28]

[22] That obligation still stands even if the insurance contract is invalidated by false statements initially provided by the policyholder. See, in that regard, judgment of 20 July 2017, *Fidelidade-Companhia de Seguros* (C-287/16, EU:C:2017:575, paragraph 27).

[23] See the last paragraph of Article 3 of Directive 2009/103, as interpreted by the Court. See judgment of 23 January 2014, *Petillo* (C-371/12, EU:C:2014:26, paragraphs 33 to 35 and the case-law cited). As regards Polish law, see judgment of 21 December 2021, *Skarb Państwa (Motor insurance coverage)* (C-428/20, EU:C:2021:1043, paragraph 16.)

[24] See judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraphs 54 and 58).

[25] See recital 2 of Directive 2009/103.

[26] See Article 9 of Directive 2009/103 and judgment of 10 June 2021, *Van Ameyde España* (C-923/19, EU:C:2021:475, paragraph 41).

[27] See recital 12 of Directive 2009/103 and, inter alia, judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 39).

[28] See also, where the obligation to insure the vehicle involved in the accident has not been met, judgment of 29 April 2021, *Ubezpieczeniowy Fundusz Gwarancyjny* (C-383/19, EU:C:2021:337, paragraph 56). This serves as a reminder of the objective of protecting victims of road traffic accidents, which is essential when interpreting the provisions of Directive 2009/103.

54. Fourth, the analysis of the obligations of the insurance undertaking against which the injured party should exercise his or her direct right of action on a contentious basis must be consistent with the provisions of EU law on the jurisdiction of the courts [29] and the law applicable [30] in a cross-border situation, as well as with the regime of subrogation that may be exercised by the insurer. [31]

55. Thus, in this context, it seems inconceivable that Article 18 of Directive 2009/103 can be interpreted to mean that the insurer could be required to provide the compensation in kind that the injured party might obtain, under national law, from the person responsible for the accident. It is precisely a question of not confusing the direct relationship between the victim and the insurer with that between the victim and the person responsible.

56. Accordingly, I am of the opinion that Article 18 must be interpreted as not precluding national legislation that provides only for the payment of monetary compensation to injured parties who exercise their direct right of action against the insurance undertaking covering, as regards civil liability, the person responsible for an accident caused by a vehicle, irrespective of the nature of the damage to be compensated.

57. There are other points to consider in order to answer comprehensively the questions of the referring court, which seeks to limit the compensation for an injured party exercising his or her direct right of action so that it is commensurate with the actual costs incurred. [32]

58. It is settled case-law that the extent of compensation is essentially governed by national law. [33]

59. It is thus for the competent authorities to guarantee, under national law, the effectiveness of the direct right of action of the injured party.

60. In that respect, the system described in the written observations of KP and SI, whereby insurance undertakings can set up a third-party payment system at vehicle repair shops to which the compensation due to the injured party is paid, [34] satisfies, in my view, the requirement for protection of the injured party arising from Directive 2009/103, if that option is chosen by the injured party.

[29] See judgment of 13 December 2007, *FBTO Schadeverzekeringen* (C-463/06, EU:C:2007:792, paragraph 29), and, as regards Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), judgment of 30 June 2022, *Allianz Elementar Versicherung* (C-652/20, EU:C:2022:514, paragraphs 30, 32, 45, 49, 50, 53 and 54 and the case-law cited).

[30] There is nothing in the wording or the objectives of Directive 2009/103 to suggest that it is intended to lay down conflict-of-law rules, as the Court notes in the judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 40). See also paragraphs 47 to 54 of that judgment concerning the conditions of application of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ 2008 L 177, p. 6) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40). See also, with regard to the obligation to enforce the Convention on the Law Applicable to Traffic Accidents, concluded in The Hague on 4 May 1971, inter alia judgment of 24 October 2013, *Haasová* (C-22/12, EU:C:2013:692, paragraph 36), as well as Advocate General Wahl's observations on the difficulties in that regard in his Opinion in *Lazar* (C-350/14, EU:C:2015:586, point 36).

[31] See, by way of illustration, judgment of 21 January 2016, *ERGO Insurance and Gjensidige Baltic* (C-359/14 and C-475/14, EU:C:2016:40, paragraph 56).

[32] See points 18 and 19 as well as 22 and 23 of this Opinion.

[33] See point 25 of this Opinion. See also, by way of illustration, judgment of 23 January 2014, *Petillo* (C-371/12, EU:C:2014:26, paragraph 43).

[34] See, by way of illustration, judgment of 21 October 2021, *T.B. and D.* (*Jurisdiction in matters of insurance)* (C-393/20, not published, EU:C:2021:871, paragraphs 17 and 18).

61. Therefore, it seems futile to seek, through an interpretation of the scope of Article 18 of Directive 2009/103, a solution to the caseload management issues described by the referring court,[35] in addition to the injustice of the injured party's enrichment that the court invokes.[36]

62. However, national legislation must not deprive the direct right of action of the injured party provided for in Article 18 of Directive 2009/103 of its effectiveness.[37] In my view, that would be the case if compensation for the injured party exercising his or her direct right of action were either excluded or limited owing to the failure to repair the damaged vehicle, owing to the sale of the vehicle, or owing to the obligation imposed on him or her by the insurance undertaking to request the repair of the vehicle from the insured party.

V. Conclusion

63. In the light of all the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Sąd Rejonowy dla m.st. Warszawy w Warszawie (District Court for the Capital City of Warsaw, Poland) as follows:

Article 18 of 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 ensure against such liability

must be interpreted as:

– not precluding national legislation that provides only for the payment of monetary compensation to injured parties who exercise their direct right of action against the insurance undertaking covering, as regards civil liability, the person responsible for an accident caused by a vehicle, irrespective of the nature of the damage to be compensated;

– meaning that the effectiveness of the direct right of action of the injured party would be impaired if it had to be limited or excluded because the damaged vehicle had not actually been repaired.

35 The referring court has argued that the Polish case-law referred to in point 14 of this Opinion leads insurers systematically to refrain from voluntarily paying compensation so as to persuade the courts to change the line of case-law by paying 'compensation for hypothetical costs', whilst calculating such costs arbitrarily, assuming that it is sufficient in this case to base the calculation on the price of cheaper substitutes, or various deductions, discounts, 'depreciation' and so on, so that the majority of cases end up before the courts, thereby increasing their workload.

36 See point 15 of this Opinion.

37 The Court has also held that domestic provisions governing compensation for damage resulting from the use of vehicles may not have the effect of automatically excluding or disproportionately limiting the injured party's right to compensation through the compulsory insurance against civil liability of the person responsible for such damage. See, for a reminder of these principles, judgments of 23 October 2012, *Marques Almeida* (C-300/10, EU:C:2012:656, paragraphs 31 and 32); of 23 January 2014, *Petillo* (C-371/12, EU:C:2014:26, paragraph 41, as well as, for application to the present case, paragraphs 44 and 45); and of 10 June 2021, *Van Ameyde España* (C-923/19, EU:C:2021:475, paragraph 44).